THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

UNIVERSITY OF LONDON
LIBRARY

15 MAY 1991

THE
ALL ENGLAND LAW REPORTS

Incorporating the

LAW TIMES REPORTS

LAW JOURNAL REPORTS

1958

VOLUME 1

Consulting Editor
for Chancery Cases

HAROLD CHRISTIE, Q.C.
Bencher of Lincoln's Inn

Consulting Editor
for Taxation Cases

CYRIL KING, Q.C.
Bencher of the Middle Temple

Editor

J. T. EDGERLEY
of the Inner Temple and Lincoln's Inn, Barrister-at-Law

LONDON
BUTTERWORTH & CO. (PUBLISHERS) LTD.

©
Butterworths Publications Ltd.
1958

BIBL.
LONDIN.
UNIV.

Printed in Great Britain by R. J. Acford Ltd., Industrial Estate, Chichester, Sussex.

HOUSE OF LORDS

The Lord High Chancellor of Great Britain: The Rt. Hon. Viscount Kilmuir of Creich

Lords of Appeal in Ordinary

The Rt. Hon. Viscount Simonds
The Rt. Hon. Lord Morton of Henryton
The Rt. Hon. Lord Reid of Drem
The Rt. Hon. Lord Radcliffe
The Rt. Hon. Lord Tucker
The Rt. Hon. Lord Cohen
The Rt. Hon. Lord Keith of Avonholm
The Rt. Hon. Lord Somervell of Harrow
The Rt. Hon. Lord Denning of Whitchurch

COURT OF APPEAL

The Lord High Chancellor of Great Britain
Lord Chief Justice of England: The Rt. Hon. Lord Goddard
Master of the Rolls: The Rt. Hon. Lord Evershed
President of the Probate, Divorce and Admiralty Division: The Rt. Hon. Lord Merriman

The Rt. Hon. Lord Justice Jenkins
The Rt. Hon. Lord Justice Hodson
The Rt. Hon. Lord Justice Morris
The Rt. Hon. Lord Justice Romer
The Rt. Hon. Lord Justice Parker
The Rt. Hon. Lord Justice Sellers
The Rt. Hon. Lord Justice Ormerod
The Rt. Hon. Lord Justice Pearce

CHANCERY DIVISION

The Lord High Chancellor of Great Britain

The Hon. Mr. Justice Vaisey
The Hon. Mr. Justice Roxburgh
The Hon. Mr. Justice Wynn-Parry
The Hon. Mr. Justice Harman
The Hon. Mr. Justice Danckwerts
The Hon. Mr. Justice Lloyd-Jacob
The Hon. Mr. Justice Upjohn

QUEEN'S BENCH DIVISION

Lord Chief Justice of England: The Rt. Hon. Lord Goddard

The Hon. Mr. Justice Hilbery
The Hon. Mr. Justice Stable
The Hon. Mr. Justice Cassels
The Hon. Mr. Justice Pilcher
The Hon. Mr. Justice Jones
The Hon. Mr. Justice Byrne
The Hon. Mr. Justice Finnemore
The Hon. Mr. Justice Streatfeild
The Hon. Mr. Justice Slade
The Hon. Mr. Justice Devlin
The Hon. Mr. Justice Gorman
The Hon. Mr. Justice Barry
The Hon. Mr. Justice Donovan
The Hon. Mr. Justice McNair
The Hon. Mr. Justice Havers
The Hon. Mr. Justice Pearson
The Hon. Mr. Justice Glyn-Jones
The Hon. Mr. Justice Ashworth
The Hon. Mr. Justice Diplock
The Hon. Mr. Justice Hinchcliffe
The Hon. Mr. Justice Paull
The Hon. Mr. Justice Salmon
The Hon. Mr. Justice Edmund Davies (appointed Jan. 10, 1958)
The Hon. Mr. Justice Elwes (appointed Jan. 10, 1958)

PROBATE, DIVORCE AND ADMIRALTY DIVISION

President: The Rt. Hon. Lord Merriman

The Hon. Mr. Justice Wallington
The Hon. Mr. Justice Barnard
The Hon. Mr. Justice Willmer
The Hon. Mr. Justice Collingwood
The Hon. Mr. Justice Karminski
The Hon. Mr. Justice Davies
The Hon. Mr. Justice Sachs
The Hon. Mr. Justice Stevenson
The Hon. Mr. Justice Wrangham (appointed Jan. 10, 1958)

REPORTERS

HOUSE OF LORDS	G. A. Kidner, Esq.	Barrister-at-Law
PRIVY COUNCIL	G. A. Kidner, Esq.	Barrister-at-Law
COURT OF APPEAL, No. 1	F. Guttman, Esq.	Barrister-at-Law
COURT OF APPEAL, No. 2	Henry Summerfield, Esq.	Barrister-at-Law
COURT OF APPEAL, No. 3	F. A. Amies, Esq.	Barrister-at-Law
COURT OF APPEAL, No. 4	F. Guttman, Esq.	Barrister-at-Law
COURT OF CRIMINAL APPEAL	G. A. Kidner, Esq. E. Cockburn Millar Wendy Shockett	Barristers-at-Law
COURTS-MARTIAL APPEALS	T. J. Kelly, Esq.	Barrister-at-Law
CHANCERY DIVISION	F. Guttman, Esq. R. D. H. Osborne, Esq.	Barristers-at-Law
QUEEN'S BENCH DIVISION and COURTS OF ASSIZE	M. Denise Chorlton K. B. Edwards, Esq. D. M. Hughes, Esq. G. A. Kidner, Esq. Gwynedd Lewis S. M. D. McKinney E. Cockburn Millar Wendy Shockett G. M. Smailes, Esq. Henry Summerfield, Esq.	Barristers-at-Law
CENTRAL CRIMINAL COURT	T. J. Kelly, Esq.	Barrister-at-Law
REVENUE CASES	F. A. Amies, Esq.	Barrister-at-Law
PROBATE, DIVORCE AND ADMIRALTY	A. T. Hoolahan, Esq.	Barrister-at-Law
ECCLESIASTICAL CASES	A. T. Hoolahan, Esq.	Barrister-at-Law

CITATION

These reports are cited thus:

[1958] 1 All E.R.

REFERENCES

These reports contain references, which follow after the headnotes, to the following major works of legal reference described in the manner indicated below—

HALSBURY'S LAWS OF ENGLAND, SIMONDS EDITION

The reference 2 HALSBURY'S LAWS (3rd Edn.) 20, para. 48, refers to paragraph 48 on page 20 of Volume 2 of the third edition of Halsbury's Laws of England, of which Viscount Simonds is Editor-in-Chief.

HALSBURY'S LAWS OF ENGLAND, HAILSHAM EDITION

The reference 34 HALSBURY'S LAWS (2nd Edn.) 30, para. 26, refers to paragraph 26 on page 30 of Volume 34 of the second edition of Halsbury's Laws of England, of which Viscount Hailsham was Editor-in-Chief.

HALSBURY'S STATUTES OF ENGLAND, SECOND EDITION

The reference 26 HALSBURY'S STATUTES (2nd Edn.) 138, refers to page 138 of Volume 26 of the second edition of Halsbury's Statutes.

ENGLISH AND EMPIRE DIGEST

The reference 24 DIGEST 602, *6028*, refers to case No. 6028 on page 602 of Volume 24 of the Digest.

There are three cumulative supplements to the Digest, described as Digest Supp., 2nd Digest Supp. and 3rd Digest Supp.; of these the first two include cases up to December 31, 1939, and December 31, 1951, respectively.

The reference 31 DIGEST (Repl.) 244, *3794*, refers to case No. 3794 on page 244 of Digest Replacement Volume 31.

HALSBURY'S STATUTORY INSTRUMENTS

The reference 12 HALSBURY'S STATUTORY INSTRUMENTS 124, refers to page 124 of Volume 12 of Halsbury's Statutory Instruments, first edition.

A reference to a volume as " 1st Re-issue " refers to the first re-issue of the appropriate volume of Halsbury's Statutory Instruments.

ENCYCLOPAEDIA OF FORMS AND PRECEDENTS, THIRD EDITION

The reference 15 ENCY. FORMS. & PRECEDENTS (3rd Edn.) 938, Form 231, refers to Form 231 on page 938 of Volume 15 of the third edition of the Encyclopaedia of Forms and Precedents.

Digitized by the Internet Archive
in 2026

https://archive.org/details/all-england-law-reports-reprint_1958_1

CASES REPORTED IN VOLUME I

PAGE
Adamastos Shipping Co., Ltd. v. Anglo-Saxon Petroleum Co., Ltd. [H.L.] 725
Alderman v. Alderman and Dunn (by his guardian) [Div.] 391
Allan's Will Trusts, Re [Ch.D.] 401
Anglo-Saxon Petroleum Co., Ltd., Adamastos Shipping Co., Ltd. v. [H.L.] 725
Australian Mutual Provident Society, Ostime (Inspector of Taxes) v. [Ch.D.] 305
Baker Bosly, Ltd., Stach (Ian), Ltd. v. [Q.B.D.] 542
Barber v. Manchester Regional Hospital Board [Q.B.D.] 322
Barford (Inspector of Taxes), Westminster Bank, Ltd. v. [Ch.D.] 829
Barima Kwabena Seifah, Kofi Forfie (Chief) v. [P.C.] 289
Bastian, R. v. [C.C.C.] 568
Bathavon Rural District Council v. Carlile [C.A.] 801
Baxter, Hill v. [Q.B.D. Divl. Ct.] 193
Ben Line Steamers, Ltd., Port Line, Ltd. v. [Q.B.D.] 787
Betty's Cafés, Ltd. v. Phillips Furnishing Stores, Ltd. [H.L.] 607
Birch v. Sullivan [Ch.D.] 56
Blakeley v. C. & H. Clothing Co. (a firm) [Manchester Assizes] 297
Bolton (Thomas) & Sons, Ltd., Reid v. [C.A.] 465
Bowen v. Bowen [Div.] 770
Boyce (Inspector of Taxes), Wright v. [Ch.D.] 864
British Imex Industries, Ltd., Malas and another (trading as Hamzeh Malas and Sons) v. [C.A.] 262
British Imex Industries, Ltd. v. Midland Bank, Ltd. [Q.B.D.] 264
British Land Co., Ltd. v. Silver (Herbert) (Menswear), Ltd. [C.A.] 833
British Transport Commission, Hazell v. [Q.B.D.] 116
British Transport Commission, Kemshead v. [C.A.] 119
British Transport Commission, O'Connor v. [C.A.] 558
Brownsea Haven Properties, Ltd. v. Poole Corpn. [C.A.] 205
Bunting, Costagliola v. [Norwich Assizes] 846
Burch v. Burch [Div.] 848
C. & H. Clothing Co. (a firm), Blakeley v. [Manchester Assizes] 297
Caister-on-Sea Joint Burial Committee, Knights and, Norfolk County Council v. [Norwich Consistory Court] 394
Carlile, Bathavon Rural District Council v. [C.A.] 801
Castiglione's Will Trusts, Re [Ch.D.] 480
Central Land Board, London County Council v. [Ch.D.] 806
Clarke, Les Fils Dreyfus et Cie Société Anonyme v. [C.A.] 459
Clarkson v. Modern Foundries, Ltd. [Leeds Assizes] 33
Clueit v. Clueit [Birmingham Assizes] 417
Collier (W.), Ltd. v. Fielding (Valuation Officer) [C.A.] 694
Corke v. Corke and Cooke [C.A.] 224
Costagliola v. Bunting [Norwich Assizes] 846
Coutts & Co. v. Duntroon Investment Corpn., Ltd. [Ch.D.] 51
Cox v. Cox [Div.] 569
Craddock v. Hampshire County Council [C.A.] 449
Cross v. Edey [C.A.] 170
D. (an infant), Re [C.A.] 427
Dafnis Thomaides & Co. (U.K.), Ltd., Margulies Brothers, Ltd. v. [Q.B.D.] 777

PAGE
Davie v. New Merton Board Mills, Ltd. [C.A.] 67
Davies v. Price [C.A.] 671
Debtor (No. 472 of 1950), Re A [C.A.] 581
Director of Public Prosecutions v. Head [H.L.] 679
District Bank, Ltd. v. Webb [Ch.D.] 126
Dudley, Regis Property Co., Ltd. v. [C.A.] 510
Duntroon Investment Corpn, Ltd., Coutts & Co. v. [Ch.D.] 51
Edey, Cross v. [C.A.] 170
Escoigne Properties, Ltd. v. Inland Revenue Comrs. [H.L.] 406
Fatstock Marketing Corpn., Ltd. v. Morgan (Valuation Officer) [C.A.] 646
Fehmarn, The [C.A.] 333
Fellowes, Prescott (orse. Fellowes) v. [Div.] 824
Fielding (Valuation Officer), Collier (W.), Ltd. v. [C.A.] 694
Fomento (Sterling Area), Ltd. v. Selsdon Fountain Pen Co., Ltd. [H.L.] 11
Fraser (*decd.*), Re [Ch.D.] 26
Frediani, Hardie v. [C.A.] 529
Fry v. Inland Revenue Comrs. [Ch.D.] 819
Fynn v. Inland Revenue Comrs. [Ch.D.] 270
Galley, National Coal Board v. [C.A.] 91
Galway, Third Party. Harvey v. O'Dell (R. G.), Ltd. [Q.B.D.] 657
Gatenex Co., Ltd., Penn v. [C.A.] 712
Gibbard, Samrose Properties, Ltd. v. [C.A.] 502
Gillingham Bus Disaster Fund, Re [Ch.D.] 37
Glanville (R. E.) & Sons (Bovey Tracey), Ltd., Rutherford v. [C.A.] 532
Gorfin v. Odhams Press, Ltd. [C.A.] 578
Gorulnick v. Gorulnick [C.A.] 146
Gough v. National Coal Board [C.A.] 754
Grace Rymer Investments, Ltd. v. Waite [Ch.D.] 138
Graham v. Heinke (C. E.) & Co., Ltd. [Q.B.D.] 365
Green, R. v. [C.C.A.] 471
Green, Wernick v. [Q.B.D. Divl. Ct.] 59
Grey v. Inland Revenue Comrs. [Ch.D.] 246
Grimthorpe's (Baron) Will Trusts, Re [Ch.D.] 765
Gwalter, MacFarlane v. [C.A.] 181
Hampshire County Council, Craddock v. [C.A.] 449
Hardie v. Frediani [C.A.] 529
Harewood Hotels, Ltd. v. Harris [C.A.] 104
Harris, Harewood Hotels, Ltd. v. [C.A.] 104
Harvey v. O'Dell (R. G.), Ltd. (Galway Third Party) [Q.B.D.] 657
Harvey, Piper v. [C.A.] 454
Hastings, Re [Q.B.D. Divl. Ct.] 707
Haynes v. Qualcast (Wolverhampton), Ltd. [C.A.] 441
Hazell v. British Transport Commission [Q.B.D.] 116
Head, Director of Public Prosecutions v. [H.L.] 679
Heaven & Kesterton, Ltd. v. Sven Widaeus A/B [Q.B.D.] 420
Heinke (C. E.) & Co., Ltd., Graham v. [Q.B.D.] 365
Hill v. Baxter [Q.B.D. Divl. Ct.] 193
Hochstrasser (Inspector of Taxes) v. Mayes [Ch.D.] 369
Holland v. Ong [C.A.] 574
Holmes v. Keyes (Lord) [Ch.D.] 721
Holyoak (Valuation Officer), Shell-Mex and B.P., Ltd. v. [C.A.] 702
Home Office, Kuchenmeister v. [Q.B.D.] 485
Horace Plunkett Foundation v. St. Pancras Borough Council [Q.B.D. Divl. Ct.] 122
Inland Revenue Comrs., Escoigne Properties, Ltd. v. [H.L.] 406
Inland Revenue Comrs., Fry v. [Ch.D.] 819
Inland Revenue Comrs., Fynn v. [Ch.D.] 270

PAGE
Inland Revenue Comrs., Grey v. [Ch.D.] 246
Inland Revenue Comrs., Oughtred v. [Ch.D.] 252
Inland Revenue Comrs., Public Trustee v. [Ch.D.] 550
Inland Revenue Comrs. v. Racecourse Betting Control Board [Ch.D.] 274
Inland Revenue Comrs. v. South Georgia Co., Ltd. [H.L.] 593
Inland Revenue Comrs., Western United Investment Co., Ltd., v. [Ch.D.] 257
Inland Revenue Comrs., Wigram Family Settled Estates, Ltd. (in liquidation) v. [H.L.] 338
Inland Revenue Comrs. v. Wood Bros. (Birkenhead), Ltd. (in liquidation) [H.L.] 405
Island Tug & Barge, Ltd. v. Makedonia Owners [Q.B.D.] 236
Jennings v. Kinder (Inspector of Taxes) [Ch.D.] 369
Joory, Shamia v. [Q.B.D.] 111
Jubilee Coffee Roasting Co., Ltd., London Export Corpn., Ltd. v. [Q.B.D.] 494
Kemshead v. British Transport Commission [C.A.] 119
Keyes (Lord), Holmes v. [Ch.D.] 721
Kinder (Inspector of Taxes), Jennings v. [Ch.D.] 369
Kingston v. Kingston (Gulder—Party cited) [C.A.] 397
Knight's Question, Re [Ch.D.] 812
Knights and Caister-on-Sea Joint Burial Committee, Norfolk County Council v. [Norwich Consistory Court] 394
Kofi Forfie (Chief) v. Barima Kwabena Seifah [P.C.] 289
Kruhlak v. Kruhlak [Q.B.D. Divl. Ct.] 154
Kuchenmeister v. Home Office [Q.B.D.] 485
Lance v. Lance and Gardner [Div.] 388
Last (*decd.*), Re [Prob.] 316
Leach v. Leach and Harrower [Div.] 320
Les Fils Dreyfus et Cie Société Anonyme v. Clarke [C.A.] 459
Lewis v. Lewis [C.A.] 859
Lim Siew Neo v. Pang Keah Swee [P.C.] 313
Linsleys (Established 1894), Ltd., Special Commissioners of Income Tax v. [H.L.] 343
London County Council v. Central Land Board [Ch.D.] 806
London Export Corpn., Ltd. v. Jubilee Coffee Roasting Co., Ltd. [Q.B.D.] 494
MacFarlane v. Gwalter [C.A.] 181
McMorran (*decd.*), Re [Ch.D.] 186
Makedonia Owners, Island Tug & Barge, Ltd. v. [Q.B.D.] 236
Malas and Another (Trading as Hamzeh Malas and Sons) v. British Imex Industries, Ltd. [C.A.] 262
Manchester Regional Hospital Board, Barber v. [Q.B.D.] 322
Manning v. Manning [Div.] 291
Margulies Brothers, Ltd. v. Dafnis Thomaides & Co. (U.K.), Ltd. [Q.B.D.] 777
Matheson (*decd.*), Re [Liverpool Consistory Court] 202
Mayes, Hochstrasser (Inspector of Taxes) v. [Ch.D.] 369
Midland Bank, Ltd., British Imex Industries, Ltd. v. [Q.B.D.] 264
Ministry of Housing and Local Government, Pyx Granite Co., Ltd. v. [C.A.] 625
Modern Foundries, Ltd., Clarkson v. [Leeds Assizes] 33
Morgan (Valuation Officer), Fatstock Marketing Corpn., Ltd. v. [C.A.] 646
Moxon's Will Trusts, Re [Ch.D.] 386
National Coal Board v. Galley [C.A.] 91
National Coal Board, Gough v. [C.A.] 754
National Coal Board, Pteroti Compania Naviera, S.A. v. [Q.B.D.] 603
Nello Simoni, Ltd., Third Party. Sanchez (Miguel) & Compania S.L. v. Result Owners [Adm.] 839
New Merton Board Mills, Ltd., Davie v. [C.A.] 67
Norfolk County Council v. Knights and Caister-on-Sea Joint Burial Committee [Norwich Consistory Court] 394
O'Connor v. British Transport Commission [C.A.] 558
O'Dell (R. G.), Ltd., Harvey (Galway Third Party) [Q.B.D.] 657
Odhams Press, Ltd., Gorfin v. [C.A.] 578
Ong, Holland v. [C.A.] 574
Ostime (Inspector of Taxes) v. Australian Mutual Provident Society [Ch.D.] 305
Oughtred v. Inland Revenue Comrs. [Ch.D.] 252
Pang Keah Swee, Lim Siew Neo v. [P.C.] 313
Penn v. Gatenex Co., Ltd. [C.A.] 712
Phillips Furnishing Stores, Ltd., Betty's Cafés, Ltd. v. [H.L.] 607
Phoenix Oil and Transport Co., Ltd., Re (No. 2) [Ch.D.] 158
Phoenix Timber Co., Ltd.'s Application, Re [C.A.] 815
Piper v. Harvey [C.A.] 454
Ponticelli v. Ponticelli (otherwise Giglio) (by her guardian) [Div.] 357
Poole Corpn., Brownsea Haven Properties, Ltd. v. [C.A.] 205
Port Line, Ltd. v. Ben Line Steamers, Ltd. [Q.B.D.] 787
Practice Direction (Proof of foreign marriage) [Div.] 364
Practice Note (Possession of mortgaged property) [Ch.D.] 128
Prescott (orse. Fellowes) v. Fellowes [Div.] 824
Price, Davies v. [C.A.] 671
Pritam Singh, R. v. [Leeds Assizes] 199
Probate, Divorce and Admiralty Division (Div.) Notice [Div.] 869
Pteroti Compania Naviera S.A. v. National Coal Board [Q.B.D.] 603
Public Trustee v. Inland Revenue Comrs. [Ch.D.] 550
Pyx Granite Co., Ltd. v. Ministry of Housing and Local Government [C.A.] 625
Qualcast (Wolverhampton), Ltd., Haynes v. [C.A.] 441
R. v. Bastian [C.C.C.] 568
R. v. Green [C.C.A.] 471
R. v. Pritam Singh [Leeds Assizes] 199
R. v. Sharp [Birmingham Assizes] 62
R. v. Smith [C.C.C.] 475
R. v. Spriggs [C.C.A.] 300
R. v. Vaccari [C.C.A.] 468
Racecourse Betting Control Board v. Inland Revenue Comrs. [Ch.D.] 274
Racecourse Betting Control Board v. Young (Inspector of Taxes) [Ch. D.] 274
Regis Property Co., Ltd. v. Dudley [C.A.] 510
Reid v. Bolton (Thomas) & Sons, Ltd. [C.A.] 465
Result, The. Sanchez (Miguel) & Compania S.L. v. Result Owners (Nello Simoni, Ltd., Third Party) [Adm.] 839
Richardson's Will Trusts, Re [Ch.D.] 538
Riding v. Riding [C.A.] 65
Royal College of Nursing v. St. Marylebone Corpn. [Q.B.D. Divl. Ct.] 129
Rutherford v. Glanville (R. E.) & Sons (Bovey Tracey), Ltd. [C.A.] 532
Rymer (Grace) Investments, Ltd. v. Waite [Ch.D.] 138
S. (an infant), Re [Ch.D.] 783
Sage, Re [Q.B.D. Divl. Ct.] 477
St. Mary's, Tyne Dock, Re (No. 2) [Durham Consistory Court] 1
St. Marylebone Corpn., Royal College of Nursing v. [Q.B.D. Divl. Ct.] 129
St. Pancras Borough Council, Horace Plunkett Foundation v. [Q.B.D. Divl. Ct.] 122
Sampson, Warner v. [Q.B.D.] 44
——, (No. 2) [Q.B.D.] 314
Samrose Properties, Ltd. v. Gibbard [C.A.] 502
Sanchez (Miguel) & Compania S. L. v. Result Owners (Nello Simoni, Ltd., Third Party). The Result [Adm.] 839
Selsdon Fountain Pen Co., Ltd., Fomento (Sterling Area), Ltd. v. [H.L.] 11
Shamia v. Joory [Q.B.D.] 111
Sharp, R. v. [Birmingham Assizes] 62
Shaw (*decd.*), Re [C.A.] 245
Shell-Mex and B.P., Ltd. v. Holyoak (Valuation Officer) [C.A.] 702
Silver v. Silver [C.A.] 523
Silver (Herbert) (Menswear), Ltd., British Land Co., Ltd. v. [C.A.] 833
Smith, R. v. [C.C.C.] 475
South Georgia Co., Ltd., Inland Revenue Comrs. v. [H.L.] 593
Special Commissioners of Income Tax v. Linsleys (Established 1894), Ltd. [H.L.] 343
Spriggs, R. v. [C.C.A.] 300
Stach (Ian), Ltd. v. Baker Bosly, Ltd. [Q.B.D.] 542
Statement, Joint (Law Society and Bar Council) [Q.B.D.] 870
Sullivan, Birch v. [Ch.D.] 56

PAGE

Sussman (J. & P.), Ltd., Re [Ch.D.] 857
Sven Widaeus A/B, Heaven & Kesterton, Ltd. *v.* [Q.B.D.] 420
Swan Hunter & Wigham Richardson, Ltd., Tate *v.* [C.A.] 150
Tacon (*decd.*), Re [C.A.] 163
Tate *v.* Swan Hunter & Wigham Richardson, Ltd. [C.A.] 150
Thomas, Wilson *v.* [Ch.D.] 871
Union Castle Mail Steamship Co., Ltd. *v.* United Kingdom Mutual War Risks Association, Ltd. [Q.B.D.] 431
United Kingdom Mutual War Risks Association, Ltd., Union Castle Mail Steamship Co., Ltd. *v.* [Q.B.D.] 431
Vaccari, R. *v.* [C.C.A.] 468
Waite, Grace Rymer Investments, Ltd. *v.* [Ch.D.] 138

PAGE

Warner *v.* Sampson [Q.B.D.] 44
——, (No. 2) [Q.B.D.] .. 314
Webb, District Bank, Ltd. *v.* [Ch.D.] .. 126
Wernick *v.* Green [Q.B.D. Divl. Ct.] .. 59
Western United Investment Co., Ltd. *v.* Inland Revenue Comrs. [Ch.D.] 257
Westminster Bank, Ltd. *v.* Barford (Inspector of Taxes) [Ch.D.] 829
White (*decd.*), Re [Ch.D.] 379
Whitworth Art Gallery Trusts, Re [Ch.D.] 176
Wigram Family Settled Estates, Ltd. (in liquidation) *v.* Inland Revenue Comrs. [H.L.] 338
Wilson *v.* Thomas [Ch.D.] 871
Wood Bros. (Birkenhead), Ltd. (in liquidation), Inland Revenue Comrs. *v.* [H.L.] .. 405
Wright *v.* Boyce (Inspector of Taxes) [Ch.D.] 864
Young (Inspector of Taxes) *v.* Racecourse Betting Control Board [Ch.D.] 274

INDEX

PAGE

ACCOMMODATION CROSSING
See Railway.

ADMIRALTY
Jurisdiction—*Damage to cargo—Contract providing for disputes to be judged by foreign court—Discretion to allow proceedings in England—Administration of Justice Act*, 1956 (*c.* 46), *s.* 1 (1) (*g*) [The Fehmarn] 333

ADMISSION
Infant—*Confession of adultery made before divorce proceedings commenced—Admissibility in evidence* [Alderman *v.* Alderman and Dunn (by his Guardian)] 391

ADOPTION
Dispensing with consent to order—"*Consent . . . unreasonably withheld*"—*Illegitimate child—Refusal by putative father—Child's welfare paramount consideration—Adoption Act*, 1950 (*c.* 26), *s.* 2 (4) (*a*), *s.* 3 (1) [Re D. (an Infant)] 427

ADVANCEMENT
See Husband and Wife (Title to property); Trust and Trustee (Powers of trustee).

AFFILIATION PROCEEDINGS
See Bastardy.

AFFIRMATION
See Evidence.

AGRICULTURAL HOLDING
See Agriculture.

AGRICULTURAL LAND TRIBUNAL
Reasons—*Tribunal not bound to state reasons* [Davies *v.* Price] 671

AGRICULTURE
Agricultural holding—*Notice to quit—Consent of Minister—Exercise of discretion—Comparison of use of land by tenant with proposed use of land by landlord—Agricultural Holdings Act*, 1948 (*c.* 63), *s.* 25 (1) (*a*) [Davies *v.* Price] 671
Notice given to personal representatives—Reason stated that the late tenant had died within three months—Deceased was herself widow and executrix of original tenant—Whether executrix of tenant can be the tenant within Agricultural Holdings Act, 1948 (*c.* 63), *s.* 24 (2) (*g*) [Costagliola *v.* Bunting] 846
Poultry. *See* Animals (Poultry).

ALIEN
Detention—*Alien landing at approved airport in United Kingdom in transit to another country—Landing for sole purpose of embarking in an aircraft at same airport—Alien detained by immigration authorities for period preventing his embarking in outward aircraft—No refusal of leave to land—Whether detention by immigration authorities illegal—Aliens Order*, 1953 (*S.I.* 1953 *No.* 1671), *art.* 2 (1) (*b*) [Kuchenmeister *v.* Home Office] 485

ALPHABET
Reform of—*Whether charitable. See* Charity (Education).

ANIMALS
Poultry—*Poultry dealer—Keeping of records—Poultry purchased to be resold for slaughter—Poultry already fattened for slaughter when bought, but fed before being resold—Whether poultry "fed" for slaughter—Live Poultry (Movement Records) Order*, 1954 (*S.I.* 1954 *No.* 122), *art.* 2 (1) [Wernick *v.* Green] 59

ANTE-NUPTIAL SETTLEMENT
See Variation of Settlement (Matrimonial Causes).

APPEAL
County court, from. *See* County Court.
Court of Appeal, to. *See* Court of Appeal.
Divorce proceedings, in. *See* Divorce.
House of Lords, to. *See* House of Lords.
Privy Council. *See* Privy Council.

ARBITRATION
Award—*Remission—Award for the payment of money—Award not specifying sum to be paid and therefore not enforceable as judgment—Remission sought for purpose of calculating sum—Jurisdiction of court to remit—Counterclaim—Arbitration Act*, 1950 (*c.* 27), *s.* 26 [Margulies Bros., Ltd. *v.* Dafnis Thomaides & Co. (U.K.), Ltd.] 777
Costs—*Discretion of arbitrator—Judicial exercise—Successful party ordered to pay total costs of reference—Discretion judicially exercised although founded on mistake in law—Misconduct* [Heaven & Kesterton, Ltd. *v.* Sven Widaeus A/B] 420
Interpleader proceedings—*Arbitration clause in contract—Exercise of court's discretion—Arbitration Act*, 1950 (*c.* 27), *s.* 5 [Re Phoenix Timber Co., Ltd.'s Application] 815
Setting aside award—*Misconduct—Procedure of board of appeal—Custom of trade contrary to implied term of agreement—Approach to question of setting aside award on grounds of irregularity in procedure or infringement of the rules of natural justice* [London Export Corpn., Ltd. *v.* Jubilee Coffee Roasting Co., Ltd.] 494

ARRAIGNMENT
See Criminal Law (Practice).

AUDITOR
See Company.

AUMBRY
Church ornament—*Legality. See* Ecclesiastical Law (Ornaments).

AUTOMATISM
Defence to criminal charge—*Mens rea not element of offence charged* [Hill *v.* Baxter] .. 193

AWARD
See Arbitration (Award; Setting aside award).

BANK
Letter of credit—*Confirmed credit—Credit available on presentation inter alia of bills of lading—Duty of bank in relation to evidence of fulfilment of conditions of bills of lading before payment under letter of credit* [British Imex Industries, Ltd. *v.* Midland Bank, Ltd.] 264

BANK—*continued.*

Confirmed letter of credit—Established practice regarding payment irrespective of dispute as to the quality of goods sold [Malas (trading as Hamzeh Malas and Sons) *v.* British Imex Industries, Ltd.] 262

BANKRUPTCY

Gambling—*Gambling by bankrupt contributing to insolvency of estate. See* Criminal Law (Gambling by bankrupt engaged in trade or business).

Inquiry as to debtor's dealings and property—*Summons to person capable of giving information to do so to the court—Former solicitor of and attorney to the debtor—Abortive previous proceedings to compel him as solicitor to deliver accounts in respect of same matter—No appeal by trustee—Whether res judicata—Delay—Whether bankruptcy summons an abuse of the process of the court—Bankruptcy Act,* 1914 (*c.* 59), *s.* 25 (1)—*R.S.C., Ord.* 52, *r.* 25, *Ord.* 37, *r.* 20 [Re A Debtor (No. 472 of 1950)] 581

Private examination. *See* Inquiry as to debtor's dealings and property, *ante.*

Property—*Rights of action—Minority shareholders' action—Whether bankrupt registered shareholder may maintain action* [Birch *v.* Sullivan] 56

Res judicata. *See* Res Judicata.

Stay of action—*Minority shareholder's action—Misfeasance alleged against sole director with controlling interest—Defective statement of claim* [Birch *v.* Sullivan] 56

BASTARDY

" Single woman "—*Child born before marriage of mother and putative father—Separation of mother and father under separation order made some years after their marriage—Whether mother a " single woman " quoad her husband—Bastardy Laws Amendment Act,* 1872 (*c.* 65), *s.* 3, *as amended* [Kruhlak *v.* Kruhlak] 154

BELLS

Sanctuary bells—*Church ornaments—Legality. See* Ecclesiastical Law (Ornaments).

BENEFIT TO COMMUNITY

Charitable object. *See* Charity.

BREACH OF CONTRACT

See Contract.

BURIAL

Burial Committee—*Representation before consistory court* [Norfolk County Council *v.* Knights and Caister-on-Sea Joint Burial Committee] 394

Disinterment—*Faculty for removal from consecrated ground—Remains to be cremated and ashes to be placed with those of deceased's widow* [Re Matheson (*decd.*)] 202

Re-interment in communal grave—Part of road widening scheme—Faculty sought [Norfolk County Council *v.* Knights and Caister-on-Sea Joint Burial Committee] 394

BUSINESS

Bequest of business. *See* Will (Gift—*Subject-matter of gift*).

BUSINESS PREMISES

New tenancy. *See* Landlord and Tenant (New tenancy).

CANDLESTICKS

Church ornament—*Legality. See* Ecclesiastical Law (Ornaments).

CAPITAL MURDER

See Criminal Law.

CARNAL KNOWLEDGE

See Criminal Law.

CARRIAGE BY RAILWAY OR CANAL

Carriage of passengers—*Negligence—Infant passenger's fall through door of guard's van—Passengers having to pass through van to reach restaurant car—Door capable of being opened by small child* [O'Connor *v.* British Transport Commission] 558

CARRIAGE OF PASSENGERS

See Carriage by Railway or Canal.

CERTIFICATE

Taxing master. *See* Costs (Taxation—*Review by court*).

CERTIORARI

Conviction—*Quashing—Sentence illegal—No power to amend sentence* [R. *v.* Green] 471

Error of law not appearing on face of award—*Excess of jurisdiction—Remedy by appeal—Agricultural Land Tribunal—Consent to notice to quit—Misconstruction of statute* [Davies *v.* Price] 671

CHARITY

Benefit to community—*Nursing—Promotion of the " advance of nursing as a profession "—Incidental benefits to individuals—Objects of the Royal College of Nursing—Rating and Valuation (Miscellaneous Provisions) Act,* 1955 (*c.* 9), *s.* 8 (1) (*a*) [Royal College of Nursing *v.* St. Marylebone Corpn.] 129

Cy-près doctrine—*Charter—Charity founded by royal charter—Jurisdiction of court to order scheme* [Re Whitworth Art Gallery Trusts] 176

Education—*Alphabet—Research into and propaganda on advantages of reform of alphabet—Whether for advancement of education—Whether beneficial to the community* [Re Shaw (*decd.*)] 245

Practicability of object—*Financial practicability—Vested gift in remainder subject to defeasance —Whether reversionary value of gift is the test of financial practicability—Assumption that gift will not be defeated* [Re Tacon (*decd.*)] 163

Trust—*Invalid trust—Impersonal trust—Whether effect would be given to testator's directions as a power on which trustees might act* [Re Shaw (*decd.*)] 245

Uncertainty—" *Worthy causes* "—*Gift of memorial fund to such worthy causes as mayors may determine* [Re Gillingham Bus Disaster Fund] 37

Validation by Charitable Trusts (Validation) Act, 1954—*Imperfect trust provision—Donations for two specific objects and " worthy causes " in memory of certain persons—Specific objects achieved—Whether trusts of surplus were validated—Charitable Trusts (Validation) Act,* 1954 (*c.* 58), *s.* 1 (1), (2), *s.* 2 (3) [Re Gillingham Bus Disaster Fund] 37

CHARTER

Charity founded by royal charter—*Cy-près jurisdiction. See* Charity (Cy-près doctrine).

CHARTERPARTY
See Shipping.

CHILD
Adoption. *See* Adoption.
Negligence—*Railway—Child and mother passengers on train—Duty of mother to look after child—Duty of railway owners to child passenger—Door of train capable of being opened by small child* [O'Connor *v.* British Transport Commission] 558

CIBORIUM
Church ornament—*Legality*. *See* Ecclesiastical Law (Ornaments).

COAL MINING
Contract of service—*Certainty—Agreement by deputy to work such days or part days in each week as may reasonably be required by management—Measure of damages for refusal to work Saturday shift* [National Coal Board *v.* Galley] 91
Statutory duty—*Breach—Security of working place—Fall of coal from coal face—Duty to make "secure" sides of a working place—Whether duty is applicable to coal face—Coal Mines Act*, 1911 (*c.* 50), *s.* 49 [Gough *v.* National Coal Board] 754

COMPANY
Auditor—*Functions and duties* [Fomento (Sterling Area), Ltd. *v.* Selsdon Fountain Pen Co., Ltd.] 11
Director—*Vacation of office—Failure to acquire qualification shares within two months after election—Election by poll—Result declared on following day—Date of election—"Holding" shares—Companies Act*, 1948 (*c.* 38), *s.* 182 (1), (3) [Holmes *v.* Keyes (Lord)] 721
Investment company. *See* Surtax.
Meeting—*Completion—Business of meeting and voting on poll completed on one day—Counting votes completed on following day—When meeting completed* [Holmes *v.* Keyes (Lord)] .. 721
Shareholder—*Minority shareholder—Representative misfeasance action against sole director with controlling interest—No allegation in statement of claim that shareholder prevented from causing company to sue—Pleading defective* [Birch *v.* Sullivan] 56
Shares—*Bequest to a company of shares in the company—Validity* [Re Castiglione's Will Trusts] 480
Transfer—Stamp duty. *See* Stamp Duty (Conveyance on sale).
Stamp duty. *See* Stamp Duty (Transfer of property from one associated company to another).
Winding-up—*Compulsory winding-up—Distribution of surplus assets—Necessity for order of court before distribution—Companies Act*, 1948 (*c.* 38), *s.* 245 (2) (*h*), *s.* 265—*Companies* (*Winding-up*) *Rules*, 1949 (*S.I.* 1949 *No.* 330), *r.* 120 [Re Phoenix Oil and Transport Co., Ltd. (No. 2)] 158
Petition—Amendment—Name of company misspelt—Errors repeated in advertisement and in order made—Jurisdiction [Re J. & P. Sussman, Ltd.] 857

COMPENSATION
Requisitioned property. *See* Requisition.

CONDONATION
See Divorce.

CONFESSIONS
See Divorce (Evidence).

CONFLICT OF LAWS
Divorce. *See* Divorce (Foreign decree).
Nullity. *See* Nullity.
Power of appointment—*Special power—Power given by English will—Exercise by Scottish will—Law relevant for construction of instrument exercising power—Whether valid exercise of power* [Re McMorran (*decd.*)] 186
Stay of proceedings—*Admiralty action—Damage to cargo—Contract providing for disputes to be judged by foreign court—Discretion to allow proceedings in England—Administration of Justice Act*, 1956 (*c.* 46), *s.* 1 (1) (*g*) [The Fehmarn] 333

CONSISTORY COURT
See Ecclesiastical Law.

CONSTRUCTIVE TRUST
See Trust and Trustee.

CONTRACT
Breach—*Damages—Measure—Contract by colliery deputy to work such days as reasonably required—Refusal in concert with other deputies to work Saturdays extending over several months—Writ issued after first Saturday's abstention from work—Relevance of breach being in concert to assessment of damages—Whether damages for failure to work Saturdays after issue of writ recoverable in the action—R.S.C., Ord.* 36, *r.* 58 [National Coal Board *v.* Galley] 91
Enforceable contract—*Certainty of term—Service agreement—Agreement to work such days or part days in each week as may reasonably be required by management* [National Coal Board *v.* Galley] 91
Money had and received. *See* Money (Money had and received).
Service. *See* Master and Servant.
Statute—*Agreement confirmed by statute*. *See* Statute.

CONVICTION
See Certiorari.

COSTS
Appeal to Privy Council. *See* Privy Council.
Arbitration. *See* Arbitration.
Counsel's fees. *See* Counsel (Fees); Divorce.
County court. *See* County Court.
Divorce. *See* Divorce (Appeal; Costs).
Landlord and tenant—*New tenancy under Landlord and Tenant Act*, 1954—*Terms of tenancy in dispute but no dispute that tenancy should be granted—Length of tenancy fixed at landlord's proposed period—Rent fixed nearer to tenants' proposed figure—Landlord to pay half tenants' costs* [Harewood Hotels, Ltd. *v.* Harris] 104

COSTS—*continued.* PAGE

- Payment into court—*Several causes of action—Negligence or breach of statutory duty—Claim for damages for personal injuries—Notice of payment in not specifying whether payment in respect of common law negligence or breach of statutory duty—Damages awarded less than sum paid in—Costs—R.S.C., Ord.* 22, *r.* 1(2) [GRAHAM *v.* C. E. HEINKE & CO., LTD.] .. 365
- Taxation—*Counsel's fees. See* COUNSEL (Fees).
  - *Review by court—Jurisdiction—Taxing master's certificate—Objections carried in to master's direction to lodge itemised bill—Objections answered and disallowed—Certificate signed by master to enable court to determine principle on which bill should be taxed—R.S.C., Ord.* 65, *r.* 27 (41) [Re FRASER (*decd.*)] .. 26
  - *Trustee's costs. See* TRUST AND TRUSTEE (Trustee).

COUNSEL

- Fees—*Leading counsel's fee disallowed on party and party taxation—Action for damages for personal injuries—Liability admitted—Amount of damages in issue* [GORFIN *v.* ODHAMS PRESS, LTD.] .. 581
  - *Matrimonial causes. See* DIVORCE (Costs).
  - *Taxation—Counsel's fees for interlocutory work—Personal injury cases* [NOTE] .. 870
- Pleading—*Lapse in pleading due to forgetfulness rather than mistake—Whether client bound* [WARNER *v.* SAMPSON] .. 44

COUNTY COURT

- Appeal—*Evidence—Weight to be given to evidence—Terms of new tenancy under Landlord and Tenant Act,* 1954 (*c.* 56), *s.* 34—*Whether weight given to particular evidence properly the subject of appeal—County Courts Act,* 1934 (*c.* 53), *s.* 105 (*as amended by County Courts Act,* 1955 (*c.* 8), *s.* 12) [HAREWOOD HOTELS, LTD. *v.* HARRIS] .. 104
- Costs—*Fixed costs—Claim for damages for personal injury—Whether court officials should enter fixed costs on summons—Payment in by defendant of sum for damages plus amount of fixed costs—Acceptance by plaintiff of sum paid in for damages—Whether plaintiff entitled to tax his costs or only to fixed costs—County Court Rules, Ord.* 11, *r.* 1, *Appendix D, Part* 1, *Direction* 1 (*a*) [REID *v.* THOMAS BOLTON & SONS, LTD.] .. 465
- Payment out of court—*Fatal accident—Damages recovered by widow invested at low rate of interest—Money recovered in High Court transferred to county court—Discretion—County Courts Act,* 1934 (*c.* 53), *s.* 164 (2), (3) [CROSS *v.* EDEY] .. 170

COURT OF APPEAL

- Ground of appeal—*Action for negligence—Point raised on appeal not canvassed in court of first instance—Appeal not decided on that ground* [O'CONNOR *v.* BRITISH TRANSPORT COMMISSION] 558

CREDIT

- Letter of credit. *See* BANK (Letter of credit); SALE OF GOODS (Payment).

CRIMINAL LAW

- Arraignment. *See* Practice, *post.*
- Capital murder—*Diminished responsibility—Abnormality of mind—Medical evidence showing accused suffering from emotional abnormality—Whether jury should be directed on the meaning of abnormality of mind—Homicide Act,* 1957 (*c.* 11), *s.* 2 (1) [R. *v.* SPRIGGS] .. 300
  - *Plea of guilty withdrawn—Insanity not alleged by accused but defence of diminished responsibility put forward—Prosecution entitled to adduce evidence of insanity—Onus of proof—Homicide Act,* 1957 (*c.* 11), *s.* 2 [R. *v.* BASTIAN] .. 568
- Carnal knowledge—*Mental defective—Whether offence can be committed against person whose original detention in institution was unlawful—Mental Deficiency Act,* 1913 (*c.* 28), *s.* 56 (1) (*a*) [DIRECTOR OF PUBLIC PROSECUTIONS *v.* HEAD] .. 679
- Gambling by bankrupt engaged in trade or business—*Income tax debt unpaid—Whether debt contracted in course and for the purposes of trade or business—Bankruptcy Act,* 1914 (*c.* 59), *s.* 157 (1) [R. *v.* VACCARI] .. 468
- Indictment—*Joinder of accounts—Separate indictments for manslaughter and other offences—Evidence on each indictment substantially similar—Bill of indictment granted including count of manslaughter and other offences* [R. *v.* SMITH] .. 475
- Intention. *See* ROAD TRAFFIC (Dangerous driving—*Automatism*).
- Perjury—"*Lawfully sworn*"—*Witness affirming—Sikh allowed to affirm owing to impracticability of administering oath according to his religion—Perjury Act,* 1911 (*c.* 6), *s.* 1 (1), *s.* 15 (2) [R. *v.* PRITAM SINGH] .. 199
- Practice—*Bill of indictment—Separate indictments preferred in respect of manslaughter and other offences—Bill of indictment comprising all charges granted* [R. *v.* SMITH] .. 475
  - *Mute of malice or by visitation of God* [R. *v.* SHARP] .. 62
- Recognisance—*Breach of recognisance—Appeal* [R. *v.* GREER] .. 471
- Sentence—*Concurrent sentences or general sentence—Indictment containing five counts—No sentence on individual counts—Conviction on one count quashed—Validity of sentence* [Re HASTINGS] .. 707
  - *Probation order—Breach of probation order—Whether conviction for which invalid sentence was imposed may be used as a breach of a probation order—Criminal Justice Act,* 1948 (*c.* 58), *s.* 6 (4) (*b*), (6), *s.* 8 (5) [R. *v.* GREEN] .. 471
  - *Several offences—Form of sentence* [Re HASTINGS] .. 707
- Trial—*Plea—Fitness to plead—Defendant standing mute—Verdict of "mute by the visitation of God"* [R. *v.* SHARP] .. 62

CROSS EXAMINATION OF WITNESS

- *See* PRACTICE.

CUSTODY

- Child. *See* INFANT (Guardianship of Infants Acts).

CY-PRÈS DOCTRINE

- *See* CHARITY.

DAMAGES

- Income tax—*Whether taken into consideration in assessing damages. See* SHIPPING (Salvage—*Award*).
- Limitation of action—*Injury partly caused by breach of statutory duty outside statutory period* [CLARKSON *v.* MODERN FOUNDRIES, LTD.] .. 33
- Measure of damages—*Breach of contract. See* CONTRACT (Breach).
- Shipping. *See* SHIPPING (Charterparty—*Delay*).

DANGEROUS DRIVING
See Road Traffic.

DANGEROUS MACHINERY
See Factory.

DEATH DUTY
See Estate Duty.

DECLARATION
Jurisdiction—*Exclusion of jurisdiction by statute—Necessity for clear exclusion—Discretionary statutory power to impose conditions on grant of permission—Whether jurisdiction excluded by provision of distinct statutory procedure or by discretionary nature of statutory power—Town and Country Planning Act*, 1947 (*c.* 51), *s.* 14 (2), *s.* 17 (1) [Pyx Granite Co., Ltd. *v.* Ministry of Housing and Local Government] 625

DECONTROL
See Rent Restriction.

DESERTION
See Divorce.

DETENTION
Alien. *See* Alien.

DEVELOPMENT
Land. *See* Town and Country Planning.

DEVELOPMENT CHARGE
See Town and Country Planning.

DIFFERENTIAL RENTS SCHEME
See Housing (House of local authority—*Rent*).

DIMINISHED RESPONSIBILITY
See Criminal Law (Capital murder).

DIRECTOR
See Company.

DISCRETION
Divorce. *See* Divorce.

DISINTERMENT
See Burial.

DIVORCE
Appeal—*Costs—Order made on decree nisi—Whether part of decree, Whether appeal lies after decree made absolute—Fresh evidence—Supreme Court of Judicature* (*Consolidation*) *Act*, 1925 (*c.* 49), *s.* 31 (1) (*e*) [Kingston *v.* Kingston (Gilder, Party cited)] 397
Condonation—*Knowledge of respondent's adultery—Suspicion not amounting to knowledge—Materiality of knowledge of second association* [Burch *v.* Burch] 848
Costs—*Appeal as to costs. See* Appeal—*Costs, ante.*
Co-respondent—Infant [Alderman *v.* Alderman and Dunn (by his Guardian)] .. 391
Counsel's fees for interlocutory work [Notice] 869
Judicial separation—Wife's petition alleging adultery with woman named—Claim for costs against woman named—Respondent in cause—Jurisdiction—Matrimonial Causes Act, 1950 (*c.* 25), *s.* 3 (2), *s.* 14 (1)—*Matrimonial Causes Rules*, 1957 (*S.I.* 1957 *No.* 619), *r.* 5 (1) [Leach *v.* Leach and Harrower] 320
Desertion—*Defence—Reasonable belief in deserted spouse's adultery—Belief induced by conduct—Reasonableness of belief* [Cox *v.* Cox] 569
Discretion—*Discretion statement by husband disclosing adultery—Amendment of wife's petition at trial by adding charge of adultery based on facts disclosed in discretion statement—Desertion alleged originally in petition and answer not proved at trial* [Clueit *v.* Clueit] 417
Evidence—*Confession—Infant co-respondent—Confession of adultery made before proceedings commenced—Admissibility in evidence of confession—Costs against co-respondent* [Alderman *v.* Alderman and Dunn (by his Guardian)] 391
Cross-examination—Adultery—Petition on ground of cruelty—Petitioner asked whether he had committed adultery—Admissibility—Matrimonial Causes Act, 1950 (*c.* 25), *s.* 32 (3) [Lewis *v.* Lewis] 859
Foreign marriage—Validity of marriage not in issue—Proof by affidavit [Practice Direction] 364
Statements made by alleged adulteress to third party tending to show innocence—Admissibility [Corke *v.* Corke and Cooke] 224
Foreign decree—*Decree granted to wife in Norway—Residence of wife in territory of foreign court for more than three years preceding application for divorce there—Irrelevance of ground of foreign decree if not contrary to natural justice—Decree recognised by English court* [Manning *v.* Manning] 291
Injunction—*Matrimonial home. See* Injunction (Husband and wife—*Wife's petition for divorce*).
Judicial separation—*Costs. See* Costs, *ante.*
Maintenance—*Child. See* Infant (Maintenance).
Practice—*Amendment—Petition—Amendment at trial by adding charge of adultery based on facts disclosed in other spouse's discretion statement* [Clueit *v.* Clueit] 417
Pleading—Answer—Amending answer by alleging adultery—Adultery disclosed in petitioner's cross-examination—Generality of pleading [Lewis *v.* Lewis] 859
Trial—Allegation of adultery—Dismissal of co-respondent from suit at end of petitioner's case—Co-respondent submitting no case to answer and not put to election—Matrimonial Causes Act, 1950 (*c.* 25), *s.* 5 [Lance *v.* Lance and Gardner] 388
Variation of settlement. *See* Variation of Settlement (Matrimonial Causes).

DOMICIL
Nullity. *See* Nullity.

DOUBLE TAXATION
See Income Tax.

DWELLING-HOUSE
See Rent Restriction.

ECCLESIASTICAL LAW
Consistory court—*Representation of parties—Numerous parties opposing petition—Representative parties opponent* [Norfolk County Council *v.* Knights and Caister-on-Sea Joint Burial Committee] 394

ECCLESIASTICAL LAW—*continued.* PAGE

Faculty—*Jurisdiction—Faculty for removal of dead body from consecrated ground for purpose of cremation* [Re MATHESON (*decd.*)] 202

Principles regarding exercise of jurisdiction [Re ST. MARY'S, TYNE DOCK (No. 2)] 1

Ornaments—*Aumbry—Tabernacle—Sanctuary gong and bells—Candlesticks—Subsequent proceedings* [Re ST. MARY'S, TYNE DOCK (No. 2)] 1

Ciborium [Re ST. MARY'S, TYNE DOCK (No. 2)] 1

EJUSDEM GENERIS RULE

Construction—*Statutes. See* STATUTE (Construction).

EQUITABLE ASSIGNMENT

Declaration of trust. *See* TRUST AND TRUSTEE (Declaration of trust).

ESTATE DUTY

Exemption—*Interest as holder of an office—Share of income of residuary estate given to trustee for life while a trustee—Death of trustee—Passing under s.* 1 *and not under s.* 2 (1) *of the Finance Act*, 1894—*Whether capital of share exempted from liability to duty—Finance Act*, 1894 (*c.* 30), *s.* 1, *s.* 2 (1) (*b*) [PUBLIC TRUSTEE *v.* INLAND REVENUE COMRS.] 550

Interest in expectancy—*Option to defer payment of duty—Option exercised—Subsequent purchase of interest by tenant for life—Trust fund handed over to tenant for life—When estate duty on interest in expectancy becomes payable—Finance Act*, 1894 (*c.* 30), *s.* 7 (6) [FRY *v.* INLAND REVENUE COMRS.] 819

ESTOPPEL

Estoppel by deed—*Effect of recital—Conveyance to purchaser reciting vendors " seised in unincumbered fee simple in possession "—Whether vendors estopped from relying on existence of lease as against mortgagee of purchaser—Whether lease an " incumbrance "* [DISTRICT BANK, LTD. *v.* WEBB] 126

EVIDENCE

Admission. *See* ADMISSION (Infant).

Affirmation—*Conditions precedent to affirmation—Sikh affirming owing to impracticability of administering oath according to his religion—" Lawfully sworn "—Oaths Act*, 1888 (*c.* 46), *s.* 1 —*Perjury Act*, 1911 (*c.* 6), *s.* 1 (1), *s.* 15 (2) [R. *v.* PRITAM SINGH] 199

Cross-examination. *See* PRACTICE (Cross-examination).

Divorce. *See* DIVORCE.

Statements on other occasions—*Subsequent statement by party to third party tending to show innocence—Admissibility* [CORKE *v.* CORKE AND COOKE] 224

EXCHANGE

Agreement for exchange of beneficial interest in personalty—*Whether writing needed. See* TRUST AND TRUSTEE (Constructive trust).

EXECUTOR AND ADMINISTRATOR

Action for possession against two executors—*Joint tenants—Executors—Leasehold premises—Denial of landlord's title by one executor binding on both—Whether denial was a disclaimer within Administration of Estates Act*, 1925 (*c.* 23), *s.* 2 (2), *s.* 55 (1) (iii) [WARNER *v.* SAMPSON] 44

Survival of cause of action—*Joint tortfeasor's claim to contribution. See* TORT (Joint tortfeasors—*Contribution*).

FACTORY

Dangerous machinery—*Duty to fence—Abrasive carborundum wheel—Disintegration of wheel—Guard shifted by flying parts of wheel and injuring workman—Factories Act*, 1937 (*c.* 67), *s.* 14 (1), *s.* 16 [RUTHERFORD *v.* R. E. GLANVILLE & SONS (BOVEY TRACEY), LTD.] 532

" Floor "—*Opening—Planking covering part of one level of a gantry—Factories Act*, 1937 (*c.* 67), *s.* 25 (3) [TATE *v.* SWAN HUNTER & WIGHAM RICHARDSON, LTD.] 150

Lift—*Gates—Obligation to provide gates which, when shut, would prevent persons coming into contact with any moving part of lift—Injury to person putting hand through gates in order to close inner gate properly—Factories Act*, 1937 (*c.* 67), *s.* 22 (3) [BLAKELEY *v.* C. & H. CLOTHING CO. (A FIRM)] 297

Statutory duty—*Breach—Injury to workman—Injury partly caused by breaches outside period of limitation—Materially contributed to by breaches within period of limitation—Measure of damages* [CLARKSON *v.* MODERN FOUNDRIES, LTD.] 33

See also SLAUGHTERHOUSE.

FACULTY

See ECCLESIASTICAL LAW.

FALSE IMPRISONMENT

Airport—*Alien detained at approved airport* [KUCHENMEISTER *v.* HOME OFFICE] 485

FEES

Counsel, of. *See* COUNSEL.

FENCING

Dangerous machinery. *See* FACTORY (Dangerous machinery).

FIXTURE

See LANDLORD AND TENANT (Lease).

FLOOR

Factory, in. *See* FACTORY.

FOREIGN COURT

Agreement for reference of disputes to. *See* CONFLICT OF LAWS (Stay of proceedings).

FOREIGN DECREE

Validity. *See* DIVORCE.

FORFEITURE

Clause in will. *See* WILL.

Lease. *See* LANDLORD AND TENANT (Lease).

GAMING

Gambling by bankrupt. *See* CRIMINAL LAW (Gambling by bankrupt engaged in trade or business).

GIFT

Income tax, on. *See* INCOME TAX (Income—*Voluntary payments*).

Will, in. *See* WILL.

GONG

Sanctuary gong—*Church ornament—Legality. See* ECCLESIASTICAL LAW (Ornaments).

HIGHWAY
Non-repair—*Grating admitting light to cellar of adjoining premises—Dedicated as part of highway—Liability of owner or occupier of adjoining premises for repair and for accident resulting from want of repair—Public Health Acts Amendment Act*, 1890 (*c.* 59), *s.* 35 (1) [MACFARLANE *v.* GWALTER] 181
Nuisance on. *See* NUISANCE.

HOSPITAL
Medical staff—*Employment*. *See* NATIONAL HEALTH SERVICE.
National health service, under. *See* NATIONAL HEALTH SERVICE.

HOUSE
Employers' house assistance scheme—*Income tax*. *See* INCOME TAX (Income—*Voluntary payments—Indemnity to employee against loss on house purchase*).

HOUSE OF LORDS
Appeal to—*Leave to appeal—Surtax—Company in liquidation—Amount of tax in dispute deposited with Board of Trade—Low rate of interest—Terms on which leave to appeal granted* [INLAND REVENUE COMRS. *v.* WOOD BROS. (BIRKENHEAD), LTD. (IN LIQUIDATION)] .. 405

HOUSING
House of local authority—*Rent—Increase—Notice of increase—Whether notice determining tenancy necessary—Housing Act*, 1936 (*c.* 51), *s.* 85 (6) [BATHAVON RURAL DISTRICT COUNCIL *v.* CARLILE] 801

HUSBAND AND WIFE
Injunction. *See* INJUNCTION.
Maintenance—*Agreement—Alteration of maintenance agreement after death of one party—Application for leave—Maintenance Agreements Act*, 1957 (*c.* 35), *s.* 2 [PRACTICE DIRECTION] 464
See also MAGISTRATES.
Title to property—*Jurisdiction—Title deeds of land held by husband as trustee—Retention of deeds by wife—Married Women's Property Act*, 1882 (*c.* 75), *s.* 17 [Re KNIGHT'S QUESTION] 812
Matrimonial home—Presumption of advancement—Wife legal owner—Part of purchase money defrayed by mortgage to building society—Repayments out of money provided by husband—Married Women's Property Act, 1882 (*c.* 75), *s.* 17 [SILVER *v.* SILVER] 523

INCOME TAX
Appeal—*House of Lords—Leave to appeal—Terms imposed as condition of granting leave—Surtax* [INLAND REVENUE COMRS. *v.* WOOD BROS. (BIRKENHEAD), LTD. (IN LIQUIDATION)] 405
Avoidance—*Transfer of assets abroad—Associated operations—Transfer of assets to company in Republic of Ireland—Company charging assets to bank—Subsequent unsecured loan of cash by transferor to company—Payment into company's banking account—Whether income of company to be deemed that of transferor—Income Tax Act*, 1952 (*c.* 10), *s.* 412 (2), (4) [FYNN *v.* INLAND REVENUE COMRS.] 270
Death of taxpayer. *See* Profits—*Death of taxpayer, post.*
Debt for income tax—*Whether a debt arising in the course and for the purposes of trade or business* [R. *v.* VACCARI] 468
Deduction in computing profits—*Capital expenditure—Improvements—Statutory appropriations towards installations at racecourses—Whether capital expenditure* [RACECOURSE BETTING CONTROL BOARD *v.* YOUNG (INSPECTOR OF TAXES), SAME *v.* INLAND REVENUE COMRS.] 274
Expenses—Distribution by statutory body pursuant to statute from moneys available after deduction of working expenses—Distribution benefiting trading activity of statutory body—Whether deductible as expense for income tax purposes—Racecourse Betting Act, 1928 (*c.* 41), *s.* 3 (6)—*Income Tax Act*, 1952 (*c.* 10), *s.* 137 (*a*) [RACECOURSE BETTING CONTROL BOARD *v.* YOUNG (INSPECTOR OF TAXES), SAME *v.* INLAND REVENUE COMRS., YOUNG (INSPECTOR OF TAXES) *v.* RACECOURSE BETTING CONTROL BOARD, INLAND REVENUE COMRS. *v.* SAME] 274
Double taxation—*Relief—Mutual life assurance society—Resident abroad—Australian company with branch office in United Kingdom—Assessments to income tax on income of society's life assurance fund—Whether assessments competent—Income Tax Act*, 1918 (*c.* 40), *Sch.* 1, *Sch. D, Rules applicable to Case III, r.* 3—*Income Tax Act*, 1952 (*c.* 10), *s.* 430—*Double Taxation Relief (Taxes on Income) (Australia) Order*, 1947 (*S.R. & O.* 1947 *No.* 806), *Schedule, art. II* (1) (*i*), (3), *art. III* (2), (3) [OSTIME (INSPECTOR OF TAXES) *v.* AUSTRALIAN MUTUAL PROVIDENT SOCIETY] 305
Income—*Voluntary payments—Huntsman—Christmas gifts—Income Tax Act*, 1952 (*c.* 10), *s.* 156, *Sch. E, paras.* 1 *and* 2, *Sch.* 9, *Rules applicable to Sch. E, r.* 1 [WRIGHT *v.* BOYCE (INSPECTOR OF TAXES)] 864
Indemnity to employee against loss on house purchase—Employers' housing assistance scheme—Reimbursement of loss on sale of house on transfer to new place of employment—Income Tax Act, 1952 (*c.* 10), *Sch.* 9, *Rules applicable to Sch. E, r.* 1 [JENNINGS *v.* KINDER (INSPECTOR OF TAXES), HOCHSTRASSER (INSPECTOR OF TAXES) *v.* MAYES] 369
Investment company. *See* SURTAX (Investment company).
Profits—*Death of taxpayer—Periodical payments under contract received by trustees of will—Contract resulting from special services by director to company—Liability to tax—Income Tax Act*, 1918 (*c.* 40), *Sch. D, Case III—Income Tax Act*, 1952 (*c.* 10), *Sch. D, Case III* [WESTMINSTER BANK, LTD. *v.* BARFORD (INSPECTOR OF TAXES)] 829
Surtax. *See* SURTAX.
Transfer of assets abroad. *See* Avoidance, *ante*.

INDICTMENT
Bill of indictment. *See* CRIMINAL LAW (Practice).

INFANT
Admission—*Confession of adultery made prior to a divorce suit—Admissibility in evidence* [ALDERMAN *v.* ALDERMAN AND DUNN (BY HIS GUARDIAN)] 391
Adoption. *See* ADOPTION.
Evidence. *See* ADMISSION.
Guardianship of Infants Acts—*Custody—Stay of transfer of custody pending appeal—Magistrates' order transferring custody from mother to father—Principles regulating grant of stay pending appeal* [Re S. (AN INFANT)] 783
Maintenance—*Order of High Court—Enforcement—Order of commitment against husband—Suspended order—Order directed to issue—Whether husband entitled to release on payment of amount not including arrears accrued since committal order made—Matrimonial Causes (Judgment Summons) Rules*, 1952 (*S.I.* 1952 *No.* 2209), *r.* 6 (3) [RIDING *v.* RIDING] .. 65

INJUNCTION
Husband and wife—*Wife's petition for divorce—Matrimonial home belonging to wife—Whether entitled to exclude husband—Married Women's Property Act*, 1882 (*c.* 75), *s.* 12, *amended by Law Reform* (*Married Women and Tortfeasors*) *Act*, 1935 (*c.* 30), *s.* 5, *Sch.* 1 [Gorulnick *v.* Gorulnick] .. 146

INSANITY
Plead, fitness to. *See* Criminal Law (Trial).
See also Criminal Law (Capital murder).

INSURANCE
Life assurance—*Income tax—Mutual insurance. See* Income Tax (Double taxation—*Relief*).
Marine insurance—*War risks time policy on vessels' hull and machinery—Insurance against expenses incurred by "prolongation" of voyage in compliance with orders or directions or with approval of a government department or insurers—Admiralty warning issued advising merchant shipping to avoid Suez Canal area as a result of hostilities—Vessels diverted round Cape because of warning—Diversions notified to insurers—Whether assured entitled to recover expenses incurred in diversions—Whether voyages prolonged* [Union Castle Mail Steamship Co., Ltd. *v.* United Kingdom Mutual War Risks Assn., Ltd.] .. 431

INTERPLEADER
Arbitration—*Reference of issue to arbitration under arbitration agreement. See* Arbitration.

INVALID TRUST
See Trust and Trustee.

INVESTMENT COMPANY
See Surtax.

JOINT TORTFEASORS
See Tort.

JUDGMENT
Judicial decision as authority—*Stare decisis—Construction of statute—Decisions of Divisional Court overruled after standing for substantial period of time* [Brownsea Haven Properties, Ltd. *v.* Poole Corpn.] .. 205
Judgment without jurisdiction—*Inherent power of court to set aside* [Chief Kofi Forfie *v.* Barima Kwabena Seifah] .. 289
Order—*Revival of maintenance order. See* Magistrates (Husband and wife—*Maintenance order*).
Setting aside. *See* Practice (Setting aside judgment on grounds of want of jurisdiction).
Summary judgment—*Leave to enter. See* Practice (Summary judgment).

JUDGMENT SUMMONS
Matrimonial causes—*Child maintenance. See* Infant (Maintenance—*Order of the High Court*).

JUDICIAL SEPARATION
See Divorce (Costs).

JURISDICTION
Admiralty. *See* Admiralty.
Magistrates. *See* Magistrates (Husband and wife).
Want of—*Setting aside judgment. See* Practice (Setting aside judgment on ground of want of jurisdiction).

JUSTICES
See Magistrates.

LAND REGISTRATION
Charge—*Date of vesting of legal estate—Land Registration Act*, 1925 (*c.* 21), *s.* 20 (1), *s.* 27 (3) [Grace Rymer Investments, Ltd. *v.* Waite] .. 138

LANDLORD AND TENANT
Lease—*Fixtures—Use of landlord's fixtures and fittings granted by tenancy agreement—Refrigerator operated by central plant in landlord's control—Plant in disrepair—Whether landlord liable to repair plant and supply refrigeration* [Penn *v.* Gatenex Co., Ltd.] .. 712
Forfeiture—Denial of landlord's title—Application for relief against forfeiture—Law of Property Act, 1925 (*c.* 20), *s.* 146 (2) [Warner *v.* Sampson (No. 2)] .. 314
Denial of landlord's title by one of two executors—Whether denial of title was a disclaimer within Administration of Estates Act, 1925 (*c.* 23), *s.* 2 (2), *s.* 55 (1) (iii) [Warner *v.* Sampson] .. 44
New tenancy—*Business premises—Opposition by landlord—Intention to demolish buildings and let land as smallholding—Intention to demolish subsidiary to purpose of letting—Landlord and Tenant Act*, 1954 (*c.* 56), *s.* 30 (1) (*f*) [Craddock *v.* Hampshire County Council] 449
Opposition by landlord—Intention to reconstruct premises on termination of current tenancy—Date at which fixed and genuine intention to reconstruct must exist—Landlord and Tenant Act, 1954 (*c.* 56), *s.* 30 (1) (*f*) [Betty's Cafés, Ltd. *v.* Phillips Furnishing Stores, Ltd.] .. 607
Terms of tenancy—Rent—Evidence—Evidence of earnings of occupant—Admissibility—Landlord and Tenant Act, 1954 (*c.* 56), *s.* 34 (*a*), (*b*) [Harewood Hotels, Ltd. *v.* Harris] .. 104
Costs—Terms of tenancy in dispute—Tenants asking for fourteen year lease, seven year lease granted—Rent nearer to figure of tenants' proposal—Landlord to pay half tenants' costs [Harewood Hotels, Ltd. *v.* Harris] .. 104
Notice to quit—*Validity—Weekly tenancy from midnight Sunday—Notice requiring possession by noon on Monday* [Bathavon Rural District Council *v.* Carlile] .. 801
Rent restriction. *See* Rent Restriction.

LAY DAYS
See Shipping (Charterparty).

LEASE
Forfeiture. *See* Landlord and Tenant.
See also Landlord and Tenant.

LEGACY
See Will.

PAGE

LETTER OF CREDIT
See BANK; SALE OF GOODS (Payment).

LICENCE
Patent. *See* PATENT.

LIFE ASSURANCE
Income tax. *See* INCOME TAX (Double taxation—*Relief*).

LIFT
Construction and maintenance. *See* FACTORY.

LIMITATION OF ACTION
Damages—*Action for breach of statutory duty—Pneumoconiosis contracted by workman—Disease probably initially contracted through breaches of statutory duty outside period of limitation—Materially aggravated by breaches within period of limitation—Limitation Act*, 1939 (*c.* 21), *s.* 2 (1) (*a*) [CLARKSON *v.* MODERN FOUNDRIES, LTD.] 33

LOCAL AUTHORITY
Representation by Treasury Solicitor—*Appeal concerning validity of traffic order—Interest of Crown in subject-matter of litigation—Whether representation proper* [BROWNSEA HAVEN PROPERTIES, LTD. *v.* POOLE CORPN.] 205

MACHINERY
Dangerous. *See* FACTORY.
Rating. *See* RATES (Valuation).

MAGISTRATES
Custody—*Change of custody—Stay pending appeal—Circumstances in which stay should be granted* [Re S. (AN INFANT)] 783
Desertion—*Reasonable and honest belief of adultery exonerating husband—Reasonableness of belief* [COX *v.* COX] 569
Husband and wife—*Jurisdiction—Maintenance order in favour of wife—Complaint by husband to reduce amount of order—Revocation of order by justices—Magistrates' Courts Act*, 1952 (*c.* 55), *s.* 53 [BOWEN *v.* BOWEN] 770
Maintenance order—Discharge—Revival of discharged or revoked order—Magistrates' Courts Act, 1952 (*c.* 55), *s.* 53 [BOWEN *v.* BOWEN] 770
Jurisdiction—*Mental Deficiency Acts, under.* *See* PERSON OF UNSOUND MIND (Mental defective).

MAINTENANCE
Infant. *See* INFANT.
Order. *See* MAGISTRATES (Husband and wife).
See also HUSBAND AND WIFE.

MANDAMUS
Special Commissioners of Income Tax—*To give direction under s.* 262 *of the Income Tax Act*, 1952 (*c.* 10) [SPECIAL COMRS. OF INCOME TAX *v.* LINSLEYS (ESTABLISHED 1894), LTD.] 343

MARINE INSURANCE
See INSURANCE.

MARRIAGE
Proxy—*Validity* [PONTICELLI *v.* PONTICELLI (OTHERWISE GIGLIO) (BY HER GUARDIAN)] .. 357

MASTER AND SERVANT
Contract of service—*Certainty of term—Coal mining service agreement—Agreement by deputy to work such days or part days in each week as may reasonably be required by the management—Measure of damages for refusal to work shift by deputy—Relevance of concerted refusal by other deputies to work same shift* [NATIONAL COAL BOARD *v.* GALLEY] 91
Duty of master—*Advice concerning use of protective clothing.* *See* SAFE SYSTEM OF WORKING (Extent of master's duty).
Factories Acts—*Duties.* *See* FACTORY.
Liability of master—*Accident to servant—Tool bought from reputable suppliers who had bought it from reputable manufacturers—Defect due to negligence in manufacture—Defect not discoverable by employers, but patent to manufacturers* [DAVIE *v.* NEW MERTON BOARD MILLS, LTD.] 67
Negligence of servant—Servant authorised to use private motor cycle combination—Accident while returning to work after buying tools and obtaining meal—Injury to fellow servant riding in sidecar [HARVEY *v.* R. G. O'DELL, LTD. (GALWAY THIRD PARTY)] 657
Liability of servant—*Negligence—Indemnity—Servant employed as storekeeper—Authorised to use his own motor cycle in travelling to and from outside job—Injury to fellow-servant in sidecar—Whether implied term of contract of service to use care while driving* [HARVEY *v.* R. G. O'DELL, LTD. (GALWAY THIRD PARTY)] 657
Wrongful dismissal—*National health service—Consultant—Measure of damages where statutory procedure on termination of employment not followed* [BARBER *v.* MANCHESTER REGIONAL HOSPITAL BOARD] 322

MATRIMONIAL HOME
Injunction in matrimonial causes. *See* INJUNCTION (Husband and wife—*Wife's petition for divorce*).
Title to. *See* HUSBAND AND WIFE (Title to property).

MEETING.
Company. *See* COMPANY.

MENTAL DEFECTIVE
See PERSON OF UNSOUND MIND.

MINE
Coal mine. *See* COAL MINING.

MINORITY
Shareholders—*Action.* *See* COMPANY (Shareholder).

MONEY
Money had and received—*Creditor instructing debtor to pay third person out of fund—Acceptance of instructions by debtor—Action by the third person against the debtor—What constitutes a sufficient fund to enable the action to lie—Whether consideration moving from the third person to the creditor is necessary* [SHAMIA *v.* JOORY] 111

MORTGAGE
Payment—*Mortgage of dwelling-house divided into six flats—Four flats outside Rent Restrictions Acts and two flats within them on basis of rateable values—Apportionment of principal secured by mortgage between the two flats and the four flats—Whether protection of Rent Restrictions Acts removed from principal apportioned to four flats—Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (*c.* 17), *s.* 12 (5), *as applied by Rent and Mortgage Interest Restrictions Act*, 1939 (*c.* 71), *s.* 3 (1) [COUTTS & CO. *v.* DUNTROON INVESTMENT CORPN. LTD.] 51
Possession of mortgaged property—*Mortgagor not in occupation—Registered land—Oral tenancy agreed and completed by tenant's entry before mortgagor has completed purchase of property—Purchase completed and mortgage granted on same day—Whether mortgagee entitled to possession as against tenant—Land Registration Act*, 1925 (*c.* 21), *s.* 19 (1), *s.* 20 (1), *s.* 27 (3), *s.* 70 (1) (*g*) [GRACE RYMER INVESTMENTS, LTD. *v.* WAITE] 138
Persons not parties to mortgage claiming to be entitled to possession—Adjournment of originating summons into open court [PRACTICE NOTE] 128
Remedies of mortgagee—*Rent Restrictions Acts—Interest in arrear for twenty-one days—Subsequent payment—Whether protection restored—Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (*c.* 17), *s.* 7, *as applied by Rent and Mortgage Interest Restrictions Act*, 1939 (*c.* 71), *s.* 3 (1) [COUTTS & CO. *v.* DUNTROON INVESTMENT CORPN., LTD.] .. 51

MOTOR VEHICLE
See ROAD TRAFFIC.

MURDER
Capital murder. *See* CRIMINAL LAW (Capital murder).

MUTUAL TRADING
Insurance—*Income tax. See* INCOME TAX (Double taxation—*Relief*).

NATIONAL HEALTH SERVICE
Hospital—*Staff—Continuance of employment of consultant after nationalisation—Contract subject to terms and conditions of service issued by Minister—Termination of employment by regional hospital board—Non-compliance with clause of terms of service for reference to Minister before termination of employment—Remedies—Measure of damages—Declaration—Discretionary remedy—Breach of contract of employment—Breach of statutory duty under National Health Service Act*, 1946 (*c.* 81), *s.* 12, *s.* 14, *s.* 68 [BARBER *v.* MANCHESTER REGIONAL HOSPITAL BOARD] 322

NATURAL JUSTICE
Arbitration award—*Application of rules of natural justice to the setting aside of an award* [LONDON EXPORT CORPN., LTD. *v.* JUBILEE COFFEE ROASTING CO., LTD.] 494

NEGLIGENCE
Causation—*Breach of duty contributing to plaintiff's injury—Duty of employer to give information or advice—Effect of unlikelihood of plaintiff's taking advice if given* [HAYNES *v.* QUALCAST (WOLVERHAMPTON), LTD.] 441
Child. *See* CHILD.
Latent defect—*Tool supplied by master for servant's use in his employment. See* MASTER AND SERVANT (Liability of master—*Accident to servant*).
Railway. *See* CARRIAGE BY RAILWAY OR CANAL (Carriage of passengers); RAILWAY (Accommodation crossing).

NEW TENANCY
Business premises. *See* LANDLORD AND TENANT.

"NO CASE"
Divorce—*Submission of no case—Election. See* DIVORCE (Practice—*Trial—Allegation of adultery*).

NON-FEASANCE
See HIGHWAY (Non-repair).

NOTICE
Shipping—*Notice of charterparty to purchaser of ship. See* SHIP (Sale).

NOTICE TO QUIT
See AGRICULTURE (Agricultural holding); LANDLORD AND TENANT.

NUISANCE
Highway—*Pavement—Public nuisance—Grating admitting light to cellar of adjoining premises—Dedicated as part of highway—Liability of owner or occupier of adjoining premises for accident resulting from want of repair—Public Health Acts Amendment Act*, 1890 (*c.* 59), *s.* 35 (1) [MACFARLANE *v.* GWALTER] 181

NULLITY
Domicil—*Marriage by proxy of Italians in Italy—Wilful refusal by wife to consummate marriage—Husband domiciled in England at time of marriage and at time of suit—Law applicable for determining issue of nullity* [PONTICELLI *v.* PONTICELLI (OTHERWISE GIGLIO) (BY HER GUARDIAN)] 357

NURSING
Rates—*Limitation—Whether organisation charitable. See* RATES (Limitation of rates chargeable).

OATH
Affirmation in lieu of oath. *See* EVIDENCE (Affirmation).

ORDER 14
See PRACTICE (Summary judgment).

ORIGINATING SUMMONS
See PRACTICE.

ORNAMENT
Church. *See* ECCLESIASTICAL LAW.

PARENT
Duty when travelling by train with child. *See* CHILD (Negligence—*Railway*).

PARTIES
See PRACTICE.

PASSENGER
Carriage. *See* CARRIAGE BY RAILWAY OR CANAL.

PATENT
  Licence—*Information for ascertaining royalties—Licensors' auditors to be given " all such other information as may be necessary or appropriate to enable the amount of the royalties payable " to be ascertained—Whether auditors entitled to information related to articles which were similar to patented articles but which licensees stated were not patented* [Fomento (Sterling Area), Ltd. *v.* Selsdon Fountain Pen Co., Ltd.] 11
    Most favoured licensee clause—Condition in licence that if sub-licence granted at lower royalties such royalties should be substituted for those in the licence—Royalty structure in sub-licence different from that in licence—Whether royalties payable under sub-licence substituted for those payable under licence [Fomento (Sterling Area), Ltd. *v.* Selsdon Fountain Pen Co., Ltd.] 11

PAVEMENT
  Nuisance—*Want of repair.* *See* Nuisance (Highway).

PAYMENT INTO COURT
  See Costs.

PAYMENT OUT OF COURT
  See Practice.

PERPETUITIES
  Rule against perpetuities—*Will—Residue given on trust for sale—Settled shares—Discretionary trusts during life of any widow of named person—Void limitation—Effect on subsequent gifts of capital* [Re Allan's Will Trusts] 401

PERSON OF UNSOUND MIND
  Mental defective—*Carnal knowledge.* *See* Criminal Law (Carnal knowledge).
    Detention order in case of indictable offence—Jurisdiction to make order if satisfied on medical evidence that the offender was a defective—Evidence by prison doctor that offender was a feeble-minded person within the Act—Whether justices had jurisdiction to make order for detention in institution for defectives—Mental Deficiency Act, 1913 (*c.* 28), *s.* 8 (1) [Re Sage] 477

PLANT
  Rating. *See* Rates (Valuation).

PLEA
  Criminal proceedings. *See* Criminal Law (Practice; Trial).

PLEADING
  Mistake—*Lapse by counsel.* *See* Counsel.

POSSESSION
  Demised property, of. *See* Rent Restriction.
  Mortgaged property, of. *See* Mortgage.

POULTRY
  See Animals.

POWER OF APPOINTMENT
  Exercise—*Special power—Power given by English will—Exercise in Scottish will—Relevant law* [Re McMorran (*decd.*)] 186

PRACTICE
  Bankruptcy of plaintiff or defendant. *See* Bankruptcy (Property—*Rights of action*).
  Criminal court. *See* Criminal Law.
  Cross-examination—*Cross-examination on deponent's affidavit—Whether order necessary to summon witness for cross-examination—R.S.C., Ord.* 37, *r.* 20 [Re A Debtor (No. 472 of 1950)] 581
  Divorce. *See* Divorce.
  Originating summons—*Amendment—Amendment claiming remedy based on right not existing at date of summons* [Coutts & Co. *v.* Duntroon Investment Corpn., Ltd.] 51
  Parties—*Adding persons as parties—Third party—Third party intending to dispute basis of plaintiff's claim and to counterclaim—Whether jurisdiction to join third party as co-defendant —R.S.C., Ord.* 16, *r.* 11 [Miguel Sanchez & Compania S.L. *v.* Owners of Result (Nello Simoni, Ltd., third party), The Result] 839
  Payment into court—*Costs.* *See* Costs (Payment into court).
  Payment out of court—*Fatal accident—Damages recovered by widow paid into court—Transfer to county court—Whether widow entitled to payment out—County Courts Act*, 1934 (*c.* 53), *s.* 164 (2), (3) [Cross *v.* Edey] 170
  Setting aside judgment on ground of want of jurisdiction—*Inherent power of court to set aside* [Chief Kofi Forfie *v.* Barima Kwabena Seifah] 289
  Stay of proceedings—*Bankruptcy—Action by bankrupt—Minority shareholder's action—Whether action stayed* [Birch *v.* Sullivan] 56
  Summary judgment—*Leave to sign judgment—Defective affidavit in support of summons—Whether further affidavits admissible—R.S.C., Ord.* 14, *r.* 1 (*a*). *r.* 2 [Les Fils Dreyfus et Cie Société Anonyme *v.* Clarke] 459

PREMIUM
  Prohibition of payment by Rent Restrictions Acts. *See* Rent Restriction.
  Rent—*Whether commuted.* *See* Rent Restriction.

PRIVY COUNCIL
  Costs—*Printed record—Inclusion of matters not relevant to subject-matter of appeal—Cost of printing irrelevant matter deducted from costs* [Lim Siew Neo *v.* Pang Keah Swee] .. 313
  West Africa—*Judgment—Judgment without jurisdiction—Inherent power of court to set aside* [Chief Kofi Forfie *v.* Barima Kwabena Seifah] 289

PROBATION
  See Criminal Law (Sentence).

PROFITS TAX
  Distribution—*Net relevant distributions—Trading loss—Gross relevant distributions made—Franked investment income less than amount of trading loss but exceeding gross relevant distributions—Whether there were net relevant distributions liable to distribution charge—Finance Act*, 1947 (*c.* 35), *s.* 34 (2)—*Finance Act*, 1937 (*c.* 54), *Sch.* 4, *para.* 7 (1A), *substituted by Finance Act*, 1947 (*c.* 35), *s.* 32 (1) [Inland Revenue Comrs. *v.* South Georgia Co., Ltd.] 593

PROTECTIVE TRUSTS
See WILL (Forfeiture clause).

PROXY
Marriage—*Validity.* *See* MARRIAGE.

QUASI-CONTRACT
See MONEY (Money had and received).

RACECOURSE
Improvements—*Payments by Racecourse Betting Control Board—Taxation of the board.* *See* INCOME TAX (Deduction in computing profits—*Expenses*).

RAILWAY
Accommodation crossing—*Duties of British Transport Commission—Duties of engine driver and occupant of motor vehicle on approaching accommodation crossing in fog* [KEMSHEAD *v.* BRITISH TRANSPORT COMMISSION (1956)] 119
[HAZELL *v.* BRITISH TRANSPORT COMMISSION] 116
Negligence—*Carriage of passengers.* *See* CARRIAGE BY RAILWAY OR CANAL (Carriage of passengers).

RATES
De-rating—*Industrial hereditament—Adapting for sale—Article—Slaughtering—Treatment of carcases—Factory and Workshop Act*, 1901 (*c.* 22), *s.* 149 (1)—*Rating and Valuation (Apportionment) Act*, 1928 (*c.* 44), *s.* 3 (1) [FATSTOCK MARKETING CORPN., LTD. *v.* MORGAN (VALUATION OFFICER)] 646
Factory or workshop—Slaughterhouse—Whether subject to factory legislation—Factory and Workshop Act, 1901 (*c.* 22), *s.* 149 (1)—*Rating and Valuation (Apportionment) Act*, 1928 (*c.* 44), *s.* 3 (1) [FATSTOCK MARKETING CORPN., LTD. *v.* MORGAN (VALUATION OFFICER)] 646
Limitation of rates chargeable—*Nil amount charged prior to the coming into force of new valuation list—Occupier formerly wholly exempt from rates but now becoming chargeable—Whether entitled to limitation of rates to nil—Rating and Valuation (Miscellaneous Provisions) Act*, 1955 (*c.* 9), *s.* 8 (2) (*a*) [HORACE PLUNKETT FOUNDATION *v.* ST. PANCRAS BOROUGH COUNCIL] .. 122
Royal College of Nursing—Organisation whose main objects are charitable—Organisation to promote the " advance of nursing as a profession "—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (*c.* 9), *s.* 8 (1) (*a*) [ROYAL COLLEGE OF NURSING *v.* ST. MARYLEBONE CORPN.] 129
Valuation—*Plant and machinery—" Ovens "—" Chambers for conditioning or treatment "—Trays attached to endless belt passing through oven—Whether in the nature of a structure—Plant and Machinery (Valuation for Rating) Order*, 1927 (*S.R. & O.* 1927 *No.* 480), *schedule, class* 4—*Rating and Valuation Act*, 1925 (*c.* 90), *s.* 24 (1) [W. COLLIER, LTD. *v.* FIELDING (VALUATION OFFICER)] 694
" Tank "—Underground petrol tank in brick and concrete compartment—Whether whole or tank only to be looked at—Plant and Machinery (Valuation for Rating) Order, 1927 (*S.R. & O.* 1927 *No.* 480), *schedule, class* 4—*Rating and Valuation Act*, 1925 (*c.* 90), *s.* 24 (1) [SHELL-MEX AND B. P., LTD. *v.* HOLYOAK (VALUATION OFFICER)] 702

RECITAL
See ESTOPPEL (Estoppel by deed).

RECOGNISANCE
See CRIMINAL LAW.

RENT
Rent limit of controlled premises. *See* RENT RESTRICTION (Rent limit).
Rent Restrictions Acts, for purposes of. *See* RENT RESTRICTION (Premium).

RENT RESTRICTION
Decontrol—*Rateable value—Flat and garage assessed for rates on Nov.* 7, 1956, *as one hereditament—Division of assessment on tenant's proposal—Alteration having effect before Nov.* 7, 1956—*Whether alteration of rateable value effective for determining question of decontrol—Validity—Rent Act*, 1957 (*c.* 25), *Sch.* 5, *para.* 1 (*a*), (*b*), *para.* 2 (1) [HOLLAND *v.* ONG] 574
" Dwelling-house "—*Premises containing shop and dwelling accommodation—Sub-tenancy of dwelling accommodation for residential purposes—New lease of premises subject to sub-tenancy—Whether letting subject to Rent Acts—Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (*c.* 17), *s.* 1, *s.* 12 (2)—*Rent and Mortgage Interest Restrictions Act*, 1939 (*c.* 71), *s.* 3 (1), (3) [BRITISH LAND CO., LTD. *v.* HERBERT SILVER (MENSWEAR), LTD.] 833
Possession—*Hardship—Availability of defence after Rent Act*, 1957—*Comparative hardship—Finality of decision of county court judge—Jurisdiction to reverse county court decision—Rent and Mortgage Interest Restrictions (Amendment) Act*, 1933 (*c.* 32), *s.* 3 (1) (*a*), *Sch.* 1, *para.* (*h*), *proviso—Rent Act*, 1957 (*c.* 25), *s.* 26, *Sch.* 6, *para.* 21 [PIPER *v.* HARVEY] 454
Reasonableness—Discretion of judge—Matters for consideration—Lesser hardship to another tenant of landlord—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (*c.* 32), *s.* 3 (1) [HARDIE *v.* FREDIANI] 529
Premium—*Payment expressed as consideration for agreement to grant a lease for one year if tenant suitable—Recital that landlords unwilling to grant a lease within Rent Restrictions Acts—Rent stated in lease less than two-thirds of rateable value—Premium commuted rent—Total rent thus exceeding two-thirds of rateable value* [SAMROSE PROPERTIES, LTD. *v.* GIBBARD] 502
Rent paid for three years in advance—Whether payment constituted a premium—Whether tenancy rendered invalid by payment of premium—Landlord and Tenant (Rent Control) Act, 1949 (*c.* 40), *s.* 2 [GRACE RYMER INVESTMENTS, LTD. *v.* WAITE] 138
Rent limit—*Adjustment for repairs—Appropriate factor—Basis of determination—Whether determination a decision of fact—Rent Act*, 1957 (*c.* 25), *s.* 1 (1), *Sch.* 1, *Part* 1, *para.* 1 (2), (3) [REGIS PROPERTY CO., LTD. *v.* DUDLEY] 510
Reasonable charge for services provided by landlord—Depreciation of plant—Profit on services—Rent Act, 1957 (*c.* 25), *s.* 1 (1) (*b*) [REGIS PROPERTY CO., LTD. *v.* DUDLEY] .. 510

REQUISITION
Compensation—*Ship—Purchase of ship subject to time charterparty—Whether charterer entitled to compensation paid to purchaser—Compensation (Defence) Act*, 1939 (*c.* 75), *s.* 4, *s.* 15 [PORT LINE, LTD. *v.* BEN LINE STEAMERS, LTD.] 787

RES JUDICATA
Bankruptcy—*Inquiry under bankruptcy jurisdiction as to dealings on behalf of debtor by solicitor and attorney for debtor—Abortive previous proceedings to compel solicitor to deliver accounts—Whether res judicata—R.S.C., Ord.* 52, *r.* 25—*Bankruptcy Act*, 1914 (*c.* 59), *s.* 25 (1) [*Re* A DEBTOR (NO. 472 OF 1950)] 581

RESULTING TRUST
See TRUST AND TRUSTEE.

REVERSION
Sale. *See* SPECIFIC PERFORMANCE (Title—*Doubtful title*).

ROAD TRAFFIC
Dangerous driving—*Automatism—Whether mens rea an element of the offence—Road Traffic Act*, 1930 (*c.* 43), *s.* 11 (1) [HILL *v.* BAXTER] 193
Regulation of traffic—*Prevention of obstruction of streets—One-way traffic system for all vehicles in two streets—Order by local authority—For six months' holiday season—" Route " to be observed—" Any occasion when the streets are thronged or liable to be obstructed "—Town Police Clauses Act*, 1847 (*c.* 89), *s.* 21 [BROWNSEA HAVEN PROPERTIES, LTD. *v.* POOLE CORPN.] 205
Traffic sign—*Automatism—Whether mens rea an element of the offence of failing to conform to a traffic sign—Road Traffic Act*, 1930 (*c.* 43), *s.* 49 (*b*) [HILL *v.* BAXTER] 193

RULE AGAINST PERPETUITIES
See PERPETUITIES.

SAFE SYSTEM OF WORKING
Extent of master's duty—*Duty to give information or advice—Availability of protective clothing insufficient—Foundry—Injury to experienced moulder* [HAYNES *v.* QUALCAST (WOLVERHAMPTON), LTD.] 441

SALE
Reversionary interest. *See* SPECIFIC PERFORMANCE (Title—*Doubtful title*).

SALE OF GOODS
Notice—*Whether purchaser with notice bound by contract of which notice given. See* SHIP (Sale).
Payment—*Confirmed credit—Credit available on presentation inter alia of bills of lading—Bills presented must normally be clean bills of lading—Condition on back of bills of lading absolving shippers from liability if goods not marked and secured in accordance with condition—Whether acknowledgment of compliance with condition must be tendered before payment under letter of credit—Validity of condition—Carriage of Goods by Sea Act*, 1924 (*c.* 22), *Schedule, art. IV, r.* 2 (*n*), (*o*), *art III, r.* 8 [BRITISH IMEX INDUSTRIES, LTD. *v.* MIDLAND BANK, LTD.] .. 264
Confirmed letter of credit—F.o.b. contract—Time when credit should be opened [IAN STACH, LTD. *v.* BAKER BOSLY, LTD.] 542
Injunction—Application for injunction restraining sellers dealing with second of two letters of credit—Dispute regarding quality of goods sold [MALAS (TRADING AS HAMZEH MALAS AND SONS) *v.* BRITISH IMEX INDUSTRIES, LTD.] 262

SALVAGE
See SHIPPING.

SANCTUARY BELLS
Church ornaments—*Legality. See* ECCLESIASTICAL LAW (Ornaments).

SANCTUARY GONG
Church ornament—*Legality. See* ECCLESIASTICAL LAW (Ornaments).

SENTENCE
See CRIMINAL LAW.

SETTLEMENT
Variation of settlement. *See* VARIATION OF SETTLEMENT (MATRIMONIAL CAUSES).

SHARE
Legacy of shares. *See* WILL (Legacy).

SHIP
Sale—*Sale when subject to time charterparty—Purchaser with notice of charterparty—Bareboat charterparty granted to vendor for term of time charterparty—Whether purchaser bound to give effect to time charterparty* [PORT LINE, LTD. *v.* BEN LINE STEAMERS, LTD.] 787

SHIPPING
Admiralty jurisdiction. *See* ADMIRALTY (Jurisdiction).
Charterparty—*Construction—Incorporation of U.S. Paramount Clause—Application to charterparty of United States Carriage of Goods by Sea Act, 1936—Whether Paramount Clause must be rejected as insensible—Whether loss or damage excepted by s.* 4 (2) (*a*) *of the Act includes loss of services of vessel—Whether damages assessed solely in relation to the voyage in which the breach occurred—United States Carriage of Goods by Sea Act*, 1936 (*Public Statutes No.* 521), *Preamble, s.* 3 (1), *s.* 4 (1), (2), *s.* 5, *s.* 13 [ADAMASTOS SHIPPING CO., LTD. *v.* ANGLO-SAXON PETROLEUM CO., LTD.] 725
Delay—Damages—Incompetence of engine room staff—Whether damages assessed solely in relation to the voyage in which breach occurred [ADAMASTOS SHIPPING CO., LTD. *v.* ANGLO-SAXON PETROLEUM CO., LTD.] 725
Lay days—Unloading—Commencement of lay days—Unloading begun before notice of readiness given [PTEROTI COMPANIA NAVIERA S.A. *v.* NATIONAL COAL BOARD] 603
Purchase of ship with notice of charterparty—Ship subsequently requisitioned—Whether purchaser bound by charterparty—Whether owners received compensation as trustees for charterers—Compensation (Defence) Act, 1939 (*c.* 75), *s.* 4, *s.* 15 [PORT LINE, LTD. *v.* BEN LINE STEAMERS, LTD.] 787
Salvage—*Award—Amount—Tax liability—Award liable to taxation in hands of salvors—Whether taxation to be taken into account in assessing amount of award* [ISLAND TUG & BARGE, LTD. *v.* OWNERS OF THE S.S. MAKEDONIA] 236

SLAUGHTERHOUSE
Factories Acts—*Whether slaughterhouses within factory legislation—Factory and Workshop Act*, 1901 (*c.* 22), *s.* 149 (1) [FATSTOCK MARKETING CORPN., LTD. *v.* MORGAN (VALUATION OFFICER)] 646

SOLICITOR
Account—*Information—Solicitor acting as attorney for client in prison—Bankruptcy of client—Denial by solicitor of receipt of money on particular transactions—Procedure for inquiry—R.S.C., Ord.* 52, *r.* 25—*Bankruptcy Act*, 1914 (*c.* 59), *s.* 25 (*c*) [Re A DEBTOR (No. 472 of 1950)] 581
Treasury solicitor. *See* TREASURY SOLICITOR.

SPECIFIC PERFORMANCE
Title—*Doubtful title—Latent ambiguity of description of beneficiaries in will—Deed of family arrangement to resolve ambiguity—Sale of reversionary interest subject to special conditions—Whether title too doubtful to be forced on purchaser* [WILSON *v.* THOMAS] 871

STAMP DUTY PAGE

Conveyance on sale—*Periodical payments—Payments for a definite period exceeding twenty years—Provision for payment of all instalments on default in paying any instalment in due time—Whether charge for stamp duty limited to the aggregate of instalments for twenty years—Stamp Act*, 1891 (*c.* 39), *s.* 56 (2) [WESTERN UNITED INVESTMENT CO., LTD. *v.* INLAND REVENUE COMRS.] .. 257

Separate instrument securing payments—Execution of separate instrument prior to conveyance on sale—Whether ad valorem duty chargeable on separate instrument—Stamp Act, 1891 (*c.* 39), *s.* 56 (4) [WESTERN UNITED INVESTMENT CO., LTD. *v.* INLAND REVENUE COMRS.] .. 257

Transfer of shares—Shares subject to settlement—Oral agreement to exchange reversionary interest in settled shares, for shares owned by life tenant—Trustees' subsequent transfer of shares to life tenant—Whether conveyance of beneficial interest or legal estate only—Stamp Act, 1891 (*c.* 39), *s.* 54, *Sch.* 1—*Law of Property Act*, 1925 (*c.* 20), *s.* 53 (1), (2) [OUGHTRED *v.* INLAND REVENUE COMRS.] .. 252

Repayment—*Interest on overpaid duty—Jurisdiction of court to order payment of interest—Stamp Act*, 1891 (*c.* 39), *s.* 13 (1), (4)—*Law Reform (Miscellaneous Provisions) Act*, 1934 (*c.* 41), *s.* 3 [WESTERN UNITED INVESTMENT CO., LTD. *v.* INLAND REVENUE COMRS.] .. 257

Transfer of property from one associated company to another—*Contract by original owner to sell freehold and leasehold properties to a company—Purchase price received but no conveyance or transfer executed by owner—Death of owner—Subsequent sale by company to associated company—Conveyance, transfer and assignment executed by deceased's personal representatives—Whether exempt from ad valorem stamp duty—Stamp Act*, 1891 (*c.* 39), *s.* 54, *s.* 58 (4)—*Finance Act*, 1930 (*c.* 28), *s.* 42—*Finance Act*, 1938 (*c.* 46), *s.* 50 (1) (*b*) [ESCOIGNE PROPERTIES, LTD. *v.* INLAND REVENUE COMRS.] .. 406

Voluntary disposition—*Inter vivos—Transfer of shares—Transfer by settlor to trustees of settlement—Subsequent oral direction to trustees on what trusts shares to be held—Deed of declaration by trustees executed subsequently confirming trusts—Whether direction a transfer by way of trust or assignment—Whether deeds of declaration liable to ad valorem duty—Stamp Act*, 1891 (*c.* 39), *Sch.* 1—*Finance* (1909-10) *Act*, 1910 (*c.* 8), *s.* 74 (1)—*Law of Property Act*, 1925 (*c.* 20), *s.* 53 (1) (*c*) [GREY *v.* INLAND REVENUE COMRS.] .. 246

STATUTE

Construction—*Ejusdem generis rule—Rule applied to a phrase that did not include the word "other"—"And in any case"—Town Police Clauses Act*, 1847 (*c.* 89), *s.* 21 [BROWNSEA HAVEN PROPERTIES, LTD. *v.* POOLE CORPN.] .. 205

Contract—*Agreement confirmed by statute—Whether agreement binding by statutory force or binding in contract—Malvern Hills Act*, 1924 (*c.* xxxvi), *s.* 54, *Sch.* 4 [PYX GRANITE CO., LTD. *v.* MINISTRY OF HOUSING AND LOCAL GOVERNMENT] .. 625

Repeal—*Proviso applying only to one paragraph of schedule but expressed as proviso to schedule—Substitution of new paragraph without reference to proviso—Whether proviso applicable to substituted paragraph—Rent and Mortgage Interest Restrictions (Amendment) Act*, 1933 (*c.* 32), *s.* 3 (1) (*a*), *Sch.* 1, *para.* (*h*), *proviso*—*Rent Act*, 1957 (*c.* 25), *s.* 26, *Sch.* 6, *para.* 21 [PIPER *v.* HARVEY] .. 454

STATUTORY DUTY

Breach—*Cause of action—Whether separate from negligence for the purposes of payment into court* [GRAHAM *v.* C. E. HEINKE & CO., LTD.] .. 365

Damages—Limitation of action—Measure of damages [CLARKSON *v.* MODERN FOUNDRIES, LTD.] .. 33

See also COAL MINING.

STAY OF PROCEEDINGS

Foreign court—*Determination of disputes. See* CONFLICT OF LAWS.

SUBSCRIPTIONS

Fund raised by public subscriptions—*Whether resulting trust. See* CHARITY (Uncertainty—"*Worthy causes*").

SURTAX

Appeal—*House of Lords—Leave to appeal—Terms imposed as condition of granting leave* [INLAND REVENUE COMRS. *v.* WOOD BROS. (BIRKENHEAD), LTD. (IN LIQUIDATION)] .. 405

Investment company—*Apportionment of income—In accordance with the respective interests of members—Apportionment in proportion to dividend rights—Redeemable preference shares—Whether additional interest from contributions to redemption fund—Finance Act*, 1922 (*c.* 17), *s.* 21 (1), (8), *Sch.* 1, *para.* 8 [WIGRAM FAMILY SETTLED ESTATES, LTD. (IN LIQUIDATION) *v.* INLAND REVENUE COMRS.] .. 338

Directions and apportionments—Compellability of direction—Profits tax, if payable, exceeding actual income from all sources—Appeal against profits tax—Meaning of "payable"—When profits tax "falls to be computed"—Right of election relieving from profits tax—Power dependent on issue of surtax direction—Mandamus to commissioners to issue direction—Income Tax Act, 1952 (*c.* 10), *s.* 245, *s.* 262 (1)—*Finance Act*, 1952 (*c.* 33), *s.* 68 (1)—*Finance Act*, 1947 (*c.* 35), *s.* 31 (3) [SPECIAL COMRS. OF INCOME TAX *v.* LINSLEYS (ESTABLISHED 1894), LTD.] .. 343

TABERNACLE

Church ornament—*Legality. See* ECCLESIASTICAL LAW (Ornaments).

TAXATION

Costs. *See* COSTS; COUNSEL (Fees).

TENANCY

New tenancy under Landlord and Tenant Act, 1954. *See* LANDLORD AND TENANT (New tenancy).

See also LANDLORD AND TENANT.

TITLE DEEDS

Property in title deeds themselves [Re KNIGHT'S QUESTION] .. 812

TORT

Cause of action—*Whether statutory claim for contribution between joint tortfeasors is a cause of action in tort* [HARVEY *v.* R. G. O'DELL, LTD. (GALWAY THIRD PARTY)] .. 657

Joint tortfeasors—*Contribution—Master and servant joint tortfeasors—Negligence of servant resulting in servant's death and injury to another person—Action by injured person against master commenced nearly two years after grant of administration of deceased servant's estate—Third-party notice served by master on administratrix—Law Reform (Miscellaneous Provisions) Act*, 1934 (*c.* 41), *s.* 1 (1), (3), (4)—*Law Reform (Married Women and Tortfeasors) Act*, 1935 (*c.* 30), *s.* 6 (1) (*c*) [HARVEY *v.* R. G. O'DELL, LTD. (GALWAY THIRD PARTY)] .. 657

TOWN AND COUNTRY PLANNING

Development—*Permission—Necessity for permission—Agreement between quarry-owners and local authority as to quarrying areas scheduled to Act of Parliament—Whether agreed quarrying was development "authorised" by any local or private Act—Town and Country Planning General Development Order*, 1950 (*S.I.* 1950 *No.* 728), *art.* 3 (1), *Sch.* 1, *class* xii—*Malvern Hills Act*, 1924 (*c.* xxxvi), *s.* 54, *Sch.* 4 [PYX GRANITE CO., LTD. *v.* MINISTRY OF HOUSING AND LOCAL GOVERNMENT] .. 625

Permission granted subject to conditions—Conditions as to land not included in application for permission—Validity—Town and Country Planning Act, 1947 (*c.* 51), *s.* 14 (2), *s.* 17 (1) [PYX GRANITE CO., LTD. *v.* MINISTRY OF HOUSING AND LOCAL GOVERNMENT] .. 625

Development charge—*Determination—Land subject to development viewed as a whole—Estate acquired for building purposes—Heavy expenditure to make part of land suitable—Expenditure exceeding value of whole land for building purposes—Whether development charge exigible—Town and Country Planning Act*, 1947 (*c.* 51), *s.* 70 (2) [LONDON COUNTY COUNCIL *v.* CENTRAL LAND BOARD] .. 806

TRAFFIC SIGN

See ROAD TRAFFIC.

TRANSFER

Abroad—*Transfer of assets abroad for tax avoidance. See* INCOME TAX (Avoidance).

Equitable interest—*By declaration of trust. See* TRUST AND TRUSTEE (Declaration of trust).

TREASURY SOLICITOR

Representing local authority on matter of concern to Ministry—*Interest of Crown in subject-matter of litigation—Revenue Solicitors' Act*, 1828 (*c.* 25), *s.* 1 [BROWNSEA HAVEN PROPERTIES, LTD. *v.* POOLE CORPN.] .. 205

TRIAL

See CRIMINAL LAW.

TRUST AND TRUSTEE

Charitable trust. *See* CHARITY.

Constructive trust—*Exchange of shares owned by life tenant for reversionary interest in settled shares—Oral agreement to transfer reversionary interest (by exchange) to life tenant—Whether any need for writing—Law of Property Act*, 1925 (*c.* 20), *s.* 53 (1), (2) [OUGHTRED *v.* INLAND REVENUE COMRS.] .. 252

Declaration of trust—*Transfer by way of declaration of trust—Personalty—Whether need for writing—Law of Property Act*, 1925 (*c.* 20), *s.* 53 (1) (*c*) [GREY *v.* INLAND REVENUE COMRS.] .. 246

Invalid trust—*Trust for reform of alphabet—Whether effect could be given to directions of trust as empowering trustee to act on them* [Re SHAW (*decd.*)] .. 245

Powers of trustee—*Power of advancement—Statutory power—Payment to beneficiary—Money not required for specific purpose—Trustee Act*, 1925 (*c.* 19), *s.* 32 (1) [Re MOXON'S WILL TRUSTS] .. 386

Resulting trust—*Donations made to fund—Many donors unascertainable—Failure of objects of fund—Bona vacantia* [Re GILLINGHAM BUS DISASTER FUND] .. 37

Trustee—*Costs—Amount to be allowed—R.S.C., Ord.* 65, *r.* 27 (29) [Re GRIMTHORPE'S (BARON) WILL TRUSTS] .. 765

VALUATION

See RATES.

VARIATION OF SETTLEMENT (MATRIMONIAL CAUSES)

Ante-nuptial settlement—*Deed agreeing to transfer securities as absolute gift immediately after marriage—No transfer to trustees—Whether ante-nuptial settlement—Matrimonial Causes Act*, 1950 (*c.* 25), *s.* 25 [PRESCOTT (ORSE. FELLOWES) *v.* FELLOWES] .. 824

WAR RISKS

See INSURANCE (Marine insurance).

WILL

Absolute gift—*Effect of subsequent words—"Anything that is left"—Ambiguity—Cutting down of absolute gift to life interest* [Re LAST (*decd.*)] .. 316

Charity. *See* CHARITY.

Forfeiture clause—*Protective trusts—Court order that principal beneficiary should charge his interest to secure maintenance—No charge executed—Whether court order caused forfeiture—Trustee Act*, 1925 (*c.* 19), *s.* 33 (1) (ii) [Re RICHARDSON'S WILL TRUSTS] .. 538

Gift—*Subject-matter of gift—"Business"—What assets included in gift of testator's business of house furnisher—Whether gift subject to payment of trade liabilities* [Re WHITE (*decd.*)] .. 379

Legacy—*Shares—Bequest to a company of shares in the company—Validity* [Re CASTIGLIONE'S WILL TRUSTS] .. 480

Perpetuity. *See* PERPETUITIES (Rule against perpetuities).

Power of appointment. *See* POWER OF APPOINTMENT (Exercise).

WINDING-UP

Company. *See* COMPANY.

WOMAN NAMED

Costs against. *See* DIVORCE (Costs—*Judicial separation*).

STATUTES, ETC., REFERRED TO

PUBLIC GENERAL STATUTES

PAGE

- Agricultural Holdings Act, 1948 (*c.* 63)—
  - *s.* 24 (2) (*g*) .. 846
  - *s.* 25 (1) (*a*) .. 671
- Administration of Estates Act, 1925 (*c.* 23), *ss.* 2 (2), 55 (1) (iii) .. 44
- Administration of Justice Act, 1956 (*c.* 46), *s.* 1 (1) (*g*) .. 333
- Adoption Act, 1950 (*c.* 26), *ss.* 2 (4) (*a*), 3 (1) .. 427
- Arbitration Act, 1950 (*c.* 27)—
  - *s.* 5 .. 815
  - *s.* 26 .. 777
- Bankruptcy Act, 1914 (*c.* 59)—
  - *s.* 25 (1) .. 581
  - *s.* 157 (1) .. 468
- Bastardy Laws Amendment Act, 1872 (*c.* 65), *s.* 3, as amended .. 154
- Carriage of Goods by Sea Act, 1924 (*c.* 22), *Schedule*, *art.* IV, *r.* 2 (*n*), (*o*), *art.* III, *r.* 8 .. 264
- Charitable Trusts (Validation) Act, 1954 (*c.* 58), *ss.* 1 (1), (2), 2 (3) .. 37
- Coal Mines Act, 1911 (*c.* 50), *s.* 49 .. 754
- Companies Act, 1948 (*c.* 38)—
  - *s.* 182 (1), (3) .. 721
  - *ss.* 245 (2) (*h*), 265 .. 158
- Compensation (Defence) Act, 1939 (*c.* 75), *ss.* 4, 15 .. 787
- County Courts Act, 1934 (*c.* 53)—
  - *s.* 105 (as amended by the County Courts Act, 1955 (*c.* 8), *s.* 12) .. 104
  - *s.* 164 (2), (3) .. 170
- Criminal Justice Act, 1948 (*c.* 58), *ss.* 6 (4) (*b*), (6), 8 (5) .. 471
- Factories Act, 1937 (*c.* 67)—
  - *ss.* 14 (1), 16 .. 532
  - *s.* 22 (3) .. 297
  - *s.* 25 (3) .. 150
- Factory and Workshop Act, 1901 (*c.* 22), *s.* 149 (1) .. 646
- Finance Act, 1894 (*c.* 30)—
  - *ss.* 1, 2 (1) (*b*) .. 550
  - *s.* 7 (6) .. 819
- Finance (1909-10) Act, 1910 (*c.* 8), *s.* 74 (1) .. 246
- Finance Act, 1922 (*c.* 17), *s.* 21 (1), (8), *Sch.* 1, *para.* 8 .. 338
- Finance Act, 1930 (*c.* 28), *s.* 42 .. 406
- Finance Act, 1937 (*c.* 54), *Sch.* 4, *para.* 7 (1A), substituted by Finance Act, 1947 (*c.* 35), *s.* 32 (1) 593
- Finance Act, 1938 (*c.* 46), *s.* 50 (1) (*b*) .. 406
- Finance Act, 1947 (*c.* 35)—
  - *s.* 31 (3) .. 343
  - *s.* 34 (2) .. 593
- Finance Act, 1952 (*c.* 33), *s.* 68 (1) .. 343
- Homicide Act, 1957 (*c.* 11)—
  - *s.* 2 .. 568
    - (1) .. 300
- Housing Act, 1936 (*c.* 51), *s.* 85 (6) .. 801
- Income Tax Act, 1918 (*c.* 40)—
  - *Sch.* 1 .. 305
  - *Sch.* D, *Case* III .. 829
    - *r.* 3 .. 305
- Income Tax Act, 1952 (*c.* 10)—
  - *s.* 123, *Sch.* D, *Case* III .. 829
  - *s.* 137 (*a*) .. 274
  - *s.* 156, *Sch.* E, *paras.* 1 & 2 .. 864
  - *s.* 160 .. 369
  - *ss.* 245, 262 (1) .. 343
  - *s.* 412 (2), (4) .. 270
  - *s.* 430 .. 305
  - *Sch.* 9, *r.* 1 .. 369, 864
- Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (*c.* 17)—
  - *s.* 1 .. 833
  - *s.* 7 .. 51
  - *s.* 12 (2) .. 833
    - (5) .. 51
- Land Registration Act, 1925 (*c.* 21), *ss.* 19 (1), 20 (1), 27 (3), 70 (1) (*g*) .. 138
- Landlord and Tenant (Rent Control) Act, 1949 (*c.* 40), *s.* 2 .. 138
- Landlord and Tenant Act, 1954 (*c.* 56)—
  - *s.* 30 (1) (*f*) .. 449, 607
  - *s.* 34 (*a*), (*b*) .. 104
- Law of Property Act, 1925 (*c.* 20)—
  - *s.* 53 (1) .. 252
    - (*c*) .. 246
    - (2) .. 252
  - *s.* 146 (2) .. 314
- Law Reform (Miscellaneous Provisions) Act, 1934 (*c.* 41)—
  - *s.* 1 (1), (3), (4) .. 657
  - *s.* 3 .. 257
- Law Reform (Married Women and Tortfeasors) Act, 1935 (*c.* 30), *s.* 6 (1) (*c*) .. 657
- Limitation Act, 1939 (*c.* 21), *s.* 2 (1) (*a*) .. 33
- Magistrates' Courts Act, 1952 (*c.* 55), *s.* 53 .. 770
- Married Women's Property Act, 1882 (*c.* 75)—
  - *s.* 12 (amended by Law Reform (Married Women and Tortfeasors) Act, 1935 (*c.* 30), *s.* 5, *Sch.* 1) .. 146
  - *s.* 17 .. 523, 812

- Matrimonial Causes Act, 1950 (*c.* 25)—
  - *s.* 3 (2) .. 320
  - *s.* 5 .. 388
  - *s.* 14 (1) .. 320
  - *s.* 25 .. 824
  - *s.* 32 (3) .. 859
- Mental Deficiency Act, 1913 (*c.* 28)—
  - *s.* 8 (1) .. 477
  - *s.* 56 (1) (*a*) .. 679
- National Health Service Act, 1946 (*c.* 81), *ss.* 12, 14, 68 .. 322
- Oaths Act, 1888 (*c.* 46), *s.* 1 .. 199
- Perjury Act, 1911 (*c.* 6), *ss.* 1 (1), 15 (2) .. 199
- Public Health Acts Amendment Act, 1890 (*c.* 59), *s.* 35 (1) .. 181
- Racecourse Betting Act, 1928 (*c.* 41), *s.* 3 (6) .. 274
- Rating and Valuation Act, 1925 (*c.* 90), *s.* 24 (1) .. 694, 702
- Rating and Valuation (Apportionment) Act, 1928 (*c.* 44), *s.* 3 (1) .. 646
- Rating and Valuation (Miscellaneous Provisions) Act, 1955 (*c.* 9)—
  - *s.* 8 (1) (*a*) .. 129
  - *s.* 8 (2) (*a*) .. 122
- Rent Act, 1957 (*c.* 25)—
  - *s.* 1 (1) (*b*) .. 510
  - *s.* 26 .. 454
  - *Sch.* 1, *Part* 1, *para.* 1 (2), (3) .. 510
  - *Sch.* 5, *paras.* 1 (*a*) (*b*), 2 (1) .. 574
  - *Sch.* 6, *para.* 21 .. 454
- Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (*c.* 32)—
  - *s.* 3 (1) .. 529
    - (*a*), *Sch.* 1, *para.* (*h*), *proviso* .. 454
- Rent and Mortgage Interest Restrictions Act, 1939 (*c.* 71), *s.* 3 (1), (3) .. 833
- Revenue Solicitors' Act, 1828 (*c.* 25), *s.* 1 .. 205
- Road Traffic Act, 1930 (*c.* 43), *ss.* 11 (1), 49 (*b*) .. 193
- Stamp Act, 1891 (*c.* 39)—
  - *ss.* 13 (1), (4) .. 257
  - *s.* 54 .. 252, 406
  - *s.* 56 (2), (4) .. 257
  - *s.* 58 (4) .. 406
  - *Sch.* 1 .. 246, 252
- Supreme Court of Judicature (Consolidation) Act, 1925 (*c.* 49), *s.* 31 (1) (*e*) .. 397
- Town and Country Planning Act, 1947 (*c.* 51)—
  - *ss.* 14 (2), 17 (1) .. 625
  - *s.* 70 (2) .. 806
- Town Police Clauses Act, 1847 (*c.* 89), *s.* 21 .. 205
- Trustee Act, 1925 (*c.* 19)—
  - *s.* 32 (1) .. 386
  - *s.* 33 (1) (ii) .. 538

PRIVATE

- Malvern Hills Act, 1924 (*c.* xxxvi), *s.* 54, *Sch.* 4 .. 625

FOREIGN

- United States Carriage of Goods by Sea Act, 1936 (Public Statutes No. 521), Preamble, *ss.* 3 (1), (4) (1), (2), 5, 13 .. 725

RULES

- Companies (Winding-up) Rules, 1949 (S.I. 1949 No. 330), *r.* 120 .. 158
- County Court Rules, *Ord.* 11, *r.* 1, *Appendix D*, *Part* 1, *Direction* 1 (*a*) .. 465
- Matrimonial Causes (Judgment Summons) Rules, 1952 (S.I. 1952 No. 2209), *r.* 6 (3) .. 65
- Matrimonial Causes Rules, 1957 (S.I. 1957 No. 619), *r.* 5 (1) .. 320
- R.S.C.—
  - *Ord.* 14, *rr.* 1 (*a*), 2 .. 459
  - *Ord.* 16, *r.* 11 .. 839
  - *Ord.* 22, *r.* 1 (2) .. 365
  - *Ord.* 36, *r.* 58 .. 91
  - *Ord.* 37, *r.* 20 .. 581
  - *Ord.* 52, *r.* 25 .. 581
  - *Ord.* 65, *r.* 27 (29) .. 765
    - *r.* 27 (41) .. 26

ORDERS

- Aliens Order, 1953 (S.I. 1953 No. 1671), *art.* 2 (1) (*b*) .. 485
- Double Taxation Relief (Taxes on Income) (Australia) Order, 1947 (S.R. & O. 1947 No. 806), *Schedule, arts.* II (1) (i), (3), III (2), (3) .. 305
- Live Poultry (Movement Records) Order, 1954 (S.I. 1954 No. 122), *art.* 2 (1) .. 59
- Plant and Machinery (Valuation for Rating) Order, 1927 (S.R. & O. 1927 No. 480), *Schedule, class* 4 .. 694, 702
- Town and Country Planning General Development Order, 1950 (S.I. 1950 No. 728), *art.* 3 (1), *Sch.* 1, *class* xii .. 625

WORDS AND PHRASES

PAGE
Advance of nursing as a profession 129
All such other information as may be necessary or appropriate to enable the amount of the royalties payable 11
Anything that is left 316
Authorised 625
Business 379
Chambers for conditioning or treatment 694
Consent . . . unreasonably withheld 427
Dwelling-house 833
Expense 369
Falls to be computed 343
Fed 59
Floor 150
Holding 721
Incumbrance 126
Lawfully sworn 199
Mute by the visitation of God 62
Occasion—" Any occasion when the streets are thronged or liable to be obstructed " 205
Other (whether essential to application of ejusdem generis order of construction) 205
Ovens 694
Payable 343
Profession—" Advance of nursing as a profession " 129
Prolongation 431
Route 205
Secure 754
Seised in unincumbered fee simple in possession 126
Single woman 154
Tank 702
Worthy causes 37

CORRIGENDA

[1958] 1 All E.R.

p. 264: MALAS AND ANOTHER (TRADING AS HAMZEH MALAS AND SONS) *v.* BRITISH IMEX INDUSTRIES, LTD. First line: for " PEARSON, L.J." read " PEARCE, L.J."

p. 280: RACECOURSE BETTING CONTROL BOARD *v.* YOUNG (INSPECTOR OF TAXES). Counsel for the Crown: for "*J. G. Monroe*" read "*Hubert H. Monroe*".

p. 468: REID *v.* THOMAS BOLTON & SONS, LTD. Solicitors: read "*Mawby, Barrie & Letts*, agents for *Silverman & Livermore*, Liverpool (for the plaintiff); *Gardiner & Co.*, agents for *Barrell & Co.*, Liverpool (for the defendants)" instead of as printed.

THE
ALL ENGLAND
LAW REPORTS

INCORPORATING THE

LAW TIMES REPORTS

AND THE

LAW JOURNAL REPORTS

Re ST. MARY'S, TYNE DOCK (No. 2).

[Durham Consistory Court (Deputy Chancellor (W. S. Wigglesworth, Esq.)), September 26, 27, October 14, 18, November 14, 1957.]

Ecclesiastical Law—Ornaments—Ciborium.

Ecclesiastical Law—Faculty—Principles regarding exercise of jurisdiction.

In 1954 the Consistory Court for the Diocese of Durham made an order, on opposed petitions for faculties for the introduction and removal of certain articles into and from the church of St. Mary, Tyne Dock, confirming the introduction of some of the articles into the church and granting a faculty for the removal of six categories of articles. The faculty for removal was ordered to issue only in default of the vicar and churchwardens lodging declaration of their consent to remove the articles within a period of three months from the date of the order. The articles ordered to be removed included (a) two portable candle holders, (b) a sanctuary gong and two sanctuary bells and (c) a tabernacle and large ciborium. The declaration of consent was duly lodged, save as regards the tabernacle and ciborium. In relation to the tabernacle the vicar wrote to the registrar and in reply was told that the tabernacle and ciborium must be removed within the three months and that the vicar's letter would be accepted as consent to remove them. Articles (a) and (b) were removed from the church, but the large ciborium was not removed. In November, 1955, a further petition was presented alleging irregularities and malpractices in contravention of the order of 1954, and seeking faculties for removal of (i) certain candlesticks, (ii) a hand bell and a bell cord leading to a bell in the belfry, and (iii) an aumbry and the large ciborium. On Oct. 6, 1956, citation was decreed. Until October, 1956, candles were carried in the church contrary to the spirit of the order of 1954; after October, 1956, the practice ceased. Prior to January, 1956, a hand bell and, by means of a cord leading to the belfry, a bell there were rung in the church at the times when the sanctuary gong and two sanctuary bells were rung before their removal; since January, 1956, this practice had ceased and the hand bell had been removed from the church. The large ciborium was used in an aumbry in the church, where there was also a small ciborium, not previously the subject of faculty proceedings. Reservation of the Sacrament in this church had been sanctioned by the bishop. The inference from the evidence before the court was that the use of the large ciborium had the bishop's sanction. On May 14, 1957, the parochial church council unanimously passed a resolution supporting the vicar and churchwardens. On May 24, 1957, the vicar and churchwardens petitioned for a faculty to confirm the retention of the two ciboria. The claim for the removal of the aumbry was not pursued in the A consistory court, but was reserved for a higher court.

Held: (i) the faculty jurisdiction was not a punitive jurisdiction but was a discretionary jurisdiction to be exercised with due regard to the interests not only of the parties to the suit but also of present and future parishioners.

Observations of CHANCELLOR KEMPE in *St. Luke's, Newcastle* (1912) (unreported) and of CHANCELLOR ERRINGTON in *Re St. Saviour's, Hampstead* B ([1932] P. at p. 138) applied.

(ii) a ciborium was not an illegal ornament (see p. 9, letter I, post), and accordingly a faculty would be granted confirming the retention of the small ciborium; but, since the order of 1954 stood and there had been no appeal from it, a faculty would also be granted for the removal of the large ciborium, the bishop not having power to sanction its retention in view of C the order of 1954 (*Ex p. Medwin* (1853), 1 E. & B. 609, applied).

(iii) if an order for the removal of the aumbry had been sought, the court would have allowed the aumbry to remain, following on this point *Re Lapford* ([1954] 3 All E.R. 484), although, as a decision of the Arches Court of Canterbury, it was not strictly binding in the Province of York.

(iv) a faculty for the removal of the bell rope would be granted; but a D faculty for the removal of the candlesticks would not be granted, as it would be in the nature of punishment and would not be in the interests of the bulk of the congregation (see p. 8, letters G and C, post).

Observations on the effect of the grant of a faculty " until further order " (see p. 7, letter A, post).

E

[As to the considerations affecting the exercise of the faculty jurisdiction, see 13 HALSBURY'S LAWS (3rd Edn.) 417, para. 924; and for cases on the subject, see 19 DIGEST 463, *3106-3113*.

As to church ornaments, see 13 HALSBURY'S LAWS (3rd Edn.) 333, para. 759; as to a tabernacle, aumbry or sanctus bell, see ibid., pp. 335, 336, paras. 765, 766; and for cases on the subject, see 19 DIGEST 435-437, *2762-2769*.]

F

Cases referred to:

(1) *Re St. Mary's, Tyne Dock*, [1954] 2 All E.R. 339; [1954] P. 369; 3rd Digest Supp.
(2) *St. Luke's, Newcastle*, (1912), Unreported.
(3) *Re St. Saviour's, Hampstead*, [1932] P. 134; Digest Supp.
(4) *Fuller* v. *Lane*, (1825), 2 Add. 419; 162 E.R. 348; 19 Digest 464, *3123*. G
(5) *Re Lapford*, [1954] 3 All E.R. 484; [1955] P. 205; 3rd Digest Supp.
(6) *Ex p. Medwin*, (1853), 1 E. & B. 609; 118 E.R. 566; sub nom. *Rawlinson* v. *Medwin, Ex p. Medwin*, 22 L.J.Q.B. 169; sub nom. *Rawlinson* v. *Medwin & Hurst*, 21 L.T.O.S. 5; sub nom. *Rawlinson* v. *Medwin & West*, 17 J.P. 166; 19 Digest 241, *233*.
(7) *Martin* v. *Mackonochie*, (1868), L.R. 2 P.C. 365; 38 L.J.Eccl. 1; 19 L.T. H 503; 33 J.P. 35; 16 E.R. 603; *varying*, S.C. sub nom. *Martin* v. *Mackonochie, Flamank* v. *Simpson*, L.R. 2 A. & E. 116; *subsequent proceedings*, sub nom. *Martin* v. *Mackonochie*, (1869), L.R. 3 P.C. 52, 409; 19 Digest 450, *2948*.

Petition.

I

By a petition dated Nov. 21, 1955, one William Finch and six other parishioners or inhabitants of the parish of St. Mary, Tyne Dock, in the Diocese of Durham (described in previous proceedings, reported [1954] 2 All E.R. 339, and in these proceedings as " the opponents "), sought a faculty for the removal of certain articles from the church of St. Mary's, Tyne Dock, consequent on an order of the Consistory Court in those earlier proceedings. By a petition dated May 26, 1957, the vicar and churchwardens (described in the earlier proceedings and in these proceedings as " the petitioners "), sought a faculty to confirm the retention in the church of two ciboria, one of which had been the subject-matter of the earlier proceedings. Both petitions were opposed. The petitions were tried together and the hearing took place in the Chapter House at Durham on Sept. 26, 27, 1957, when the evidence was concluded, and in London on Oct. 14, 18, 1957, when the legal argument was concluded. The facts appear in the judgment.

H. S. Ruttle for the seven parishioners.
K. J. T. Elphinstone and *M. B. Kelly* for the vicar and churchwardens.

Cur. adv. vult.

Nov. 14. **THE DEPUTY CHANCELLOR** read the following judgment: This case relates to certain articles in the parish church of St. Mary, Tyne Dock in the Diocese of Durham. It was described by counsel for the opponents in his opening speech as a sequel to the proceedings (*Re St. Mary's, Tyne Dock* (1), [1954] 2 All E.R. 339) relating to the same church which came before Chancellor Hylton-Foster. In those proceedings Chancellor Hylton-Foster had to deal with three petitions, first a petition on the part of the vicar and churchwardens (then as now the Revd. Richard Louis Hilditch, Mr. Norman Edward Lorenson and Mr. Robert Henry Hickman) and fifty-eight others who sought a faculty to introduce into the church a statue of the Virgin and Child, secondly a petition on the part of Miss Elsie Collingwood, Miss Margaret Ann Whitton, Mr. William Finch and eight others who sought a faculty to remove thirty articles from the church, and thirdly another petition on the part of the vicar and churchwardens who sought a faculty to introduce into, or confirm the retention in, the church of some if not all of the thirty articles and certain other articles. Each of these petitions was opposed. For convenience Chancellor Hylton-Foster called the vicar and churchwardens and their associates " the petitioners " and Miss Collingwood and her associates " the opponents ".

Chancellor Hylton-Foster's order in the earlier proceedings was dated July 15, 1954, and I will refer to it as the order of 1954: by it he confirmed the introduction into the church of twenty-nine articles (numbered 1 to 29 in the order of 1954) and ordered the removal from the church within three months from the date thereof of six articles (numbered 30 to 35 in the order of 1954). As regards the twenty-nine articles, some of them were authorised to be retained in the church only " until further order ". As regards the six articles ordered to be removed, the order of 1954 provided that in the event of the petitioners failing to lodge a declaration with the registrar within fourteen days from the date of service of copies of the order of 1954 on them or their solicitors signifying their consent to remove these articles within the three-month period, a faculty should issue to the opponents authorising the opponents to remove them. A clear declaration was lodged within the time prescribed as regards the articles numbered 31 to 35, but in the case of article No. 30 (which comprised a tabernacle and a ciborium) the vicar, in a letter to the registrar dated July 27, 1954, which referred to article No. 30 as if it had comprised a tabernacle alone, asked if it would be sufficient if the tabernacle were made unusable, a course to which he said the Bishop of Durham had agreed. The registrar replied that the vicar was bound to remove the tabernacle by Oct. 15, 1954, or an order would issue to the opponents authorising them to remove it. The vicar was told that the registrar was accepting the vicar's letter as his official declaration signifying his consent to remove the articles by Oct. 15, 1954; in consequence no faculty was issued to the opponents authorising them to remove them.

The present case is correctly described as a sequel to these earlier proceedings. It involves two petitions, first a petition dated Nov. 21, 1955, on the part of some of the persons called "the opponents" in the earlier proceedings, namely, Mr. Finch, Miss Whitton and others who seek a faculty for the removal of some of the articles which were the subject-matter of the earlier proceedings, and secondly a petition dated May 26, 1957, on the part of some of the persons called

" the petitioners " in the earlier proceedings, namely, the vicar and churchwardens who seek a faculty to confirm the retention in the church of two ciboria, the removal of one of which had been ordered in the earlier proceedings. Each of these petitions is opposed. For convenience I shall continue to describe the two sides in the same way as Chancellor Hylton-Foster described them and will call the vicar and churchwardens " the petitioners " and Mr. Finch, Miss Whitton and their associates " the opponents ". In the earlier proceedings the petitioners were represented by Mr. Garth Moore and the opponents by Mr. Ruttle. Since then Mr. Garth Moore has succeeded Chancellor Hylton-Foster as Chancellor of the Diocese of Durham, but Mr. Garth Moore is disabled by the part which he played in the earlier proceedings from hearing the present case, and has asked me to hear it for him. In the present case the opponents are represented by Mr. Ruttle: the petitioners on this occasion have appeared by Mr. Elphinstone and Mr. Kelly. I should like to thank counsel for the assistance they have given me.

I must now refer more particularly to the articles mentioned in the opponents' petition dated Nov. 21, 1955, which is the origin of the present case; in doing so, I shall refer to them by the numbers by which they are referred to in the order of 1954. In the first instance, the opponents asked for a faculty to remove six articles on the ground that since the order of 1954 they had observed certain irregularities and malpractices in contravention of the order of 1954 in respect of the articles. The articles in question were: (i) article No. 2: this is a small Holy Table at the east end of the south aisle which had been authorised by the order of 1954 to be retained until further order. The complaint was that it had been used in an irregular manner in that the cross which the order of 1954 had authorised to be placed thereon had on occasions been removed and in substitution therefor a crucifix believed to be article No. 29 (a crucifix which the order of 1954 had authorised to be retained until further order and had referred to as being on the east window sill of the vestry); (ii) article No. 3: this is a set of stations of the cross which Chancellor Hylton-Foster in his judgment had allowed to be introduced during Holy Week, and the complaint was that they had been displayed in the church outside Holy Week; (iii) article No. 17: this is a set of six wooden candlesticks authorised by the order of 1954 to be kept in some convenient place and used in the church as required. The complaint was that all or any two of them had been used on occasions in substitution for article No. 32 (two portable candle holders the removal of which had been ordered by the order of 1954); (iv) article No. 18: this is a pair of candle holders normally standing on the credence table the retention of which until further order had been authorised by the order of 1954. The complaint was that they had been used on occasions as portable candle holders in substitution for article No. 32 already mentioned in a manner in which they were likely to become of superstitious use, reverence and regard; (v) article No. 21: this is an aumbry authorised to be retained by the order of 1954. The complaint was that on occasions it had been used as a receptacle for the purpose of retaining a ciborium the same or similar to article No. 30 which comprised a tabernacle and ciborium both of which had, as already mentioned, been ordered to be removed by the order of 1954; (vi) article No. 29: this is the crucifix from the vestry which, it was alleged, had been used on the Holy Table in the south aisle.

In the second instance, the opponents in their petition alleged that in contravention of the terms of the order of 1954 and in contempt thereof the petitioners had retained four articles or replaced them with other articles of a similar kind. The four articles were: (a) article No. 30: this article had consisted of a tabernacle and ciborium the removal of both of which had been ordered by the order of 1954. The tabernacle had been removed in obedience to the order of 1954, but the complaint was that the ciborium or one like it had been placed in the aumbry (article No. 29); (b) article No. 31: this consisted of a sanctuary gong and two sanctuary bells the removal of which had been ordered by the order of 1954, and the complaint was that in substitution therefor a small hand bell had been introduced into the church and used on many occasions and that also in substitution therefor a cord or rope had been led from the belfry through a hole in the roof and had been used to ring the church bell at the times at and in the manner in which the sanctuary gong had been used; (c) article No. 32: this was a pair of portable candle holders which had been ordered to be removed and the complaint was that other candle holders had been used in their place; (d) article No. 33: this was a pair of outdoor portable candle holders which had also been ordered to be removed, and the complaint was that they or candle holders of similar kind had been used on at least one occasion in services in or within the precincts of the church.

This recurrence of litigation at St. Mary, Tyne Dock, was a matter of concern to the Archdeacon of Durham in whose archdeaconry the parish is situate. The archdeacon considered that it was his duty to intervene between the parties who were about to re-engage in conflict in order to prevent a second trial in this court. I consider that he was right to try and I am sorry that he failed. Litigation in a case of this kind cannot possibly benefit a parish and is bound to be unedifying. The archdeacon interviewed the petitioners and the opponents separately and, as a result of the advice which he gave, the vicar wrote a letter to the archdeacon which is dated Jan. 13, 1956, and is in the following terms:

> "As a basis of negotiation with the seven petitioners, who have lodged the petition (dated Nov. 21, 1955) with the diocesan registrar, I have undertaken for the time being and for the foreseeable future to make the following modifications in the use of ornaments at St. Mary's, Tyne Dock: 1. That the small hand-bell, mentioned in s. 8b of the petition, shall be removed from the church. 2. That the rope led from the belfry to the west end of the church (s. 8b) shall be made unusable by being hitched up in the gallery at a height which puts it out of reach. 3. That the two wooden candlesticks (mentioned in s. 8c) shall no longer be moved during the course of a service. They will, however, be placed in the church before certain services and removed afterwards (as is allowed in the confirmatory faculty). The servers will hold small lighted candles without holders at the reading of the Holy Gospel and whenever the Blessed Sacrament is removed from the aumbry to the altar for renewal. This we believe is an essential part of the expression of our reverence to our Lord. 4. With regard to the substitution of a crucifix for a cross on the portable altar, I have decided to celebrate at this altar with two candles only and no ornament in the centre. The large brass cross makes reverent celebration impossible and the confirmatory faculty states that 'all or any' of the ornaments may be used. While the celebration is in progress the brass cross will be placed in the sacristy . . .
>
> "I shall be grateful if you will use your influence to persuade the petitioners not to insist on the removal of the additional bell-rope. If it is taken away, our lady-caretaker will be unable to toll the bell at funerals. We shall of course continue to ring the tower bell at the consecration on Sundays."

It will be noted that this letter says nothing about the stations of the cross or the ciborium, but amounts to an admission that until then the order of 1954 had as regards the other matters raised by the opponents' petition been disobeyed in letter or in spirit or had at least been evaded.

At first it was hoped that the vicar's undertaking might be sufficient for the opponents and these proceedings remained dormant for some months. The opponents were not, however, satisfied and on Oct. 6, 1956, Chancellor Garth Moore took the neutral step of decreeing citation and thereafter had nothing further to do with the case. The petitioners entered an appearance in opposition.

Their first step was to apply to strike out of the opponents' petition the allegations relating to all the articles mentioned in the petition other than the aumbry and the ciborium. This application I heard and dismissed in chambers in February, 1957. The petitioners filed their act on petition on May 24, 1957, and at the same time counter-petitioned for a faculty to retain the ciborium (article No. 30) and another ciborium which had been in the church for many years but had not previously been the subject-matter of faculty proceedings. These two ciboria are of different sizes, article No. 30 being the larger. In order to distinguish them, I will refer to article No. 30 as " the large ciborium " and the other one as " the small ciborium ". The opponents entered an appearance in opposition to the counter-petition and filed their act on petition on Sept. 16, 1957. The petitioners are supported by a unanimous resolution of the parochial church council passed on May 14, 1957.

Before I deal with the matters in dispute in the present case it will be convenient if I refer generally to the principles which govern the exercise of the faculty jurisdiction. In this respect counsel for the petitioners referred me to two cases. The first was *St. Luke's, Newcastle* (2) (1912) (unreported), where Chancellor Kempe in the Consistory Court of Newcastle said:

> " Whether or not a faculty shall be granted for the introduction into, retention in, or removal from a church of any particular thing, which can be lawfully introduced into it; and whether such introduction, retention, or removal shall be effected in the manner proposed by the parties before the court, or be sanctioned subject to such variations as seem proper to the judge, is a matter entirely in the judicial discretion of the latter, who in the exercise of that discretion is bound to consider not only the interests of the parties to the suit before him, but also those of present and future parishioners . . . In the present proceedings the court has no power to punish the vicar or churchwardens for any breach of the law they may have committed in introducing these articles into the church and using them there, or to issue a monition of them ordering them not to repeat such offence. Its power is limited to authorising the removal from or retention in the church (including a consecrated vestry forming part of it) of things which are actually in it, and it cannot empower the removal of anything from a building which is not part of the church or under its jurisdiction."

The second was *Re St. Saviour's, Hampstead* (3) ([1932] P. 134) where Chancellor Errington in the Consistory Court of London said (ibid., at p. 138):

> " It may be useful to refer to the general principles guiding this court in faculty cases. It has first to be borne in mind that they have no relation to criminal proceedings against a clergyman for illegal services or ceremonies. Evidence as to such services or ceremonies, though it cannot be wholly rejected, is only relevant so far as it indicates a danger of the ornaments complained of being used for superstitious purposes. In the absence of such evidence the object of the faculty jurisdiction is not to hamper a clergyman by impeding his work. He is responsible for the religious welfare of his parish, and it is not the province of this court to criticize his teaching; still less to discourage his efforts by withdrawing such symbolic help as church decorations may give. On the other hand, there are of course certain ornaments which the court has no power to sanction, as being outside the ornaments rubric."

I need hardly say that I fully accept these passages as accurate statements of the law applicable to the exercise of the faculty jurisdiction.

I ought also to say something about the effect of a faculty. First, as its name indicates, it confers liberty on a person to do something; it does not command him to do anything. Secondly, a faculty not expressed to be " until further order " once granted cannot be recalled unless obtained by fraud. The grantee can surrender it, if he chooses, but unless he does it remains good and valid even against the ordinary himself (*Fuller* v. *Lane* (4) (1825), 2 Add. 419 at p. 421 per Sir John Nicholl, Dean of Arches). Lastly, a faculty expressed to be granted "until further order" can be recalled against the will of the grantee. The insertion of these words enables the court to retain control of the subject-matter of the faculty and to recall the faculty if for instance there is a change in the relevant circumstances, or a condition inserted in the faculty has not been obeyed, or the subject-matter of the faculty becomes an object of unlawful ceremonial use or of superstitious use or reverence.

I will now deal with the matters in dispute which fall under five heads. The first relates to the Holy Table in the south aisle (article 2) and the crucifix in the vestry (article 29). The petitioners admit that the brass cross which Chancellor Hylton-Foster said could be placed on this Holy Table was on occasions removed and replaced by the crucifix, but they say (and there was no evidence to the contrary) that the crucifix has not been so used since the vicar's undertaking to the archdeacon given nearly two years ago. The vicar had no authority to put the crucifix on this Holy Table and ought not to have done so. He has full authority to remove the cross when he celebrates and continues to do so. I cannot regard the putting of a crucifix on a Holy Table during the period between October, 1954, and January, 1956, as such an irregularity or malpractice in contravention of the order of 1954 (to use the language of the opponents' pleading) as would warrant the grant of a faculty for the removal of either crucifix or Holy Table and decline to grant one. In so deciding, I expect and rely on the vicar to continue to keep his undertaking and remind him that the order of 1954 in this respect continues in force only "until further order."

Secondly, there are the stations of the cross (article 3). In his judgment Chancellor Hylton-Foster said that these could only be put up in the church during Holy Week. In 1955 they were in fact put up during the week before owing, so the vicar said, to a mistake. In 1956 and 1957 Chancellor Hylton-Foster's direction was observed and the vicar undertakes to continue to observe it. I regard this isolated slip as trivial in character and I cannot regard it as justifying a faculty for removal. Accordingly I leave the order of 1954 in force "until further order" so far as the stations of the cross are concerned.

Thirdly, there is the matter of the candlesticks or candle holders (articles 17, 18, 32 and 33). The portable candle holders (articles 32 and 33) are no longer in the church and no relief is now required so far as they are concerned. The complaint is that candlesticks authorised to be retained (articles 17 and 18) were used in place of the portable candle holders ordered to be removed and that such use contravened the order of 1954. There was good ground for this complaint. As soon as the order of 1954 came into force the vicar sought to evade it so far as these candlesticks are concerned. It is admitted that candlesticks were carried in place of the banished portable candle holders until January, 1956, and that this was contrary to the spirit if not the letter of the order of 1954. In his letter to the archdeacon in January, 1956, the vicar undertook not to use the candlesticks again but said that servers would carry candles without holders. It is admitted that candles were carried between January and October, 1956. This, too, was in breach of the spirit of the order of 1954 whether the candles were in candlesticks or not. There is in fact an acute clash of testimony whether candlesticks were used during this period. The opponents' witnesses say that they were, the petitioners' witnesses say that they were not. I do not consider it necessary for me to say that I believe one set of witnesses and disbelieve the other. What I do not believe is that any witness deliberately set out to commit perjury in this case. Any one can be mistaken in his or her recollection whether it was one and a half years ago or two and a half years ago that a candle which was certainly carried was carried in a candlestick. The only contemporary record, Miss Whitton's diary, is silent on the point since that only speaks of candles being carried without making mention of candlesticks. In any case I do not regard the matter as of much importance. The important thing is that candles continued to be carried contrary to the spirit of the order of 1954 notwithstanding the archdeacon's intervention. This practice only stopped in October, 1956 (the month in which citation issued), when the petitioners consulted their solicitors and received advice on which they wisely acted. The petitioners admit the foolishness of their ways, apologise and say they will not err in this respect again. The opponents seek the removal of all eight candlesticks comprised in articles 17 and 18. As regards the six candlesticks comprised in article 17 the order of 1954 did not contain the limiting words " until further order " and it may be that I have no power to grant a faculty for their removal, but if I have power I do not propose to exercise it; nor do I propose to exercise the power which I undoubtedly have over the two candlesticks normally on the credence table comprised in article 18. I decline to order the removal of these candlesticks because I do not consider it necessary while the conditions which have prevailed since October, 1956, continue. The removal of articles in 1954 caused real distress to the bulk of the congregation and I am reluctant to add to that distress now by ordering further removals unless I consider it absolutely necessary. The removal of candlesticks would be in the nature of a punishment of the petitioners which is not the concern of the faculty jurisdiction. It would not, I consider, be in the interests of the bulk of the congregation which is a matter of concern in the exercise of the faculty jurisdiction. In saying this, I am taking into account that the petitioners include the two churchwardens and that they are supported by a unanimous parochial church council and that the opponents are only seven in number.

I will deal next with the sanctuary gong and two sanctuary bells (article 31). There is no dispute as to fact in this respect. CHANCELLOR HYLTON-FOSTER held that these were illegal ornaments, that the opponents were entitled to have the law applied to them and ordered their removal. It is admitted that when they were removed the petitioners introduced a hand bell and also caused a cord or rope to be led from the belfry through a hole in the roof to the interior of the church and that both the hand bell and with the assistance of the cord or rope a bell in the belfry was rung on the same occasions in the services as those when the gong and bells removed under the order of 1954 had previously been rung. The less said about these unworthy subterfuges the better. They ceased in January, 1956, and have not been resumed. The vicar very properly apologised for them and counsel for the petitioners said that these practices would not occur again; he told me that the hand bell was no longer in the church and on this footing no relief is required in respect thereof. As regards the cord or rope he said that he would submit to its removal if that would remove suspicion but that he wished for it to be retained for use at funerals. I consider that its removal would assist to remove suspicion and I will grant a faculty to remove it.

Lastly, I come to the aumbry (article 21) and the large ciborium (article 30). At the same time I will deal with the petitioners' counter-petition which relates exclusively to the large ciborium and the small ciborium. As regards the aumbry, counsel for the opponents very properly did not press for its removal although he reserved the right to question in a higher court the judgment in *Re Lapford* (5) ([1954] 3 All E.R. 484) where the late Dean of the Arches, SIR PHILIP BAKER-WILBRAHAM considered that a faculty could be granted authorising the introduction of an aumbry in a case where the bishop has sanctioned the reservation of the Blessed Sacrament and where there is compliance with the provisions of the rubric in the alternative order for the communion of the sick contained in the Prayer Book approved by the Church Assembly but rejected by the House of Commons in 1928. A judgment of the Arches Court of Canterbury is not a binding authority in the province of York, but is naturally treated with the greatest respect in particular because the judge of the two provincial courts is required by statute to be the same person*. In any case, therefore, I would have followed the *Lapford* (1) judgment and allowed the aumbry to remain in view of the fact that the bishop has sanctioned the reservation of the Blessed Sacrament in this church.

The two ciboria have been in the church for some years. The large ciborium was given in 1935 by members of the Coverdale family in memory of their father. The small ciborium was given about eight years ago by members of the youth fellowship in memory of the daughter of one of the opponents. The custom has been to use the large ciborium for reservation and the small ciborium in the celebration and administration of the Holy Communion, but the small ciborium has also been used for reservation when the large ciborium has been removed for cleaning or for use in the celebration and administration of the Holy Communion; the large ciborium is so used on occasions when there are more than a hundred communicants. The large ciborium was formerly in the tabernacle and with the tabernacle was ordered to be removed from the church by CHANCELLOR HYLTON-FOSTER. The small ciborium has not hitherto been the subject of faculty proceedings. The large ciborium has not in fact been removed from the church. Instead it has been used in the aumbry. In this respect the order of 1954 has never been obeyed and the vicar in cross-examination stated that he was not prepared to obey it. The petitioners have pleaded that the use of the large ciborium in the aumbry was in accordance with the express instructions of the bishop given to the vicar at or about the time of the removal of the tabernacle. The inference to be drawn from the evidence of the vicar and of the treasurer of the parochial church council, who was called as a witness by the petitioners, is that the large ciborium was so used with the bishop's sanction. The bishop, however, had no power to vary the order of 1954. CHANCELLOR HYLTON-FOSTER was sitting as a judge independent of the bishop and uncontrolled by any views of the bishop, compare *Ex p. Medwin* (6) ((1853), 1 E. & B. 609). If the petitioners were not content with the order of 1954 as regards the large ciborium they should not have disobeyed it, they should have appealed against it to the Chancery Court of York. The order of 1954 provided that if the petitioners did not lodge a declaration signifying their consent to remove (among other things) the large ciborium within the three-month period allowed a faculty should issue to the opponents to effect the removal. The petitioners have been treated as having lodged such a declaration, but have not removed and obstinately refuse to remove the large ciborium. I cannot, as counsel for the petitioners invited me to do, deal with his counter-petition as if the order of 1954 had never been made, or treat this part of the order of 1954 as a slip and by changing it convert the petitioners' disobedience into obedience. The opponents got an order for the removal of the large ciborium in 1954 and in my view they are entitled to have that order implemented. I shall, therefore, grant a faculty for the removal of the large ciborium which will have to be disposed of by the churchwardens in such way as they think fit. The authority to remove will be granted to the petitioners in the first instance; if they do not act on it within the time specified in the faculty the opponents will have authority to remove.

The petitioners also ask for a confirmatory faculty for the small ciborium. Counsel for the opponents argued that I could not grant such a faculty even if I were otherwise disposed to do so because a ciborium was an ornament forbidden by the ornaments rubric and he referred me to the well known passage on the ornaments rubric in the opinion of the Judicial Committee of the Privy Council in *Martin* v. *Mackonochie* (7) ((1868), L.R. 2 P.C. 365 at p. 390). In my view, a ciborium is not an illegal ornament. A ciborium is defined in the OXFORD DICTIONARY OF THE CHRISTIAN CHURCH (1957) as " a chalice-shaped vessel, with a lid, used to contain the Sacramental Bread ". It is not only used in connexion with reservation; it is also used to contain the Sacramental Bread during the administration of the Holy Communion. If it is not expressly covered by the rubric, I consider that it is an article consistent with or subsidiary to the services of the Church of England and as such is not forbidden by the rubric. Further, as regards the small ciborium I am not affected by any previous order. Counsel for the petitioners argues that it is highly desirable to have a ciborium to contain the Blessed Sacrament where reservation takes place in an aumbry, and I agree with him. A ciborium is the receptacle normally used for this purpose and I consider that the small ciborium can and should be used for this purpose in this church. I propose, therefore, to grant a faculty confirming the retention of the small ciborium.

---

* See the Public Worship Regulation Act, 1874, s. 7; 7 HALSBURY'S STATUTES (2nd Edn.) 621.

It only remains to deal with the costs of this case. If the petitioners had accepted the order of 1954 loyally, I do not consider that these proceedings would ever have begun. When the opponents began them, they asked for relief in two matters in which in my view no relief was called for, but in other respects I consider that they had a grievance. Had they been more charitably minded they might have been content with the result of the archdeacon's intervention, but the petitioners' continued use of lights after such intervention contrary to the spirit of the order of 1954 and the petitioners' continued disobedience (which continues today) to that order as regards the large ciborium afford some explanation why these proceedings have continued to their bitter end. On the whole I consider that justice will be done if the petitioners pay the opponents' costs of the interlocutory proceedings which came before me in February and pay a half of the rest of the opponents' costs. Each party will pay the court fees incurred by that party: the petitioners will pay to the opponents a sum equal to the court fees payable by the opponents in respect of the interlocutory proceedings and a sum equal to a half of the court fees payable by the opponents in respect of the rest of the proceedings. The form of faculty will be settled in chambers.

Order accordingly.

Solicitors: *Ralph W. T. Lubbock*, Newcastle-upon-Tyne (for the seven parishioners); *Trollope & Winckworth* (for the vicar and churchwardens).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

FOMENTO (STERLING AREA), LTD. v. SELSDON FOUNTAIN PEN CO., LTD. AND OTHERS.

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Tucker, Lord Keith of Avonholm and Lord Denning), October 22, 23, 24, December 4, 1957.]

Patent—Licence—Information for ascertaining royalties—Licensors' auditors to be given "all such other information as may be necessary or appropriate to enable the amount of the royalties payable" to be ascertained—Whether auditors entitled to information related to articles which were similar to patented articles but which licensees stated were not patented.

Company—Auditor—Functions and duties.

By a deed of terms the respondents agreed the terms on which a full but *appellants non-exclusive sub-licence was granted to the respondents to manufacture, use and sell writing instruments, spare parts therefor, refills, ink and writing paste which were wholly or partially protected by certain letters patent. Royalties were payable on sales of articles protected by the patents. By cl. 7 of the deed of terms* the respondents undertook, inter alia, to give the appellants' auditors "all such other information as may be necessary or appropriate to enable the amount of the royalties payable hereunder to be ascertained", and the auditors, if so required by the respondents, were to give an undertaking to treat the information as confidential. In the course of carrying out an audit, the appellants' auditors ascertained that three types of refills were being sold by the respondents, types A, B and C. Royalties had been paid on type A but not on types B and C. They asked the respondents for specimens or specifications of types B and C in order to ascertain whether they were patented articles or not. Fraud or mistake was not alleged. The respondents refused to give this information on the ground that types B and C were not patented articles and that they were only required to give information related to patented articles.

Held (VISCOUNT SIMONDS and LORD TUCKER dissenting): the appellants' auditors were entitled to the information which they sought since the words "all such other information . . .", in cl. 7, extended to this information, which was necessary or appropriate to enable the auditors to carry out their work as auditors and verify the amount of royalties payable, and no limitation of the words should be implied; moreover, if specimens had been supplied, the auditors could have sought advice whether the specimens were within the patents without committing any breach of confidence.

Duties and functions of auditors discussed: see p. 15, letters F to I, and p. 23, letters B to H, post.

Appeal allowed.

Patent—Licence—Most favoured licensee clause—Condition in licence that if sub-licence granted at lower royalties such royalties should be substituted for those in the licence—Royalty structure in sub-licence different from that in licence—Whether royalties payable under sub-licence substituted for those payable under licence.

By a deed of terms the appellants and the respondents agreed the terms on which a full but non-exclusive sub-licence was granted to the respondents to manufacture, use and sell writing instruments, spare parts therefor, refills, ink and writing paste which were wholly or partially protected by certain letters patent. By these terms royalties on sales of patented articles were payable on a sliding scale. By cl. 15 of the deed of terms it was provided that, should the appellants grant a licence under the patents at a lower royalty, that lower royalty should apply in substitution for the royalty agreed in the deed of terms. The royalty payable under the deed of terms varied from six per cent. on the cheapest article to three per cent. on the most expensive articles. The appellants granted a non-exclusive sub-licence to sell the patented articles to a third party at a royalty of five per cent. on all such articles alike. The respondents claimed, under cl. 15 of the deed of terms, that the royalty of six per cent. payable by them should be reduced to five per cent.

---

* The terms of cl. 7 are set out at p. 18, letter G, post.

Held: the respondents were entitled to reduce the royalty of six per cent. payable by them to five per cent., retaining the benefit of their sliding scale in so far as it bound them to pay less than five per cent. on certain articles, because " royalty " in cl. 15 meant the relevant royalty for articles in a comparable category and not the total sum payable for all articles sold under the deed of terms.

Appeal dismissed.

[As to the duties of an auditor, see 6 HALSBURY'S LAWS (3rd Edn.) 387, para. 751; and for cases on the subject, see 9 DIGEST (Repl.) 587-589, *3880-3898*.

For form of licence verification clause in a non-exclusive compulsory licence, see Form 46, cl. 7, in 11 ENCY. FORMS & PRECEDENTS (3rd Edn.) 762; and for a clause providing for information to be given by licensees in a licence granted by the Comptroller, see ibid., p. 766, Form 47, cl. 5.]

Cases referred to:

(1) *Re Kingston Cotton Mill Co.* (*No. 2*), [1896] 2 Ch. 279; 65 L.J.Ch. 673; sub nom. *Re Kingston Cotton Mill Co., Ltd., Ex p. Pickering & Peasegood* (*No. 2*), 74 L.T. 568; 9 Digest (Repl.) 587, *3880*.

(2) *Roberts* v. *Hopwood*, [1925] A.C. 578; 94 L.J.K.B. 542; 133 L.T. 289; 89 J.P. 105; 33 Digest 20, *83*.

(3) *Re Ridsdel, Ridsdel* v. *Rawlinson*, [1947] 2 All E.R. 312; [1947] Ch. 597; [1947] L.J.R. 1486; 2nd Digest Supp.

(4) *Bevan* v. *Webb*, [1901] 2 Ch. 59; 70 L.J.Ch. 536; 84 L.T. 609; 1 Digest 272, *37*.

Appeal.

Appeal by Fomento (Sterling Area), Ltd. from an order of the Court of Appeal (LORD EVERSHED, M.R., BIRKETT and ROMER, L.JJ.), dated Nov. 8, 1956, reversing an order of HARMAN, J., dated July 30, 1956, whereby he (i) granted the appellants a declaration that the respondents, Selsdon Fountain Pen Co., Ltd., Ralph Selsdon and Rebecca Selsdon, were in breach of a sub-licence under certain patents relating to ball-pointed writing instruments and parts thereof and that the sub-licence had been effectively determined by notice in writing given by the appellants, and (ii) dismissed a counterclaim by the respondents for a declaration that they were entitled to more favourable royalty terms than those provided by the sub-licence by reason of the subsequent grant by the appellants of a sub-licence to another company.

The facts are set out in the opinion of VISCOUNT SIMONDS.

K. E. Shelley, Q.C., *K. R. H. Johnston, Q.C.*, and *J. N. K. Whitford* for the appellants.

Charles Russell, Q.C., and *Owen Swingland* for the respondents.

The House took time for consideration.

Dec. 4. The following opinions were read.

VISCOUNT SIMONDS: My Lords, in the action and counterclaim out of which this appeal arises the appellants claimed that the respondents had committed a breach of an agreement to which I shall refer, and that they had, accordingly, rightfully determined it. The respondents, denying the breach and rightful determination, alleged that the appellants had themselves broken a term of the agreement relating to the grant of a licence at a lower royalty and claimed the appropriate relief. On both points, HARMAN, J., gave judgment in favour of the appellants, but on both points was reversed by the Court of Appeal.

I have referred to an agreement between the parties but, in fact, there were two documents which must be read together. The first was a deed, referred to as a " deed of terms " dated May 17, 1950, the second a formal sub-licence of the same date. A complicated history of dispute lies behind the execution of these documents. I think it necessary only to say that they were originally entered into in settlement of litigation between a company called the Miles Martin Pen Co., Ltd. and the respondents. That company changed its name first to Biro Pens, Ltd. and then to Biro Swan, Ltd.; the head licence, under which the sub-licence to the respondents was granted, was at a later date surrendered by Biro Swan, Ltd. with the benefit of the sub-licence which had been granted to the respondents, while at the same time a head licence was granted to the appellants for the area within which the sub-licence to the respondents was operative. In settlement of further disputes, the appellants and respondents and other parties in 1954 executed another deed of which I need only say that its practical effect was that, for the purposes of that appeal, the relevant clauses of the deed of terms and sub-licence can be read as if the name of the appellants were substituted for that of the Miles Martin Pen Co., Ltd. I am not in a position, nor is it necessary, to explain the purpose or effect of these moves and countermoves in the history of the relations between the parties. Nor need I refer to the terms of the formal sub-licence. It is sufficient to refer to the deed of terms and that I must do in some detail.

The deed of terms (to which a Uruguayan company whom I need not further mention was also a party) first recited that the Miles Martin Pen Co., Ltd. (in whose shoes the appellants now stand) owned a sole and exclusive licence for twenty years from Dec. 9, 1945, to manufacture, distribute, market, service and exploit ball-pointed pens, refills and ink or writing paste, such licence being granted as therein mentioned, and had agreed to grant to the respondents a sub-licence on the terms thereinafter appearing. It then so far as material proceeded as follows, the respondents being referred to as " the Selsdon Company ".

> " 2. Miles Martin hereby agrees to grant and the Uruguayan company and Martin hereby agree to confirm to the Selsdon Company full but non-exclusive sub-licence to manufacture use and sell writing instruments spare parts therefor refills ink and writing paste which or any part of which is protected by the patents which are granted or which shall proceed to grant (hereinafter called ' the patented articles ') in the countries and territories listed in the schedule hereto (hereinafter called ' the licensed territory ') upon and subject to the terms herein and in the said sub-licence contained for a term of twenty years from Dec. 9, 1945.
>
> " 3. During the continuance of the said sub-licence and of any further sub-licence which may hereafter be granted by Miles Martin in pursuance of these presents and provided that all or any of the patents which are granted or which shall proceed to grant remain subsisting in the United Kingdom and have not all been declared invalid by a court of competent jurisdiction therein the Selsdon Company shall pay to Miles Martin as and by way of royalty the following sums subject to the deduction of United Kingdom taxes required by law, that is to say:—
>
> " (a) Six per cent. on the full selling price to the public (excluding purchase tax) if such price is one pound or less of all or any complete writing instruments sold by it which or any part of which is protected by the patents
>
> " (b) Four per cent. on the full selling price to the public (excluding purchase tax) if such price is two pounds or less but more than one pound of all or any such writing instruments as aforesaid

> "(c) Three per cent. on the full selling price to the public (excluding purchase tax) if such price exceeds two pounds of all or any such writing instruments as aforesaid
>
> "(d) Six per cent. on the full selling price to the public (excluding purchase tax) of all or any parts for writing instruments refills ink and writing paste sold by it which or any part of which is protected by the patents. The 'full selling price to the public' shall mean the full price at which the article is normally offered for sale to the public (i.e. the price commonly known as the full list price) at the time and place of the sale in question irrespective of the price actually paid or received and in the case of writing instruments shall mean the price of the complete fully assembled writing instrument or if the writing instrument is sold in dissembled parts shall mean the aggregate price of all the parts Provided that nothing in this clause shall make subject to royalties any articles which are returned otherwise than for re-sale to the Selsdon Company for full credit.
>
> "7. The Selsdon Company shall keep or cause to be kept at its principal place of business for the time being all necessary books of account relating to the sale or distribution by it of the patented articles and containing such true and complete entries as may be necessary or appropriate for computing royalties hereby reserved and showing all relevant sale prices and shall at all reasonable times if and when required by Miles Martin produce the said books of account to its auditors for the time being and permit them to inspect the same and take copies or extracts therefrom and shall give to the said auditors all such other information as may be necessary or appropriate to enable the amount of the royalties payable hereunder to be ascertained as aforesaid Provided that such auditors shall if so required by the Selsdon Company give an undertaking to treat all such information obtained as confidential information disclosed only for the purpose of verifying the amount of royalties which have become payable Provided Further that the Selsdon Company will supply when called upon so to do by Miles Martin full details of all ball-pointed pens and other supplies returned to them for credit."

On Aug. 10, 1954, the parties entered into a further agreement, the expressed purpose of which was to remove doubts as to the proper construction of cl. 7 of the deed of terms. It failed so signally of its purpose that neither party relied on it in your Lordships' House.

I come now to the alleged breach by the respondents of their obligations under cl. 7, which gave the appellants the right to determine the sub-licence. In the course of carrying out the audit for the period Apr. 1, 1953 to June 30, 1954, for the purpose of ascertaining the amount of royalties payable, the appellants' auditor ascertained, as the fact was, that there were recorded in the books of the respondents sales of three types of refills which were called type "A", type "B" and type "C". The respondents included in their returns for royalty purposes the refills of type "A"; they did not include those of type "B" or type "C". The auditor asked for further information regarding type "B" and type "C". He demanded a specification or description or a specimen of these types in order that he might satisfy himself that they were not patented articles (i.e., articles which, or any part of which, were protected by the patents in question) and, accordingly, subject to royalty. The respondents declined to give this information, deeming it sufficient to say that they were not patented articles, and that it was only in regard to patented articles that they were required to give information. The appellants claim and the respondents deny that the respondents have committed a breach of their obligations under cl. 7. This was, and remains, the issue between the parties, and the difference of judicial opinion on it suggests that it is not easily determined. It is not disputed that the sub-licence has been lawfully determined if there has been such a breach.

My Lords, it is an irrelevant consideration that the question asked is an easy one to ask and, maybe, an easy one to answer. Certainly it is easy to demand a type " B " refill and easy to hand one over, though it may require a decision of this House to determine whether or not it is a patented article. Nor can it be determined whether it is necessary or appropriate that the respondents should furnish certain information to enable the appellants' auditor to perform his duty unless the scope of that duty is precisely defined. It is a deceptively easy answer to say that it is his duty to ascertain the amount of the royalties payable under the sub-licence, and that any information which helps him to do so must be necessary or appropriate. It would, of course, be properly assumed in such an answer that the information would be asked for in good faith and for no extrinsic purpose. But, my Lords, I am satisfied that this answer is radically unsound and, as I unfortunately differ from some of your Lordships, I must give my reasons fully. They are not materially different from those given by the Court of Appeal.

The relevant clause is such a clause as I should expect to find in a licence to exploit a patent. It is a reasonable protection for the licensor that his licensees should keep books of account showing the distribution and sale of patented articles, and that such books should contain true and complete entries to enable the royalties to be computed and should show all relevant sale prices, and that they should, if required, at all reasonable times produce the books to the licensor's auditors for their inspection and allow them to take copies or extracts. Nor does it surprise me that the licensees should be required to give

> " all such other information as may be necessary or appropriate to enable the amount of the royalties payable hereunder to be ascertained."

It was conceded that much information could be gleaned about admittedly patented articles from price cards and other literature which would not appear from the books of account. It is obvious that such further information might form a valuable check on what appeared from the books alone. But it is at this point that the controversy begins. For the appellants claim that their auditor is entitled to information which will not only enable him to check the number of patented articles sold and the price at which they have been sold, but also to examine and, I suppose, decide whether other articles have not been included for computing the royalty which ought to have been included. In the present case, the demand is a simple one " hand over the article and I will see whether by mistake or deliberately you have been falsifying the account ", though, as I have pointed out, the question may be one of extreme nicety. To this the respondents give an answer, which is somewhat contemptuously described as their " ipse dixit " that, however easy it may be to do so, they will give no information about anything which is not a patented article, and that this was not a patented article. Let me observe at this stage that no charge of fraud or mistake has been made; if it were, other considerations would arise. Here the position is quite different. In effect the auditor says " I have all the information which enables me to compute the amount of royalties on the articles which you say are patented, but how do I know that you are not mistaken or fraudulent ? Let me see other articles that I may form my own judgment on them ". My Lords, I cannot too strongly express the view that this forms no part of the right or duty of an auditor under such a clause as this. I say " right or duty ", for, if it is his right, it is also his duty. It is unnecessary to consider what may be his right or duty, under other and different clauses, and it is wholly irrelevant to refer to his statutory duties under the Companies Acts. I cannot, however, forbear to recall that it has often been said that his duty is not detection but verification, and on one occasion more picturesquely that he is a watchdog not a bloodhound (see *Re Kingston Cotton Mill Co.* (*No. 2*) (1), [1896] 2 Ch. 279).

In their consideration of this clause the Court of Appeal have, in my opinion, rightly laid great stress on the fact that it is an auditor whose rights they are considering. No one will deny that, in the course of their professional A practice, accountants, chartered or incorporated, may acquire a wide range of commercial knowledge, but the accountant will not claim that it is part of his professional skill and expertise to determine whether or not an article, or any part of it, is protected by a patent. The accountant here concerned frankly said that, given the article, he would take the advice of a patent agent—who, in his turn, might well say it was a question about which he would like to consult B counsel. This appears to me to throw a flood of light on the scope of the clause. The obligation of the licensees is to give to the auditor books and other information which will enable him as an accountant to ascertain or (to use another word in the same context) to verify the amount of royalty payable under the licence. If he must rely not on what his own professional skill and knowledge have taught him but on the advice of others—on a question of patent likely C enough to be but tentative—for the ascertainment and verification of the amount of royalty payable, he cannot fairly say that he has himself ascertained or verified anything at all. He can, at most, say that, though the licensees claim that a certain article is not, such and such a patent agent or counsel has advised that it is, or may be, protected by a patent. I decline to believe that the clause has such a scope as this. D

But, it is said, even if the clause has such a result as I have indicated, at least it will have the advantage for the licensor that it will give him information which he would otherwise have difficulty in getting. I am by no means satisfied that he would have any difficulty. But suppose it to be so. I see no valid reason for saying that the clause is intended to authorise a roving inquiry by the licensor through the auditor in order to see whether the licensee is manufacturing under E the patent other articles than those which he admits to be protected and brings into the royalty account. Where is this to end ? HARMAN, J., from whose opinion I am always reluctant to differ, committed, I think, a fundamental error which was repeated many times at the Bar, when he said that the refills of type " B " and type " C " were, prima facie, articles carrying royalty. They were nothing of the kind, any more than were any other " writing instruments spare parts F therefor refills ink and writing paste " which the licensees sold in the course of their business. He may have been influenced by the fortuitous and insignificant fact that articles of type " A " and type " B " or type " C " were recorded as having been sold at the same time and under the same docket. I say " insignificant " because there is as little significance in a vendor of " writing G instruments " selling two different types at the same time to the same purchaser as there would be in the same manufacturer making two types in one factory. And so I ask, where is this demand by the auditor for further information to end ? If it is his right and, therefore, as I have pointed out, his duty to require further information because he ascertains that, in addition to type " A " refills, the licensees sell other refills, he will presumably be entitled to inquire, and fall H short of his duty if he does not inquire, about every other article sold by the licensees which falls, or might be claimed to fall, within the so-called patented field, and demand specimens for submission to expert opinion. Thus, under the guise of an accountancy transaction, a far-ranging investigation of the licensees' manufactures will be involved. At the risk of repeating myself, I must say that an interpretation of the clause which has this inevitable result is I plainly repugnant to common sense and should be rejected.

A second consideration which to some extent influenced the Court of Appeal lay in the clause requiring the auditor to give an undertaking to treat as confidential any information given to him, and a good deal of argument was addressed to it at the Bar. I find it enough to say that the clause certainly does not militate against the opinion that I have otherwise formed, though I am not satisfied that it adds any weight to it.

I turn now to the second matter of appeal. It is independent of the first and arises on cl. 15 of the deed of terms which provides that, should Miles Martin (that is now the appellants) grant a licence under the patents in question at a lower royalty, that lower royalty should apply in substitution for the royalty therein agreed, with a proviso which is immaterial. On July 16, 1953, the appellants granted a non-exclusive sub-licence to Biro Swan, Ltd. to exploit the patents which had been the subject of the sub-licence to the respondents. It was provided, by cl. 5 (a) of this sub-licence, that Biro Swan, Ltd. should pay to the appellants during its continuance by way of royalty a sum at the rate of five per cent. of the advertised price to the public in the country of sale (less purchase tax) of all ball-pointed writing instruments manufactured and sold or manufactured and delivered by way of gift but not trade samples. When this sub-licence was brought to the notice of the respondents, they not unnaturally claimed that cl. 15 of their own sub-licence was brought into play, and that the royalty of six per cent. payable by them under cl. 3 (a) and cl. 3 (d) thereof should be reduced to five per cent. I do not know whether before action brought they were aware of the further clause in the sub-licence to Biro Swan, Ltd., whereby the appellants acknowledged that that sub-licence was granted on more favourable terms than that to any other sub-licensee. It would not, I think, have deterred them from prosecuting their claim, but it must not be regarded as conclusive in their favour.

It is clear that the effect of the Biro Swan sub-licence, as I will call it, is to enable that company, which presumably competes with the respondents, to pay only five per cent. royalty in respect of the wide range of goods covered by cl. 3 (a) and cl. 3 (d) of the respondents' sub-licence as against six per cent. payable by the respondents. That is precisely the competitive advantage against which cl. 15 was intended to protect the respondents.

But it is said that, if the sum of the royalties at five per cent. paid by Biro Swan in respect of all the articles covered by cl. 3 of the respondents' sub-licence (the royalties on which vary from six per cent. to three per cent.) is added up over a certain period, it will be found, or may be found, or at least it has not been proved that it will not be found, that it is not a lower sum than if they had paid at the several rates prescribed by the respondents' sub-licence. This is an ingenious but unconvincing argument. Clause 15 of the respondents' sub-licence is, by its nature, intended to come into operation at once and once for all when a licence at a lower royalty has been granted. The appellants' contention involves that, at the end of some arbitrary period a calculation, which the respondents would have no means of making or checking, must be made to ascertain both what Biro Swan in fact paid and what they would have paid if they had paid at different rates. Only then could it be said that the appellants had, or had not, granted a licence at a lower royalty, so as to bring cl. 15 retrospectively into operation. Nor is it clear whether a fresh calculation would, in this view, have to be made at the end of the next arbitrary period. My Lords, this is to make nonsense of what is intended to be a workable commercial document, and it does so unnecessarily. For it is easy to give an effective meaning to it by the simple process of expanding the clause in the Biro Swan sub-licence, so that a royalty of five per cent. is chargeable against each of the groups of articles comprised in cl. 3 (a), (b), (c) and (d) of the respondents' sub-licence, and then asking whether, in respect of any of those groups, a lower royalty is payable under the Biro Swan sub-licence. This is well expressed by the learned Master of the Rolls (LORD EVERSHED) where he says that the phrase in cl. 15, " the royalty herein agreed ", means the relevant royalty, and if it turns out, therefore, as regards any particular section of the particular field, another sub-licensee is granted the right to sell them at a royalty which, in respect of that class of articles, is lower than the appropriate or relevant royalty in the respondents' sub-licence, then the latter is reduced to the level of the former. I agree with this, and would add only two further observations. It appears to me that to give effect to the appellants' contentions would be to open the door to trickery, for nothing could be easier than to alter slightly, even insignificantly, the structure of the royalty clause in a later sub-licence and then to argue, as the appellants have argued here, that the earlier royalty clause has no effective operation. Finally, it was argued that, under the Biro Swan sub-licence, the sub-licensees had to pay royalty on ball-pointed writing instruments, etc., whether or not they were manufactured under the relevant patents. This was said to add to the difficulty of determining whether the royalty payable under the Biro Swan sub-licence was a lower one or not. I dare say it would, but without determining a question in the absence of one of the vitally interested parties I would say that such an interpretation has little to commend it and, if it is the right one, it makes cl. 15 on the appellants' construction even more unworkable than I had supposed.

I would dismiss the appeal on both points.

LORD MORTON OF HENRYTON: My Lords, on May 17, 1950, predecessors in title of the appellants granted to the respondents

> " full but non-exclusive sub-licence to manufacture use and sell writing instruments spare parts therefor refills ink and writing paste which or any part of which is protected by the patents which are granted or which shall proceed to grant . . . in the countries and territories listed in the schedule hereto . . . for a term of twenty years from Dec. 9, 1945 "

subject to certain terms and conditions. The patents in question related to ball-pointed pens and accessories thereto, covered by a large group of patents. On the same day the same parties entered into a " deed of terms " setting out the terms on which the sub-licence was granted. It is common ground, for the purposes of this appeal, that the appellants were from 1954 the successor in title of the company referred to in this deed as " Miles Martin ".

Clause 3 of the deed of terms provided that the respondents (therein referred to as " the Selsdon Company ") were to pay to Miles Martin as and by way of royalty (a) six per cent. on complete writing instruments protected by the patents which were sold at a price of £1 or less; (b) four per cent. on such writing instruments sold at a price between £1 and £2; (c) three per cent. on such writing instruments sold at a price exceeding £2; and (d) six per cent. on parts for writing instruments, refills, ink and writing paste. The royalty was to be measured on the " full selling price to the public ", which was more fully defined in the deed. Clause 7 of the deed of terms must be quoted at length. It is as follows:

> " The Selsdon Company shall keep or cause to be kept at its principal place of business for the time being all necessary books of account relating to the sale or distribution by it of the patented articles and containing such true and complete entries as may be necessary or appropriate for computing royalties hereby reserved and showing all relevant sale prices and shall at all reasonable times if and when required by Miles Martin produce the said books of account to its auditors for the time being and permit them to inspect the same and take copies or extracts therefrom and shall give to the said auditors all such other information as may be necessary or appropriate to enable the amount of the royalties payable hereunder to be ascertained as aforesaid provided that such auditors shall if so required by the Selsdon Company give an undertaking to treat all such information obtained as confidential information disclosed only for the purpose of verifying the amount of royalties which have become payable . . . "

Then follows a proviso which is immaterial for the present purpose. Clause 8 provided that the Selsdon Company should render a quarterly statement showing the total sales effected by it of the patented articles during the preceding three months, together with the relevant sale prices and the sum due to Miles Martin for royalties in respect of such period, and should, with each such statement, pay or remit to Miles Martin the sum for royalties thereby shown to be due. Clause 11 provided that the Selsdon Company should notify Miles Martin of all the names under which they were selling any of the patented articles. Clause 13 provided that, if either of the parties to the agreement should commit any breach of any of the obligations or agreements on their part therein contained, the other party might give notice in writing calling on the party committing such breach to remedy the same; and if such breach should not be remedied within thirty days thereafter, the other party should be at liberty to terminate the sub-licence by notice in writing. Clause 15 is of importance and is in the following terms:

> " Should Miles Martin grant a licence under the said patents at a lower royalty that lower royalty shall apply in substitution for the royalty herein agreed . . . "

Then there followed a proviso which is irrelevant for the present purpose.

Two quite separate questions arise on this appeal, the first under cl. 7 of the deed of terms, the second under cl. 15. The first question is—Did certain information requested by the appellants' auditors, and refused by the respondents, come within the description of

> " all such other information as may be necessary or appropriate to enable the amount of the royalties payable hereunder to be ascertained as aforesaid "

within the meaning of cl. 7 of the deed of terms ?

The events giving rise to this question are as follows. The auditors of the appellants were Messrs. Farrow, Bersey, Gain, Vincent & Co., and the partner carrying out the audit under cl. 7 was a Mr. Young, who gave evidence at the trial. It is, I think, obvious that Mr. Young could not " ascertain " the amount of the royalties *payable* under the deed without satisfying himself on two points—(a) the total number of articles sold which were within the patents, and (b) the full selling price of each of these articles. He found from inspection of the books and documents before him that the respondents had sold, amongst other articles, refills described as " type A, type B and type C " respectively, and it is to be noted that refills are included among the articles mentioned in cl. 1 of the sub-licence and in cl. 3 of the deed of terms. Consequently, Messrs. Farrow & Co. wrote, on Oct. 13, 1954, to the accountants of the respondents saying that Mr. Young would like an appointment with Mr. Selsdon (the second respondent) to discuss certain matters which had arisen during the audit of the royalties payable to the appellants. They continued:

> " In particular we would mention the following points which Mr. Young wishes to discuss with him: (a) the sale of types " B " and " C " refills and the patents by which these refills are covered . . . "

The respondents' accountants replied on Oct. 28, 1954:

> " With regard to the points raised in your letter, we are instructed to say:—(a) " B " and " C " refills are not covered by patents . . . "

On Nov. 23, 1954, Messrs. Farrow & Co. replied saying (inter alia):

> " We should be obliged if you would obtain for us specimens or specifications of each of the ' A ', ' B ' and ' C ' type refills so that we may satisfy ourselves which are covered by the Biro patents. We feel sure that as accountants you will agree that the above information constitutes the minimum necessary to enable us to certify the royalties payable by your clients."

Further correspondence followed, but the respondents, by their accountants, took up the attitude that the auditors were not entitled to the information which they requested. Thereupon the appellants served the necessary notice under cl. 13 of the deed of terms, and, as the respondents failed to comply with it, the appellants purported to determine the licence by letter dated Mar. 22, 1955, and issued the writ in this action claiming that the sub-licence and deed of terms had been terminated. The respondents filed a counterclaim to which I shall refer later. Harman, J., granted the declaration as claimed, but his decision was reversed by the Court of Appeal.

I now return to the first question which I have already stated. My Lords, all the words of cl. 7 of the deed of terms are English words in common use, and it seems to me clear that the information sought by Mr. Young was, in the circumstances, " necessary or appropriate to enable the amount of the royalties payable hereunder to be ascertained as aforesaid ". Mr. Young could not ascertain the amount of the royalties payable without ascertaining whether the refills called by the respondents " type B and type C " were, or were not, within the patents. The respondents might honestly believe that the types of refills to which they had given these names did not come within the patents, but they might well be mistaken. Further, it is, I think, important to note the wording of the proviso to cl. 7:

> " Provided that such auditors shall if so required by the Selsdon Company give an undertaking to treat all such information obtained as confidential information disclosed only for the purpose of verifying the amount of royalties which have become payable . . ."

The word " verifying " affords a strong indication that the auditors were not bound to accept the statement of the respondents which was, after all, merely a statement of their opinion. It is, indeed, difficult to see why the respondents should have refused to supply specimens of types B and C to the auditors. These articles had been sold, and any person who purchased one would be entitled to take it to pieces and observe its construction if he so desired. If the specimens had been supplied, all that Mr. Young had to do was to show the articles to a patent agent, hand him the patents, and ask him whether either of the articles came within any of the patents. In so doing, he would not be revealing any information which was not already in the possession of the public.

The result is that, in my opinion, if the words in cl. 7 are read in their ordinary meaning and without putting any gloss on them, the auditors were entitled to ask for the information now in question, and the respondents committed a breach of cl. 7 in refusing it. The respondents, however, invite your Lordships to put a very limited construction on the clause. This construction is stated in para. 14 (i) of their printed Case. Counsel amplified this statement in argument but did not depart from its terms. It is as follows:

> " Clause 7 of the deed of terms in all its parts, including that referring to information, is related only to patented articles: unless an article dealt in by the licensee is established as being a patented article there can be no breach in its absence from the books of account kept or from the entries therein ' necessary or appropriate for computing royalties hereby reserved ': nor consequently can information as to such article be required on the ground that it is information ' necessary or appropriate to enable the amount of the royalties payable hereunder to be ascertained as aforesaid '."

My Lords, I am quite unable to accept this construction of the clause. It involves, in effect, implying in cl. 7, after the words " all such other information " the insertion of the words " relating to articles stated by the Selsdon Company to be within the patents ". Thus the appellants would be bound to rely on the ipse dixit of the Selsdon Company, and would have no means of " establishing " (to quote the words of the respondents' Case) whether or not any article shown to have been sold was or was not a patented article. By using the words " all such *other* information," the parties have made it clear that the auditors are to be entitled to ask for, and receive, information which does not appear in the respondents' books of account, and they have inserted a clear limitation on the extent of such information—it must be necessary or appropriate to enable the amount of the royalties payable to be ascertained. That is the only limitation, and it seems to me a natural and sensible limitation. The implied limitation suggested by counsel for the respondents places the licensors in an impossible position, and I cannot doubt that, if the respondents had suggested the insertion of any such limitation, the licensors would have rejected the suggestion. If this sub-licence, a business document, had the meaning for which counsel contends, the result would be as follows. Throughout the period of the licence, the licensees could sell ball-pointed pens, spare parts therefor, refills, ink or writing paste, entering all or any of these articles on their books under the wholly uninformative names type A, type B, or type C, and meeting all requests for information with the bare statement of their opinion " Types B and C are not covered by the patents ". This seems to me a result to which no licensor would agree, and I can find no indication in the sub-licence or the deed of terms that any such result was intended.

Counsel relied strongly on the fact that the information is to be given (to quote again the respondent's Case)

> " not to the appellants nor to patent agents but to auditors who are not qualified to appreciate or understand the problems involved in a question of infringement: this indicates that the quality of the information referred to does not include that demanded."

My Lords, to my mind it is entirely appropriate that the auditors, and no one else, should be given all information, of every kind, which is necessary or appropriate to enable them to do their work as auditors, i.e., the work of ascertaining and verifying the amount of royalties payable. That is exactly what cl. 7 says in terms. If the auditors ask for information which is neither necessary nor appropriate for this purpose, the respondents can refuse to give it; and, if a dispute arises, it is for the court to determine whether the information sought is necessary or appropriate.

A further argument advanced by counsel for the respondents is stated in para. 14 (iii) of the respondents' Case as follows:

> " The information is receivable by the auditors in confidence. This confirms that it is of quality exclusive of the information sought in this case. Moreover the auditor could not seek advice on the information without breach of confidence."

My Lords, it is not quite accurate to say that the information is receivable by the auditors in confidence. Clause 7 merely confers a power on the respondents to require from the auditors an undertaking to treat the information obtained as confidential information, and there is no evidence that they have ever required such an undertaking. In any event, I cannot see that this portion of cl. 7 in any way supports the limitation of the meaning of the word " information " for which counsel contends. On the contrary, I should have thought that, if it was of any assistance in construing the simple words " all information ", it would tend the other way. If the auditors are bound to accept as correct a statement by the respondents that " type A is within the patent and types B and C are not ", it is difficult to see what information of a confidential nature he would desire to obtain. On the other hand, if the words are given their natural meaning, and the only limitation on the information required is that it must be necessary or appropriate for the purpose mentioned in the clause, it seems much more likely that information of a confidential character might be sought. I add that, in the present case, as I have already pointed out, if specimens of types B and C had been supplied, the auditors could have " sought advice on the information without breach of confidence ".

In the result, my Lords, I am entirely unconvinced that any limitation should be implied on the words

> " all such other information as may be necessary or appropriate to enable the amount of the royalties payable hereunder to be ascertained as aforesaid ",

and I remain of the opinion that the information sought by Mr. Young was information of the kind described in these words. It follows that, in my view, Harman, J., arrived at the right conclusion and his order should be restored.

The second question for decision arises under a counterclaim by the respondents. They refer to cl. 3 and cl. 15 of the deed of terms, to which I have already referred, and contend that, in the case of the articles described in cl. 3 (a) and cl. 3 (d), the appellants have granted " a licence under the said patents at a lower royalty " within the meaning of cl. 15, and, consequently, that lower royalty should be substituted for the royalty mentioned in cl. 3 (a) and cl. 3 (d). The Court of Appeal held that this contention was well founded, as the appellants, on July 16, 1953, granted a licence to Biro Swan, Ltd. to sell (inter alia) articles coming within cl. 3 (a) and cl. 3 (d) of the deed of terms at a royalty of five per cent. My Lords, on this part of the case I agree with the reasoning and conclusion of the learned Master of the Rolls, which was accepted by his brethren; and, as I understand your Lordships are all in agreement on this point, I shall not delay you by any observations of my own.

The result is that I would allow the appeal so far as regards the claim of the appellants, and restore the order of Harman, J.; but I would dismiss the appeal so far as regards the counterclaim of the respondents. If your Lordships share my view, the order as to costs should be that the respondents do pay the appellants' costs of the claim, here and below, and the appellants do pay the respondents' costs of the counterclaim, here and below.

LORD TUCKER: My Lords, I would dismiss this appeal for the reasons which have been stated by my noble and learned friend, Viscount Simonds, with which I am in complete agreement.

LORD KEITH OF AVONHOLM: My Lords, I agree with the speech of my noble and learned friend, Lord Morton of Henryton.

LORD DENNING: My Lords, in this case auditors were appointed " for the purpose of verifying the amount of royalties payable " by the respondents in respect of certain patented articles such as ball-pointed pens, refills, inks and so on. In the course of their investigation, the auditors found that royalties had been paid on refills of type A but not on refills of types B and C. They thereupon asked the respondents for further information about these refills, saying that they wanted to discuss " the sales of types ' B ' and ' C ' refills and the patents by which these refills are covered ". The only reply they got was " ' B ' and ' C ' refills are not covered by patents ". The auditors pressed for specimens or specifications but they got no more information.

The question is whether the auditors were bound to accept the assertion of the respondents that " B and C refills are not covered by patents " as being honest, accurate and sufficient; or whether they were entitled to insist on further information so as to check whether or not the assertion was correct. This depends on the true construction of cl. 7 of the deed of terms. The words which impose an obligation to give information are very general. The respondents must give

> " all such other information as may be necessary or appropriate to enable the amount of royalties payable hereunder to be ascertained."

Those words—especially the word " payable "—would seem to cover the information here sought. But the apparent width of these words has been held by the Court of Appeal to be cut down by several considerations and, in particular, by these four: (i) That the information was to be given to *auditors*; (ii) That it was to be given under a seal of *confidence*; (iii) That it was limited to the *patented articles*; (iv) That it could not have been intended to authorise a *roving inquiry* over the business of the respondents. I propose to consider them in order.

(i) The first point raises the question—What is the proper function of an auditor ? It is said that he is bound only to verify the sum, the arithmetical conclusion, by reference to the books and all necessary vouching material and oral explanations; and that it is no part of his function to inquire whether an article is covered by patents or not. I think this is too narrow a view. An auditor is not to be confined to the mechanics of checking vouchers and making arithmetical computations. He is not to be written off as a professional " adder-upper and subtractor ". His vital task is to take care to see that errors are not made, be they errors of computation, or errors of omission or commission, or downright untruths. To perform this task properly, he must come to it with an inquiring mind—not suspicious of dishonesty, I agree—but suspecting that someone may have made a mistake somewhere and that a check must be made to ensure that there has been none. I would not have it thought that *Re Kingston Cotton Mill Co.* (*No.* 2) (1) ([1896] 2 Ch. 279) relieved an auditor of his responsibility for making a proper check. But the check, to be effective, may require some legal knowledge, or some knowledge of patents or other specialty. What is he then to do ? Take, for instance, a point of law arising in the course of auditing a company's accounts. He may come on a payment which, it appears to him, may be unlawful, in that it may not be within the powers of the corporation, or improper in that it may have no warrant or justification. He is, then, not only entitled but bound to inquire into it and, if need be, to disallow it; see *Roberts* v. *Hopwood* (2) ([1925] A.C. 578 at p. 605), *Re Ridsdel, Ridsdel* v. *Rawlinson* (3) ([1947] 2 All E.R. 312 at p. 316). It may be, of course, that he has sufficient legal knowledge to deal with it himself, as many accountants have, but, if it is beyond him, he is entitled to take legal advice on the principle stated in *Bevan* v. *Webb* (4) ([1901] 2 Ch. 59 at p. 75), that

> " permission to a man to do an act, which he cannot do effectually without the help of an agent, carries with it the right to employ an agent."

So, also, with an auditor who is employed for the purpose of checking the royalties payable. It is part of his duty to use reasonable care to see that none has been omitted which ought to be included. He is not bound to accept the ipse dixit of the licensee that there are no other articles which attract royalty. He is entitled to check the accuracy of that assertion by inquiring the nature of any other articles, which, it appears to him, may come within the patented field. If he cannot be sure, of his own knowledge, whether they attract royalty or not, he can take the advice of a patent agent, just as, within the legal sphere, he can take the advice of a lawyer. This is, however, subject to the seal of confidence, which brings me to the second point.

(ii) The auditor here acknowledged that, if he got the information, he would need the advice of a patent agent. It is said that he could not take such advice without breaking the seal of confidence imposed on him by the agreement. I do not think this is correct. If once the auditor were given the desired information about refills " B " and " C ", he could get all the technical advice he needed without breaking any confidence. He could, for instance, put before the patent agent a hypothetical case. Or he could ask his advice on a specimen refill of types B and C which had already been sold on the open market and was thus in the public domain. In such a case, although he would have been put on the track by means of the confidential information, he would not actually be disclosing it. Such would not be a breach of the stipulation. In any case, I do not think the stipulation should be construed so narrowly as to prevent the auditor consulting his own servants and agents. The stipulation is that the auditor shall treat the information as " confidential information disclosed only for the purpose of verifying the amount of the royalties payable". Even without this express stipulation, the auditor would be bound to keep the information confidential and not divulge it to the outside world. The effect of this stipulation is to prevent the auditor from disclosing it, even to his own client. He can only report to him the result of his investigation, not the information he obtains in the course of it, such as the names and addresses of the licensees' customers. But the stipulation does not prevent the auditor from disclosing the information to his own servants and agents when it is necessary to enable him to carry out the very purpose for which the information is disclosed, namely, to verify the amount of royalties payable. Each of his servants and agents is bound, just as the auditor himself is, to keep the information confidential and not to divulge it; and this is a duty which, by the very nature of the case, is owed to the party who has given the information.

(iii) It is said that cl. 7 is confined to " patented articles " and, therefore, that it cannot be invoked by the auditor except in respect of articles which are *admittedly* patented articles or are *established* to be patented articles; which refills of types B and C are not. This argument put a gloss on the words " patented articles " which is not warranted by the definition in the agreement. " Patented articles " mean articles which are, in fact, protected by the patents, not merely those which are admitted or established to be protected. If it should turn out that refills of types B and C are within the patents, then they attract royalty, and have done so all the time, no matter how fiercely the respondents may have asserted the contrary. But how is it to be ascertained, one way or the other, whether they attract a royalty unless the respondents give the information that is desired ? Counsel for the respondents said that the licensors could find out for themselves. They could do the same, he said, as any patentee did, who wished to ascertain if his patent was being infringed. They could buy the offending article in the market, take it to a patent agent, and pursue all the usual inquiries until the offence was brought home. Counsel for the appellants said that this would be quite impracticable, because there were a large number of Biro pens and refills on the market, and it was impossible to tell the respondents' refills from any others. Howsoever that may be, the information is clearly " appropriate to enable the amount of the royalties payable " to be ascertained. It is much more appropriate for it to be obtained direct from the respondents than for the licensors to go searching up and down the market for it. It is, therefore, information which the auditor may properly require.

(iv) It was said that, if the auditor were authorised to require information of this kind, it would mean that the respondents could be interrogated about all the articles they sell—even those which had nothing to do with ball-pointed pens—and that this could not have been intended. The short answer to this is that the auditor is only entitled to such information " as may be necessary or appropriate ". If his inquiries went as far as is suggested, they would not be necessary or appropriate. They would be oppressive and the respondents could justifiably refuse to answer them. But that cannot be said of the simple inquiry here. I find myself, therefore, unable to put any such limitations on the clause as the Court of Appeal did. I think the auditor's question was appropriate to ascertain the royalties payable and should have been answered. I would allow the appeal in this respect, and restore the order of HARMAN, J., on this part of the case.

I turn now to the other part of the case. This depends on the true construction of cl. 15, the " most-favoured licensee " clause. The object of that clause is to ensure that, if the licensors should grant a new licence at a lower royalty than that agreed in this licence, then the agreed royalty should be reduced to the level of the new lower royalty. The question that arises is—What is to be done when the royalty structure in the new licence is different from that in this licence?

Counsel for the appellants started with the proposition that, under cl. 15, the word "royalty" meant the total sum payable for the licence. On this basis he argued that you could not say, by looking at the new licence, whether it was granted at a lower royalty than the agreed royalty. The agreed royalty was on a sliding scale, varying from six per cent. on the cheapest articles to three per cent. on the most expensive. The new royalty was five per cent. on all alike. Whether it was more favourable or not depended on the way in which the sales were spread. If there was a large sale of the cheapest models and few of the expensive ones, the new royalty would be lower, but otherwise not. Such being the problem, counsel said that the matter must be tested by taking the sales of the respondents for the appropriate accounting period—one quarter of a year—and seeing how the rival royalties would work out when applied to those sales. If five per cent. on all the sales of the respondents gave a total which was less than that given by the sliding scale, then they would have the option of substituting five per cent. thenceforward for the rest of the term. Pressed with the question—Which quarter of which year was to be taken for the test ?—counsel said it was open to the respondents to take any quarter they liked, but, as they had taken none in this case and had given no evidence, they could not say that the royalty under the new licence was lower than that under the agreed licence.

I cannot accept this argument, for the simple reason that cl. 15 contemplates that, by simply looking at the new licence, you should be able to see from its terms whether the royalty is lower or not, without testing it by sales. The fallacy in counsel for the appellants' argument lies in his original proposition. The word "royalty" in this clause does not mean the total sum payable for all articles produced under the licence. It means the relevant royalty for articles in a comparable category. Thus, if the agreed royalty on articles under £1 is six per cent. and the new royalty on like articles is five per cent., then five per cent. is to be substituted for six per cent. Whereas, if the agreed royalty on articles between £1 and £2 is four per cent. and the new royalty on a like article is five per cent., there is no substitution and the four per cent. prevails. Any other view would mean that, by the simple device of altering the structure on which royalties are paid, the licensor could avoid the clause altogether; which would not, I am sure, commend itself to your Lordships, seeing that the whole object of the clause is to ensure that the respondents are not exposed to unfair competition.

I would, therefore, dismiss the appeal on this part of the case.

Appeal allowed in part.

Solicitors: *Payne, Hicks Beach & Co.* (for the appellants); *Rowe & Maw* (for the respondents).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

Re FRASER (*deceased*).
LEACH AND ANOTHER *v.* PUBLIC TRUSTEE AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), December 4, 1957.]

Costs—Taxation—Review by court—Jurisdiction—Taxing master's certificate—Objections carried in to master's direction to lodge itemised bill—Objections answered and disallowed—Certificate signed by master to enable court to determine principle on which bill should be taxed—R.S.C., Ord. 65, *r.* 27 (41).

Pursuant to an order dated May 18, 1956, and made in an action between two plaintiffs and six defendants, the first defendant lodged a bill of costs in three parts, of which Part 2, the major part of the bill as a whole, was a lump sum bill. On June 20, 1957, the taxing master, on a preliminary appointment, ruled that the work to which Part 2 of the bill referred was contentious business and directed that the bill be redrawn in detailed form. On July 1, 1957, the first defendant carried in objections to the taxing master's direction, the heading to the objections being: " Objections taken by the first defendant to the preliminary taxation by [the taxing master] . . . " On July 15, 1957, the taxing master gave his answers and disallowed the objections. On July 30, 1957, the taxing master signed a certificate, stating: " In pursuance of the order . . . [of] May 18, 1956 . . . whereas I should have proceeded to tax the bills of costs as by the . . . order directed, but . . . the [first defendant] having carried in objections to my direction dated June 20, 1957 . . . to bring in details in lieu of a lump sum charge in his bill of costs, I have considered such objections and disallowed the same and at the request of the [first] defendant I make this my separate certificate so that the [first] defendant may take the opinion of the court on the principle on which the . . . bill should be taxed in relation to the said lump sum charge." On a summons by the first defendant asking that his objections of July 1, 1957, to the " preliminary taxation " of costs under the order dated May 18, 1956, should be allowed and that the taxing master's certificate should be varied accordingly, none of the other parties appeared before the judge.

Held: the taxing master's certificate of July 30, 1957, was not a certificate of taxation or allocatur within the meaning of R.S.C., Ord. 65, r. 27 (39), (40) and (41)*, because under these rules it was the duty of the taxing master to reach conclusions and to state his conclusions and his reasons in a certificate, and in the present case the taxing master had not made a certificate in which conclusions were stated and reasons were given; therefore, R.S.C., Ord. 65, r. 27 (41) did not apply, the jurisdiction of the court to review taxation had not arisen, and the summons would be dismissed.

Re Donaldson ((1884), 27 Ch.D. 544) distinguished.

Per CURIAM: leave to amend the summons would have been given if the court had had opportunity to hear argument on both sides (see p. 33, letter C, post).

[As to the certificate or allocatur issued by the taxing master, see 26 HALSBURY'S LAWS (2nd Edn.) 103, para. 193; and as to review of taxation, see 31 HALSBURY'S LAWS (2nd Edn.) 227-230, paras. 251, 252.]

Cases referred to:

(1) *Re Donaldson*, (1884), 27 Ch.D. 544; 54 L.J.Ch. 151; 51 L.T. 622; 42 Digest 192, *2098*.

(2) *British, Foreign & Colonial Automatic Light Controlling Co., Ltd.* v. *Metropolitan Gas Meters, Ltd.*, [1912] 2 Ch. 82; 81 L.J.Ch. 520; 106 L.T. 834; 36 Digest (Repl.) 1032, *3802*.

(3) *Korner* v. *Korner* (*H.*) *& Co., Ltd.*, [1950] 2 All E.R. 451; [1951] Ch. 10; 2nd Digest Supp.

---

* The relevant terms of the sub-rules of r. 27 are printed at p. 29, letter H, to p. 30, letter D, post.

Summons for review of taxation.

This was an application by the Public Trustee, the first defendant in an action by two plaintiffs against six defendants, that his objections, dated July 1, 1957, to the preliminary taxation of costs under an order dated May 18, 1956, might be allowed, and that it might be referred back to the taxing master to vary his certificate accordingly and that the costs of the application be taxed and paid by the first defendant as part of the administration expenses of the testator.

The following summary of the facts leading to the present application is taken from the first defendant's " Reasons for objections ". In an action entitled *Re Fraser* (*deceased*), *Johnstone* v. *Public Trustee and Others*, CROSSMAN, J., made an order on Sept. 6, 1938, staying the proceedings and embodying the terms of a compromise arrived at between the parties, but certain questions were left undecided until the capital appropriated to pay a certain annuity should fall in on the death of the annuitant. In 1952, on the death of the annuitant, the first defendant sought the advice of his solicitors as to the devolution of the funds comprising the testator's estate. There ensued correspondence with the residuary legatees and other interested parties, and, after negotiations which lasted for nearly three years, terms of compromise were reached in August, 1955, which provided, among other things, for the payment of the costs of all parties out of the estate; but, as the Attorney-General was concerned, as representing charity at large, it was necessary to obtain an order of the court embodying the agreed terms. Accordingly, a writ of summons was issued by the present plaintiffs, and an order was made on May 18, 1956.

The order* dated May 18, 1956, was duly referred for taxation of the costs, and the first defendant lodged a bill of costs, of which the major part, as a whole, was a lump sum bill. On June 20, 1957, the taxing master, on a preliminary appointment, ruled that all the work done was contentious business and directed that the bill be withdrawn and redrawn in detailed form, or objections be lodged within ten days. On July 1, 1957, objections were lodged in the following form:

> " Objections taken by the first defendant to the preliminary taxation by [the taxing master] of the bill of costs of the first defendant under the order dated May 18, 1956."

Then the reasons for the objections were set out. On July 15, 1957, the taxing master gave his answers and overruled the objections. On July 30, 1957, the taxing master signed a certificate, stating:

> " In pursuance of the order herein bearing date May 18, 1956 . . . whereas I should have proceeded to tax the bills of costs as by the said order directed, but the solicitors for the defendant the Public Trustee having carried in objections to my direction dated June 20, 1957, whereby I directed the said defendant to bring in details in lieu of a lump sum charge in his bill of costs, I have considered such objections and disallowed the same and at the request of the said defendant I make this my separate certificate so that the said defendant may take the opinion of the court on the principle on which the said bill should be taxed in relation to the said lump sum charge."

On Sept. 23, 1957, the first defendant took out the present summons.

Paul Curtis-Bennett for the first defendant, the Public Trustee.

The plaintiffs and the other defendants were not represented by counsel.

ROXBURGH, J.: This case is said to raise a question of principle and, as a matter of fact, it has a large number of unusual features. The first one is the form of the order, dated May 18, 1956, which was made in chambers by a master in the circumstances that everybody consented except the Attorney-General, who did not object.

---

* The terms of the order as to costs are printed at p. 28, letters C to E, post.

It is important that I should recite this. There were two plaintiffs and six defendants. The first defendant was the Public Trustee. The reason why the order is one which I myself would not have made (though, of course, there is no question of going behind the order) is that counsel and solicitors persuaded the court to put in extremely wide words with a view to seeing that they got all their costs out of a certain fund. There is always a danger in doing that, because, the wider the terms, the vaguer the language becomes, and I am inclined to think that perhaps the main difficulty in this case, if it comes to a proper hearing, will revolve round the last four lines of the order as to costs. The order reads as follows:

> "It is ordered that it be referred to the taxing master (i) to tax the costs and expenses of the defendant the Public Trustee of and incident to this action and (ii) to tax as between solicitor and client the costs of the plaintiffs and of the other defendants of this action . . . including therein the costs and expenses of and incident to the preparation and negotiation of the said terms* both as between the plaintiffs or either of them and the defendants or any of them as well as between the plaintiffs themselves . . ."

Pausing there, that is a very full form of order, fuller, I think, than any that I have ever made; but it is not so much those words as the next words that bear, as it seems to me, the unusual feature:

> " . . . and including also the costs incurred in attempting to negotiate a compromise in the years 1939 and 1940 of the matters dealt with in the said schedule."

It may well be that those last costs are non-contentious costs. I am not expressing any opinion on that. I think it possible, however, that they would be on a different footing from the other costs which were ordered to be taxed by this order; but again I am expressing no opinion. I suppose that it may be argued regarding

> " . . . the costs and expenses of and incident to the preparation and negotiation of the said terms both as between the plaintiffs or either of them and the defendants or any of them as well as between the plaintiffs themselves . . ."

that some, or perhaps all, of those costs were non-contentious costs. I express no opinion except that the order is so wide that it may raise questions which are not of common occurrence.

That being the order, the first defendant carried in a bill of costs which is divided into three parts. Part 1 is an itemised bill amounting in all to £2 0s. 4d. Part 2 is a lump sum bill, except that it does contain certain disbursements. That lump sum bill occupies about eighteen pages, and, with the exception of the disbursements, no separate charge is assigned to any item in those pages. It is very difficult to follow the description of the items in Part 2 of the bill. The total sum of disbursements which appear in Part 2 amount to £9 19s., but the unitemised charge is £94 10s. Then comes Part 3, which is an itemised bill amounting in all to about £14. Thus the major part of the bill as a whole is the lump sum bill. When the parties came before the taxing master on a preliminary appointment he stated that the prior negotiations set out in Part 2 of that bill were contentious, and he said that the bill should be amended or objections lodged within ten days. An objection was lodged, and it is in this form: "Objections taken by the first defendant to the preliminary taxation by [the taxing master]." There is, however, no such thing as a "preliminary taxation." That is a misnomer which runs through the whole of this case. There may be such a thing as a "preliminary certificate"; perhaps, more appropriately, it should be called a " separate certificate ", but I am coming to that later on. It is, however, quite clear that there is no such thing under the Rules of the Supreme Court as a " preliminary taxation."

---

* Viz., terms agreed between the parties and set out in the schedule to the order.

An amended bill was not lodged, and on July 30, 1957, the taxing master signed the following certificate:

> " In pursuance of the order herein bearing date May 18, 1956 . . . whereas I should have proceeded to tax the bills of costs as by the said order directed, but the solicitors for [the first defendant] having carried in objections to my direction dated June 20, 1957, whereby I directed the [first] defendant to bring in details in lieu of a lump sum charge in his bill of costs, I have considered such objections and disallowed the same and at the request of the [first] defendant I make this my separate certificate so that the [first] defendant may take the opinion of the court on the principle on which the said bill should be taxed in relation to the said lump sum charge."

It is plain from the words " whereas I should have proceeded to tax " that the taxing master has not proceeded to tax the bills of costs.

I object to that form of certificate for many reasons. It is not, I understand, the practice for directions of this sort to be put in writing, and I understand that in this case the direction was not put in writing, but the recital of the direction in the master's certificate seems to leave out something which may or may not be important, but which certainly occurs in his own record of the occasion. It cannot be a convenient practice that somebody should be entitled to challenge a direction, and that the judge should then have to send for the taxing master to find out what the direction was which was being challenged. It is to be noted that the taxing master has not set out the whole of his direction in the certificate, and I do not suggest that he purported to do so. Therefore, I am in the position of hearing an appeal concerning a direction and having no certain knowledge what it was. That is my first objection to this procedure.

The second is this. I do not know why the taxing master should be allowed to form an opinion on the point whether, if he taxes the bill, the questions which will arise on that taxation will be questions of principle. That is why I referred to the question how far these matters are contentious. It may well be that no question of principle arises. It depends entirely on what these various items relate to, and it is essentially his business to make up his own mind on those matters. Then, if he likes to say what his mind is, this court, under the Rules of the Supreme Court to which I will refer in a moment, can investigate the question whether he has rightly appreciated the principles involved. I think that it is his duty to give his decision on the point in the certificate, and that it is his decision stated in the certificate which would be the proper matter to come before the court.

Thirdly, I think that the whole of this particular process is at variance with the relevant rule, which is R.S.C., Ord. 65, r. 27. The relevant rule, R.S.C., Ord. 65, r. 27 (39), reads:

> "Any party who may be dissatisfied with the allowance or disallowance by the taxing officer, in any bill of costs taxed by him, of the whole or any part of any items, may, at any time before the certificate or allocatur is signed, or such earlier time as may in any case be fixed by the taxing master, deliver to the other party interested therein, and carry in before the taxing officer, an objection in writing to such allowance or disallowance, specifying therein by a list, in a short and concise form, the items or parts thereof objected to . . ."

That presupposes that the taxing officer has gone through the bill and indicated, before drawing up any certificate, that he is going to allow or disallow particular items, in whole or in part—it must be an allowance or disallowance " in any bill of costs . . . of the whole or any part of any items": if he does that, then, as I understand, it is his duty to listen to the objections. The parties may then apply to the taxing officer " to review the taxation in respect of the same ".

Then there is a provision that, pending the consideration of the objections, the taxing master may issue a certificate on other items, but that does not affect the present case.

Then comes R.S.C., Ord. 65, r. 27 (40), which reads:

> " Upon such application the taxing officer shall reconsider and review his taxation upon such objections . . ."

Let it be noted that it is " his taxation ", and the taxing officer agrees that he has not proceeded to taxation in this case. Rule 27 (40) continues:

> ". . . and he may, if he shall think fit, receive further evidence in respect thereof, and, if so required by either party, he shall state either in his certificate of taxation or allocatur, or by reference to such objection, the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto . . ."

That makes it quite plain that it is the taxing officer, and not the judge, who has to reach a decision. R.S.C., Ord. 65, r. 27 (41), reads:

> "Any party who may be dissatisfied with the certificate or allocatur of the taxing officer, as to any item or part of an item which may have been objected to as aforesaid, may . . . apply to a judge at chambers for an order to review the taxation as to the same item or part of an item . . ."

Again, that seems to me to make it quite plain that the duty of the taxing master is to make up his mind, stating his conclusions in the certificate and giving his reasons, as provided for in R.S.C., Ord. 65, r. 27 (40), and then the judge has a limited jurisdiction to upset his decision. I would point out that it is a limited jurisdiction, not a complete jurisdiction such as exists, for instance, between a Chancery judge and a Chancery master. It is by no means a complete jurisdiction.

It seems to me that the certificate in the present case is not such a certificate as is contemplated by the rules, and it is not a certificate on which any party can apply to the court for the reasons which I have given.

I might not have been taking the line which I am taking in my judgment if this case had not had a curious history. Apparently, all the parties appeared before the taxing master, but no one except the first defendant has appeared before me. In that they have done nothing wrong. No one is bound to appear before the judge if he does not want to. I would, however, point out that it is not very satisfactory for a judge if he is told by the taxing master that he is asked to decide a question of principle—that is the taxing master's own description of the case, whether right or wrong—and he finds that this principle is going to be argued on one side only, although there are six parties interested in arguing against the first defendant on this matter. For my part, I refuse to be influenced in the slightest degree by the recollection that other judges have made concessions in a matter of this kind when they have been provided with argument on both sides. That entirely differentiates this case from any others in the books. I recognise that a party is entitled to proceed as against other parties as on a default, which is this case; but, if he does so, then the sins of the pleader may find him out, because, naturally, if I had the benefit of a proper argument on both sides—I have had a very proper argument on one side—I should have tried to avoid taking the technical points which I am now taking for the reasons which I have indicated. Therefore, I think that I am entitled to construe the rules strictly, and I propose to do so.

A good deal has been said about what is called the " Donaldson practice ", and I propose to explore the " Donaldson practice " rather fully. I will, first, read a passage from BUTTERWORTHS COSTS, vol. 1, p. 158, where the phrase " Donaldson practice " is not used, but the subject is introduced in a note to R.S.C., Ord. 65, r. 27 (41)[*]. The note reads (ibid.):

---

[*] See also the note to R.S.C., Ord. 65, r. 27 (41), in the ANNUAL PRACTICE, 1958, p. 1949, under heading " The Certificate or Allocatur ".

> "A preliminary certificate may be issued by the master to enable a general objection to be taken before taxation of the bill . . ."

That is where I differ. Then the note contains a reference to *Re Donaldson* (1) ((1884), 27 Ch.D. 544). In my view, to start with that is a complete misunderstanding of that case. *Re Donaldson* (1), which was decided in the days when many of the things which are done by summons today were done by petition, was a dispute between a mortgagor and a mortgagee. The taxation in that case was not a taxation in an action but a taxation which was procured under s. 38 of the Solicitors Act, 1843 (6 & 7 Vict. c. 73). A peculiar question of principle, which had very little to do with the duties of a taxing master, arose, and on this the taxing master made a separate certificate*, in which he said (27 Ch.D. at p. 545):

> " 'I was of opinion that the rule that a trustee may not make a profit of his trust, and therefore that a solicitor-trustee may not charge any but costs out of pocket does not apply to the case of a mortgagor taxing the costs of his mortgagee, where there is no relation between them but that of mortgagor and mortgagee. If the beneficiaries of the money lent to the mortgagor were taxing the bill, the rule would no doubt apply, and I must have allowed the objection; but in this case the trust fund will not in any way be diminished, and the persons interested in that fund will not suffer by my allowing to the solicitor profit costs. It was suggested on behalf of the applicant that the security may not be sufficient to pay the principal and interest and profit costs; but if so, my decision in this case will not prevent the beneficiaries taxing the bill of costs on the principle contended for ' ".

Accordingly, the master disallowed the objections. The mortgagor then took out a summons to have the objections allowed and to vary the certificate accordingly. That was a very special case, because the questions raised were concerned with certain general principles of equity. In other words, it was essentially a matter for a Chancery judge. On the other hand, the question whether, in a particular case, one ought or ought not to deliver a lump sum bill is not primarily a question for a Chancery judge. It is primarily a question for the taxing master himself who is really the expert on such a matter, and the judge is entitled to have the benefit of the taxing master's expert opinion. Then, having got the taxing master's opinion and his decision, the judge has to consider whether in his limited jurisdiction he may proceed to reverse or to vary the certificate. I would say that *Re Donaldson* (1) is not intended to lay down any rule of general application. I have not paused to consider whether the Rules of Court were precisely the same in 1884. I assume that they probably were.

The next point about that case is this. Something in the judgment in *Re Donaldson* (1) is quite irrelevant and inappropriate to the present case, because BACON, V.-C., said (27 Ch.D. at p. 551) that, if the mortgagor had wished to raise such objections to the bill as had been raised, she should have stated her objections in her petition for taxation (which, I suppose, is what is now called the summons for taxation under the Solicitors Act, 1957), and she should not have obtained only the common form order for taxation. That is quite incapable of application to the present case.

---

* The terms of the taxing master's certificate are stated in the report in 51 L.T. 622, from which it appears that the certificate was, so far as relevant, as follows:

"I have been attended by the solicitors for the said applicant and for the respondent, and I should have proceeded to tax the bill of costs as by the said order directed; but the solicitor for the applicant having carried in objections to my allowance of profit costs to the said Archibald Donaldson, I have considered such objections, and, disallowed the same, and, at the request of the applicant, I make this my separate certificate, so that the applicant may take the opinion of the court upon the principle on which the said bills should be taxed before I proceed further with such taxation, all which I humbly certify to this honourable court." The passage set out between quotation marks in the report in 27 Ch.D. at p. 545, and printed above, gives the taxing master's answer to the objections that were put before him.

The next case cited is *British, Foreign & Colonial Automatic Light Controlling Co., Ltd.* v. *Metropolitan Gas Meters, Ltd.* (2) ([1912] 2 Ch. 82), where it is stated (ibid., at p. 83):

> " By arrangement between the parties, instead of waiting for the completion of the taxation, and the dissatisfied party then taking out a summons to review the taxation, the matter was now mentioned to the court."

I do not know how that could support the statement in the text-book. Of course, a judge, with the consent of the parties, or the parties, with the consent of the judge, are often entitled to waive procedural rules, and very often it is convenient so to do. For my part, I would certainly have done so if I had been provided with argument on each side in this case. If, however, it were to be suggested that I was bound to allow the irregular proceedings which were allowed by Warrington, J., in *British, Foreign & Colonial Automatic Light Controlling Co., Ltd.* v. *Metropolitan Gas Meters, Ltd.* (2)—proceedings which were entirely reasonable in the particular circumstances of that case, but were none the less plainly irregular—that would be a complete misreading of the authorities.

The next case, *Korner* v. *H. Korner & Co., Ltd.* (3) ([1950] 2 All E.R. 451), which is a rather more remarkable case to be cited in support of the proposition, makes it quite plain that the procedure was never investigated by the judge at all. It is not uninteresting to read what the taxing master said in that case in this connexion*:

> " I have been requested by the defendants in this action to construe the order herein as to costs and thereby enable the parties, if so advised, to lay preliminary objections before me in accordance with the practice outlined in *Re Donaldson* (1)."

I must confess that I cannot find any " practice outlined in *Re Donaldson* (1)." When I asked counsel to formulate what he calls "the Donaldson form of order", what he formulated was not a form of order at all, but a sort of réchauffé of this sort of proposition. I do not think that any of the cases cited support the proposition which is laid down in Butterworths Costs, vol. 1, p. 158. I want to make it plain that I am not suggesting that there is any objection to a separate certificate. If the passage in Butterworths Costs is carefully studied, it does not go far enough to state what is put in the certificate, and, therefore, the proposition may be perfectly sound although the cases do not seem to me to support it. I am going to add this. Any separate certificate must be either an allowance or disallowance: it has to be a certificate or allocatur " as to any item or part of an item which may have been objected to as aforesaid . . . ", within the meaning of R.S.C., Ord. 65, r. 27 (41). One can then apply to the judge to review the taxation as to some item, or part of an item. In my view, no certificate, whether it is called " separate " or " preliminary " or anything else, complies with the rules if it does not comply with R.S.C., Ord. 65, r. 27 (41), and the court has no jurisdiction, except with the consent of the parties, to deal with any question which does not arise in accordance with r. 27 (41). That is the substance of the matter.

The summons states that it is

> "an application on the part of the first defendant that the objections of the first defendant dated July 1, 1957, to the preliminary taxation of costs . . . may be allowed . . . "

The objection, however, is not to the preliminary taxation. There is no such thing. The objection is to the taxing master's direction that the first defendant should file what he calls a proper bill of costs. That direction, however, is not a

---

* In his written observations in answer to the defendants' objections to his ruling on the construction of the order as to costs.

"preliminary taxation". By no manner of means can it be included in the words "preliminary taxation". The summons then asks "that it may be referred back to the taxing master to vary his certificate accordingly". I really do not know what that was intended to mean because, if I had to deal with this question—which I probably should have done if a sufficient number of the parties had appeared before me to argue it—I should have made some sort of declaration of principle, but I should not have needed to vary the certificate, for the simple reason that the taxing master has not certified anything which is material to anybody, so far as I can see, except that he says there is a question of principle. That is not a decision on a question of principle. It is true that the taxing master said that he disallowed the objection, but he has to go further than disallow the objection. He has to make a certificate which gives effect to the disallowance, and that he has never done. I would have given leave to amend the summons if I had had the opportunity of hearing argument on both sides. In my view, the summons in its present form is impossible for the reasons which I have stated. I propose to dismiss the summons with no order as to costs.

Summons dismissed.

Solicitors: *Theodore Goddard & Co.* (for the first defendant).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

CLARKSON *v.* MODERN FOUNDRIES, LTD.

[LEEDS ASSIZES (Donovan, J.), July 23, 24, 25, 26, 29, 1957.]

Limitation of Action—Damages—Action for breach of statutory duty—Pneumoconiosis contracted by workman—Disease probably initially contracted through breaches of statutory duty outside period of limitation—Materially aggravated by breaches within period of limitation—Limitation Act, 1939 (2 *&* 3 *Geo.* 6 *c.* 21), *s.* 2 (1) (*a*).

Factory—Statutory duty—Breach—Injury to workman—Injury partly caused by breaches outside period of limitation—Materially contributed to by breaches within period of limitation—Measure of damages.

From 1940 to 1951 the plaintiff was employed by the defendants as a metal dresser in an iron foundry. The operations produced dust and the defendants were in breach of their statutory duty under s. 4 of the Factories Act, 1937, in relation to the provision of ventilation and the rendering harmless of impurities in the air. In 1951 the plaintiff was found to be suffering from pneumoconiosis contracted during his employment. Each year from 1940 to 1951 had played its part in producing the disease, and exposure to dust between Aug. 19, 1949, and 1951 had materially contributed to the plaintiff's illness. On Aug. 19, 1955, the plaintiff brought an action for damages for breach of the statutory duty. On the question whether the defendants' liability in damages was limited to the aggravation of the illness due to exposure after Aug. 19, 1949, before which date any cause of action was barred by s. 2 (1) (a) of the Limitation Act, 1939,

Held: the plaintiff was entitled to recover damages in respect of the whole of his injury, although part was incurred before Aug. 19, 1949, because exposure to dust after that date had materially contributed to his illness; moreover, if the defendants were to establish a defence under the Limitation Act, 1939, s. 2 (1) (a), the onus was on them to show that the injury, being an injury wholly caused by their default, was inflicted before Aug. 19, 1949, and they could establish only that an unascertainable part of the injury was inflicted before that date.

Bonnington Castings, Ltd. v. *Wardlaw* ([1956] 1 All E.R. 615) applied.

Crookall v. *Vickers-Armstrong, Ltd.* ([1955] 2 All E.R. 12) distinguished.

[**Editorial Note.** By s. 2 (1) of the Law Reform (Limitation of Actions, &c.) Act, 1954, which came into force on June 4, 1954, a proviso was added to s. 2 (1) of the Limitation Act, 1939, substituting a reference to three years for the reference to six years in the case of actions for damages for negligence, nuisance or breach of duty where the damages claimed by the plaintiff consist of or include damages in respect of personal injuries; but under the transitional provisions in s. 7 (1) of the Act of 1954, the proviso does not affect a cause of action which arose before June 4, 1954: see 34 HALSBURY'S STATUTES (2nd Edn.) 464, 467.

As regards liability for breach of statutory duty under the Factories Act, 1937, see generally 17 HALSBURY'S LAWS (3rd Edn.) 10, para. 10.

For the Limitation Act, 1939, s. 2 (1), see 13 HALSBURY'S STATUTES (2nd Edn.) 1160.

For the Factories Act, 1937, s. 4, see 9 HALSBURY'S STATUTES (2nd Edn.) 1004.]

Cases referred to:

(1) *Bonnington Castings, Ltd.* v. *Wardlaw*, [1956] 1 All E.R. 615; [1956] A.C. 613; 3rd Digest Supp.

(2) *Crookall* v. *Vickers-Armstrong, Ltd.*, [1955] 2 All E.R. 12; 3rd Digest Supp.

(3) *Nicholson* v. *Atlas Steel Foundry & Engineering Co., Ltd.*, [1957] 1 All E.R. 776.

Action.

The plaintiff, John Norman Clarkson, claimed damages against his employers, Modern Foundries, Ltd., for personal injuries and consequential losses and expenses occasioned to him by their negligence and/or breach of statutory duty.

From 1940 to 1951 the plaintiff worked in the defendants' iron foundry as a metal dresser. His work consisted of dressing castings, that is, knocking off all flashes and rough edges and removing the sand still adhering to the casting. For this purpose he used various tools; a hand hammer, a hand chisel, a pneumatic hammer, an electric portable grinder, and from time to time, a swing frame grinder. The operations in the foundry produced dust in the atmosphere. The operations which principally produced it were the following: (i) the lifting of the casting from its bed in the moulding section of the shop, in which operation some of the moulding sand had to be dislodged from the casting and, although most of the resulting dust would be carried by the hot air up to the roof and out through the ventilators situated above the moulding section of the shop, a little of this dust might at times drift into the fettling and dressing section, some forty to sixty feet away, where the plaintiff worked; (ii) the decoring of the casting, that is, the knocking off with bars of a core of sand still inside the casting, and the periodical shovelling up of such sand; for the first two years of his employment the plaintiff had been approximately thirty feet from the decoring section and for the next eight years had been about sixty feet away; (iii) the use of portable hand grinders, which produced fine dust when they ground off any sand still adhering to the casting, to which some sand usually adhered; (iv) the use of the swing frame grinder on the heavier and long castings, which gave rise to fine dust when still adherent sand was ground off, although the real purpose of this grinder was to grind off metal excrescences on the casting. There were also occasions when castings which were too large to go into the blast chamber were shot-blasted outside it, with no tarpaulin to prevent dust from escaping into the fettling and dressing section, where the plaintiff worked. The defendants had provided a mask for the plaintiff and he was told to wear it when doing his fettling operations, but there were times when he would be in the fettling and dressing section and, without any negligence on his part, not wearing his mask, e.g., when he was using the hand hammer and chisel.

In May, 1951, the plaintiff was found to be suffering from pneumoconiosis and in September, 1951, he went into hospital. It was common ground that he contracted the disease while in the employment of the defendant company between 1940 and 1951, and that he did so through breathing silica particles from the atmosphere of the fettling and dressing shop. On Aug. 19, 1955, he issued the writ in this action, claiming damages from the defendants on the ground that he contracted the disease through their negligence or through breaches of their statutory duty under s. 4 (1) and s. 47 (1) of the Factories Act, 1937, reg. 1 and reg. 13* of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925 (S.R. & O. 1925 No. 904), and reg. 6 of the Blasting (Castings and Other Articles) Special Regulations, 1949 (S.I. 1949 No. 2225). By their defence the defendants denied the allegations of negligence and breach of statutory duty. Further or alternatively, they pleaded that, if and so far as the plaintiff relied on any cause of action which accrued prior to Aug. 19, 1949, the same was statute-barred under s. 2 of the Limitation Act, 1939. It was admitted on the plaintiff's behalf that the allegations of negligence added nothing to the allegations of breach of statutory duty, and the judgment was, therefore, confined to the latter.

On the issues of breaches of statutory duty, HIS LORDSHIP held: (i) that in breach of s. 4 (1) of the Factories Act, 1937, while the plaintiff was employed in the fettling and dressing section, effective and suitable provision was not made for securing and maintaining by the circulation of fresh air in each workroom the adequate ventilation of the rooms and for rendering harmless by such ventilation, so far as practicable, the impurities in the air; (ii) that the defendants were in breach of reg. 1 of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925, in that they did not cause an exhaust appliance to be fitted to or near the swing frame grinder; (iii) that the defendants were also in breach of statutory duty† in permitting shot-blasting to be done outside a chamber where the doors were not closed, and without arrangements being made to prevent the escape of dust; and (iv) that the defendants, having provided a mask and told the plaintiff to use it when doing his fettling operations, were not in breach of s. 47 (1) of the Act of 1937. On the question whether the plaintiff had discharged the onus which was on him of showing that the defendants' breaches of statutory duty caused his affliction or materially contributed towards it, HIS LORDSHIP found that on the occasions when the plaintiff was, quite properly, not using the mask, he would be breathing an atmosphere containing pathogenic silica dust, and that if there had been adequate ventilation of the fettling and dressing section, it was certain that he would not have inhaled so much of the dust as he did. HIS LORDSHIP held that it was a reasonable inference that the breach of s. 4 (1) alone made a material contribution towards his illness.

The case is reported only on the defence based on s. 2 of the Limitation Act, 1939.

G. S. Waller, Q.C., and *R. P. Smith* for the plaintiff.

R. Lyons, Q.C., and *R. Withers Payne* for the defendants.

DONOVAN, J., stated the facts and, having decided the issues of breaches of statutory duty, as previously stated, continued: There is this further point in the case. The plaintiff contracted the disease some time between 1940 and 1951. He did not issue his writ, however, until Aug. 19, 1955, shortly after he had changed his trade union. The defendants, therefore, plead that they are liable only in respect of any cause of action arising on or after Aug. 19, 1949, and they say that the inference is that the plaintiff contracted pneumoconiosis before this date. He was exposed to this pathogenic dust from 1940 onwards, and each year from 1940 to 1951 played its part, on the medical evidence, in producing the disease. The two years between August, 1949 and August, 1951, which are not affected by s. 2 (1) (a)* of the Limitation Act, 1939, were years when he was also exposed to the same dust, and, on the medical evidence, which I accept, the exposure for the two years made a material contribution to the severity of the disease which in all probability already existed. Dr. Tattersall, a witness for the defence, said that the plaintiff had the disease in 1949, and added that on an arithmetical basis one could say that, had the plaintiff left the defendants in 1949, he would have been one-fifth, or two-elevenths, better off as regards his expectation of working life and his expectation of life itself; but Dr. Tattersall did not pretend that this was anything but guesswork. I think it to be a just conclusion from the evidence which I heard that the two years from August, 1949, to August, 1951, made a material contribution towards the plaintiff's present condition—certainly not one which can be disregarded on the de minimis principle.

---

* Regulation 13 was revoked as from Jan. 1, 1950, by reg. 1 of the Regulations of 1949, and replaced by reg. 6 of the latter regulations.

† See reg. 6 of the Blasting (Castings and Other Articles) Special Regulations, 1949; 8 HALSBURY'S STATUTORY INSTRUMENTS 252.

Then comes the problem: Is the defendants' liability to damages to be limited to the aggravation of the disease which occurred in these two years? Here it is important to remember that I am not dealing with a case where only part of a plaintiff's injury is shown to be caused by a particular defendant and it would, therefore, be wrong to make him pay for more. The present is a case where the whole injury was caused by a default on the defendants' part; and the only question is whether, as to part of it, s. 2 (1) (a) of the Limitation Act, 1939, can be successfully pleaded. Here the onus is on the defendants. They must show that the injury was inflicted before August, 1949; and they do, I think, show that as to part, though it is impossible for anyone to discover exactly what that part was. It certainly cannot be done merely by doing a proportional sum in arithmetic. In *Bonnington Castings, Ltd.* v. *Wardlaw* (1) ([1956] 1 All E.R. 615) the plaintiff had been exposed to some silica dust in respect of which the defendants were innocent and to some in respect of which they were guilty. It was held that, the plaintiff having shown that the latter dust materially contributed to his pneumoconiosis, that was enough to entitle him to recover damages, which, apparently, he did recover in full. By parity of reasoning, in the present case the plaintiff, having established that the last two years, 1949 to 1951, have made a material contribution to his illness, is also entitled to recover and, I think, to recover in full, for, if it was impossible to distinguish between innocent and guilty dust in the matter of liability in the case just cited, it was equally impossible to distinguish between them in the matter of the quantum of damages.

I was also referred to the decision of GLYN-JONES, J., in *Crookall* v. *Vickers-Armstrong, Ltd.* (2) ([1955] 2 All E.R. 12). There it was held that the defendants were liable in damages only in respect of so much of the total injury as was suffered after their breach of duty towards the plaintiff; in other words, for the aggravation of his injury which their negligence caused, but not for the whole injury. This decision cannot apply, it seems to me, to the facts of the present case. Here the defendants were in breach of their statutory duty before the plaintiff contracted pneumoconiosis, and it was caused by that breach. The question is simply whether the plaintiff is too late to recover in respect of his whole injury. I think that the ratio decidendi of *Bonnington Castings, Ltd.* v. *Wardlaw* (1) obliges me to hold that, once the plaintiff shows that exposure to this dust from August, 1949, to 1951 contributed materially to his injury, he is entitled to recover in respect of his whole injury, although part was suffered before August, 1949.

[HIS LORDSHIP assessed the damages to which the plaintiff was entitled at £3,000, which included the special damages agreed at £781 16s. 7d.]

Judgment for the plaintiff.

Solicitors: *W. H. Thompson* (for the plaintiff); *Bromley & Walker*, Leeds (for the defendants). [*Reported by* G. M. SMAILES, ESQ., *Barrister-at-Law.*]

---

* Section 2 (1) reads: "The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say—(a) actions founded . . . on tort . . ."

Re GILLINGHAM BUS DISASTER FUND. BOWMAN AND OTHERS *v.* OFFICIAL SOLICITOR AND OTHERS.

[CHANCERY DIVISION (Harman, J.), October 4, 8, November 7, 27, 1957.]

Trust and Trustee—Resulting trust—Donations made to fund—Many donors unascertainable—Failure of objects of fund—Bona vacantia.

Charity—Uncertainty—" Worthy causes "—Gift of memorial fund to such worthy causes as mayors may determine.

Charity—Validation by Charitable Trusts (Validation) Act, 1954*—Imperfect trust provision—Donations for two specific objects and " worthy causes " in memory of certain persons—Specific objects achieved—Whether trusts of surplus were validated—Charitable Trusts (Validation) Act,* 1954 (2 *&* 3 *Eliz.* 2 *c.* 58), *s.* 1 (1), (2), *s.* 2 (3).

In December, 1951, a motor vehicle ran into a column of cadets, who were marching along a road in Gillingham, killing some of them and injuring others. The mayors of Gillingham, Rochester and Chatham decided to open a memorial fund, and the town clerk of Gillingham wrote a letter to a daily newspaper referring to that decision and stating that the fund was " to be devoted, among other things, to defraying the funeral expenses, caring for the boys who may be disabled, and then to such worthy cause or causes in memory of the boys who lost their lives, as the mayors may determine ". Money was contributed to the fund anonymously by means of street collections, and also, but to a smaller extent, by substantial gifts from known persons. After so much of the fund as was required to discharge the primary objects (i.e., the defraying of general expenses and the caring for disabled boys) had been spent for the benefit of the victims of the accident, application was made to the court to determine what should be done with the remainder. It was admitted that the primary objects of the fund were not charitable.

Held: the remainder of the fund was held on a resulting trust in favour of the donors because—

(i) treating the town clerk's letter as the instrument declaring trusts, the trust for " worthy causes " failed for uncertainty, and

(ii) the defect was not cured by the Charitable Trusts (Validation) Act, 1954, s. 1 (2)*, as, for the reason stated in (iv) below, the letter was not an " imperfect trust provision " within s. 1 (1), and

(iii) the mere fact that some of the donors were unascertainable was insufficient to displace the principle that funds held on trusts which failed to exhaust the funds would, so far as not applied under the trusts, revert to the donor and, therefore, the remainder of the fund was not bona vacantia.

Cunnack v. *Edwards* ([1896] 2 Ch. 679) and *Braithwaite* v. *A.-G.* ([1909] 1 Ch. 510) distinguished.

Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund ([1946] 1 All E.R. 501) considered.

(iv) although the town clerk's letter was a document " inviting gifts of property " within s. 1 (3) of the Charitable Trusts (Validation) Act, 1954, the letter did not create " more than one interest in the same property " (i.e., the subscriptions) within s. 2 (3), so that the object, " such worthy causes . . .", could not be regarded for the purposes of s. 1 (1) as a separate provision for either charitable worthy causes or other worthy causes not charitable; therefore, the fund could not be " used exclusively for charitable purposes " within those words in s. 1 (1), as the payment of funeral expenses and of the caring for disabled boys were not charitable purposes, and the letter was not an " imperfect trust provision " within that sub-section.

---

* The provisions of s. 1, so far as relevant, and of s. 2 (3) are printed at p. 40, letters A and F, post.

[As to resulting trusts arising where trusts declared are not exhaustive or on the termination of a particular purpose, see 33 HALSBURY'S LAWS (2nd Edn.) 142, para. 240, pp. 147, 148, paras. 247, 248; and for cases on the subject, see 43 DIGEST 642-645, 657, 658, *785-800, 904-910*.

For the Charitable Trusts (Validation) Act, 1954, s. 1 and s. 2, see 34 HALSBURY'S STATUTES (2nd Edn.) 68, 69.]

Cases referred to:

(1) *Re Abbott Fund Trusts, Smith* v. *Abbott*, [1900] 2 Ch. 323; 69 L.J.Ch. 539; 8 Digest (Repl.) 447, *1414*.

(2) *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund, Ryan* v. *Forrest*, [1946] 1 All E.R. 501; [1946] Ch. 194; 115 L.J.Ch. 158; 174 L.T. 428; *affg.* [1945] 2 All E.R. 711; [1946] Ch. 86; 115 L.J.Ch. 50; 174 L.T. 91; 2nd Digest Supp.

(3) *Cunnack* v. *Edwards*, [1896] 2 Ch. 679; 65 L.J.Ch. 801; 75 L.T. 122; 61 J.P. 36; 8 Digest (Repl.) 355, *344*.

(4) *Smith* v. *Cooke, Storey* v. *Cooke*, [1891] A.C. 297; 60 L.J.Ch. 607; 65 L.T. 1; 43 Digest 650, *341*.

(5) *Braithwaite* v. *A.-G.*, [1909] 1 Ch. 510; 78 L.J.Ch. 314; 100 L.T. 599; 73 J.P. 209; 8 Digest (Repl.) 355, *345*.

(6) *Re Buck, Brutey* v. *Mackey*, [1896] 2 Ch. 727; 65 L.J.Ch. 881; 75 L.T. 312; 60 J.P. 775; 8 Digest (Repl.) 356, *348*.

(7) *Re Welsh Hospital (Netley) Fund, Thomas* v. *A.-G.*, [1921] 1 Ch. 655; 90 L.J.Ch. 276; 124 L.T. 787; 8 Digest (Repl.) 467, *1681*.

(8) *Re Hillier, Hillier* v. *A.-G.*, [1953] 2 All E.R. 1547; *revsd.* C.A., [1954] 2 All E.R. 59; 3rd Digest Supp.

(9) *Re Ulverston & District New Hospital Building Fund, Birkett* v. *Barrow & Furness Hospital Management Committee*, [1956] 3 All E.R. 164; 3rd Digest Supp.

Adjourned Summons.

The plaintiffs, the trustees of the Gillingham Bus Disaster Fund, by an originating summons dated July 26, 1956, asked for the determination of, amongst others, the following questions: (i) whether the trusts affecting the said fund were valid charitable trusts under the Charitable Trusts ((Validation) Act, 1954, or otherwise; (ii) as to any surplus of the said fund over and above what was required for the purposes of funeral expenses and caring for boys disabled in the disaster, whether the same (a) was applicable cy-près for some charitable purpose or purposes; or (b) was repayable to the donors who contributed to the said fund in the proportions of their gifts; or (c) went to the Crown as bona vacantia, or that it might be determined how otherwise the same ought to be applied; and (iii) if it should be held that the donors to the said fund were entitled to the said surplus, that all necessary or proper inquiries might be directed to ascertain so far as possible who were the donors and the amounts given respectively.

J. V. Nesbitt for the plaintiffs.
E. W. Griffith for the Official Solicitor on behalf of the donors.
J. W. Brunyate for the Crown.
Denys B. Buckley for the Attorney-General.

Cur. adv. vult.

Nov. 7. **HARMAN, J.**, read the following judgment: In December, 1951, there occurred an accident with tragic consequences in Dock Road, Gillingham, in the county of Kent, when a motor vehicle ran into a column of cadets marching along the road, killing twenty-four of them and injuring a further number. There was, of course, widespread concern at so shocking an event, and the three

A plaintiffs, then mayors of the surrounding areas, namely, Gillingham, Rochester and Chatham, determined to open a memorial fund. According to the evidence of the town clerk of Gillingham before me at the hearing, this was done by making a statement to the Press, and Press accounts of the statement were relied on as constituting the foundation of the so-called charity. I questioned this at the time, and it now turns out that the town clerk wrote a letter to the editor B of the "Daily Telegraph", and, I dare say, to some other papers as well. At any rate, this letter appeared in the columns of the "Daily Telegraph" on Dec. 13, 1951:

> "Cadets' memorial. To the editor of the 'Daily Telegraph'. Sir, The mayors of Gillingham, Rochester and Chatham have decided to promote C a Royal Marine Cadet Corps Memorial Fund to be devoted, among other things, to defraying the funeral expenses, caring for the boys who may be disabled, and then to such worthy cause or causes in memory of the boys who lost their lives, as the mayors may determine."

There is then another observation by the town clerk, which is not relevant, and then are given the addresses of the mayors to which donations may be sent. D It was signed: "Yours faithfully, Frank Hill, town clerk, Gillingham". Mr. Hill had entirely forgotten the letter, but there it is. This appeal evoked a generous response from the public, whose subscriptions amounted to nearly £9,000, contributed partly in substantial sums by known persons, but mainly anonymously as a result of street collections, and so forth.

The result has shown that emotion is a bad foundation for such an activity. E Each of the dead or injured cadets had at common law legal rights against the bus company which were in due course asserted, with the result that compensation has been paid in full in accordance with the law. The plaintiffs administering the fund for the benefit of the victims have spent £2,368 14s. 9d., and are at a loss what to do with the balance—hence this summons. There are three claimants: first, the donors, who are represented by the Official Solicitor, F second, the Crown, represented by the Treasury Solicitor, claiming the unwanted fund as bona vacantia, and, third, the Attorney-General, claiming the fund for charity. It was agreed at the hearing that I should try the issue as to charity first.

Taking the town clerk's letter as the instrument constituting the trusts applicable to this money, I am constrained to say at the outset that it is most G unfortunately worded. It begins by saying that the fund is to be devoted, "among other things", to certain objects. On the face of it, this would enable the fund to be devoted to any object in the world. I think this cannot be the true meaning, and that the words must be read so as to confine the objects to such worthy causes as shall keep green the memory of the boy victims. The money is to be spent primarily in defraying the funeral expenses of the dead and H caring for the disabled, and secondarily on such other worthy cause or causes as the mayors may determine.

It was admitted at the Bar that the primary objects, namely, the funeral expenses and care of the boys, were not themselves charitable objects, there being no element of poverty involved, nor any section of the public. Further, "worthy" objects, while no doubt it would include charitable purposes, must I include many others. It is perhaps a wider word even than "benevolent". It follows that the trust must fail for uncertainty unless the Charitable Trusts (Validation) Act, 1954, can be invoked to support it. I have found this a most difficult Act to construe. I begin by reading the long title:

> "An Act to validate under the law of England and Wales, and restrict to charitable objects, certain instruments taking effect before Dec. 16, 1952, and providing for property to be held or applied for objects partly but not exclusively charitable . . ."

It came into operation on July 30, 1954. Section 1 says:

> " (1) In this Act, ' imperfect trust provision ' means any provision declaring the objects for which property is to be held or applied, and so describing those objects that, consistently with the terms of the provision, the property could be used exclusively for charitable purposes, but could nevertheless be used for purposes which are not charitable.
>
> " (2) Subject to the following provisions of this Act, any imperfect trust provision contained in an instrument taking effect before Dec. 16, 1952, shall have, and be deemed to have had, effect in relation to any disposition or covenant to which this Act applies—(a) . . . as if the whole of the declared objects were charitable . . .
>
> " (3) A document inviting gifts of property to be held or applied for objects declared by the document shall be treated for the purposes of this section as an instrument taking effect when it is first issued."

The first objection taken on behalf of the donors was that there was no instrument or document inviting these gifts, and on the evidence filed at the hearing a strong case was made on this point. It was difficult to see how an oral statement reported in a newspaper was a " document inviting gifts " or an " instrument ". These difficulties have, however, been surmounted by the production of the letter published in the " Daily Telegraph " of Dec. 13, 1951, which I have read, and which I hold to be a document inviting gifts of property under s. 1 (3) of the Act.

In s. 1 (1) the word " provision " seems to mean something which declares the trusts in question, and this, by virtue of sub-s. (3), must be " an instrument ".

The next argument was that the " provision ", i.e., the appeal, states two primary objects, which are admittedly not charitable, and it cannot (runs the argument) therefore be postulated " that the property could be used exclusively for charitable purposes ". The Attorney-General in answer to this relied on s. 2 (3) of the Act, which is in these terms:

> " A disposition in settlement or other disposition creating more than one interest in the same property shall be treated for the purposes of this Act as a separate disposition in relation to each of the interests created."

He argued that the instrument which, be it observed, has now changed its name from being a " provision " to being a " disposition ", creates three interests in the same property (the property being the subscriptions), namely, funeral expenses, care, and other worthy causes, and that, therefore, each must be taken separately, and, so taking them, worthy causes might all be charitable and thus satisfy s. 1 (1); when, therefore, everything which can properly be spent on the first two objects has been spent, the third object remains and is validated by the Act under s. 1 (2). This is a very far-reaching submission. If it be right, a bequest " for such objects as my trustees think fit " will be validated although nothing whatever about charity is mentioned in the will. The vaguer the words are, the better they will do. In my judgment, the Act was not intended to produce any such result. It was, as the long title shows, intended to cure dispositions whereby part of the trust fund is devoted to charitable purposes and part to purposes not charitable, or not wholly charitable, so long as the whole of the money could be devoted to charity by excluding words which were too wide or too vague. In my judgment, s. 2 (3) cannot be called in aid, as has been claimed, for I do not think that the letter to the newspaper " creates more than one interest in the same property ". In fact, the letter created no interest in any property at all. It was merely an appeal which had the result of producing property in the hands of the three mayors. When they received it they were bound to devote it to the memory of the boys, first by the two specified non-charitable activities, and then by using the balance for worthy objects. The first two purposes and the worthy objects cannot be described, in my judgment, as different interests in the same property. If s. 2 (3) cannot be called in aid, it seems to me to be tolerably clear that this letter is not an " imperfect trust provision ", for the property, i.e., the subscriptions given in answer to the appeal, cannot be used exclusively for charitable purposes. It is true that the first two non-charitable purposes have, on the evidence, been fulfilled, and no object is now left but some other worthy object, but the time when the matter had to be decided was, in my judgment, the time when the trust was set up. If I am right so far, it follows that s. 2 (1) of the Act does not apply, because the letter was not a " disposition of property to be held or applied for objects declared by an imperfect trust provision ". If this be so, there can be no scheme or application cy-près of the fund.

[Further questions were then argued.]

Nov. 27. **HARMAN, J.**, read the following judgment: I have already decided that the surplus of this fund now in the hands of the plaintiffs as trustees ought not to be devoted to charitable purposes under a cy-près scheme. There arises now a further question, whether, as the defendant, the Treasury Solicitor, claims, this surplus should be paid to the Crown as bona vacantia, or whether there is a resulting trust in favour of the subscribers, who are here represented by the defendant, the Official Solicitor. The general principle must be that where money is held on trust and the trusts declared do not exhaust the fund it will revert to the donor or settlor under what is called a resulting trust. The reasoning behind this is that the settlor or donor did not part with his money absolutely out and out, but only sub modo to the intent that his wishes, as declared by the declaration of trust, should be carried into effect. When, therefore, this has been done, any surplus still belongs to him. This doctrine does not rest, in my judgment, on any evidence of the state of mind of the settlor, for in the vast majority of cases no doubt he does not expect to see his money back; he has created a trust which, so far as he can see, will absorb the whole of it. The resulting trust arises where that expectation is, for some unforeseen reason, cheated of fruition, and is an inference of law based on after-knowledge of the event.

Counsel for the Treasury Solicitor admitted that it was for him to show that this principle did not apply to the present case. Counsel for the subscribers cited to me *Re Abbott Fund Trusts, Smith* v. *Abbott* (1) ([1900] 2 Ch. 326). In that case a fund had been subscribed for the relief of two distressed ladies who had been defrauded of their patrimony. There was no instrument of trust. When the survivor of them died the trustees had not expended the whole of the moneys subscribed, and the summons asked whether this surplus resulted to the subscribers or whether it was payable to the personal representatives of the two ladies. Stirling, J., had no difficulty in coming to the conclusion that the ladies were not intended to become the absolute owners of the fund, and, therefore, their personal representatives had no claim. It was never suggested in this case that any claim by the Crown to bona vacantia might arise. A similar result was reached in *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund, Ryan* v. *Forrest* (2) ([1945] 2 All E.R. 711), where the learned judge found that, though the objects of the fund were charitable, no general charitable intent was shown in the absence of any element of public benefit and decided that the money belonged to the subscribers on a resulting trust. Here again no claim was made on behalf of the Crown that the surplus constituted bona vacantia.

I was referred to two cases where a claim was made to ~~bona vacantia~~, and succeeded. The first of these was *Cunnack* v. *Edwards* (3) ([1896] 2 Ch. 679). This was a case of a society formed to raise a fund by subscriptions and so forth from the members to provide for widows of deceased members. On the death of the last widow of a member it was found that there was a surplus. It was held in the Court of Appeal that no question of charity arose, that there was no resulting trust in favour of the subscribers, but that the surplus passed to the Crown as bona vacantia. A. L. SMITH, L.J., said (ibid., at p. 683):

> "But it was argued that the proper implication is that when the society itself came to an end, as it has done, there was then a resulting trust of what might happen to be in the coffers of the society in favour of all the personal representatives of those who had been members since the year 1810, and CHITTY, J., has so held. Now it was never contemplated that the society would come to an end; but, on the contrary, provision was made for the introduction of new members for its perpetual existence; and the existing members had power to alter and revise the rules, so that, if it was found that the society was too affluent, provision might be made as to what was to be done with what money might not be wanted. As the member paid his money to the society, so he divested himself of all interest in this money for ever, with this one reservation, that if the member left a widow she was to be provided for during her widowhood. Except as to this he abandoned and gave up the money for ever. The case of *Smith* v. *Cooke* (4) ([1891] A.C. 297), in which it was held there was no resulting trust, shows the principle applicable to such a point. In my opinion this case cannot be likened to that of a man providing a fund by way of trust for the payment of an annuity to his widow during her life, and making no provision for the fund when the widow died and her interest therein ceased, in which case there would be a resulting trust, because the implication in such a case would be that the settlor intended that when the trust came to an end the fund should revert to his representatives, he not having provided to whom it should then go. In such a case there would be no abandonment of the fund as in the present case. In my opinion there was no resulting trust in favour of all those members who had ever subscribed to the fund."

RIGBY, L.J., said ([1896] 2 Ch. at p. 689):

> "The members were not cestuis que trust of the funds or of any part thereof, but persons who, under contracts or quasi-contracts with the society, secured for valuable consideration certain contingent benefits for their widows which could be enforced by the widows in manner provided by the Acts. Any surplus would, according to the scheme of the rules, be properly used up (under appropriate amendments of the rules) either in payment of larger annuities or in reduction of contributions. It is true that no such alterations were made, and it is now too late so to distribute the funds; but I do not think that such omission can give to the contracting parties any benefit which they did not bargain for."

The ratio decidendi seems to have been that, having regard to the constitution of the fund, no interest could possibly be held to remain in the contributor who had parted with his money once and for all under a contract for the benefit of his widow. When this contract had been carried into effect the contributor had received all that he had contracted to get for his money and could not ask for any more. A similar result was reached in *Smith* v. *Cooke* (4), cited by A. L. SMITH, L.J., though it does not appear from the report what the result was. Another case cited to me was *Braithwaite* v. *A.-G.* (5) ([1909] 1 Ch. 510). Here again it was held that there was no room for a resulting trust and the claim to bona vacantia succeeded. The opponents it appears were the last two surviving annuitants. Their claim was rejected on the ground that they had had or were having everything for which the contract provided. The claim of the Attorney-General on behalf of charity was rejected, it being held that there was no charity. A different result was reached by KEKEWICH, J., in *Re Buck, Brutey* v. *Mackey* (6) ([1896] 2 Ch. 727), but it was on the ground that the society was a charity and the money was therefore directed to be applied cy-près. In addition there were cited to me the three hospital cases, *Re Welsh Hospital*

(*Netley*) *Fund, Thomas* v. *A.-G.* (7) ([1921] 1 Ch. 655), *Re Hillier, Hillier* v. *A.-G.* (8) ([1954] 2 All E.R. 59), and *Re Ulverston & District New Hospital Building Fund, Birkett* v. *Barrow & Furness Hospital Management Committee* (9) ([1956] 3 All E.R. 164). In the first of these P. O. LAWRENCE, J., held that all subscribers to the hospital must be taken to have parted with their money with a general intention in favour of charity. This was the only contest in the case between the subscribers on the one hand and charity on the other. In *Re Hillier* (8), UPJOHN, J., at first instance found that certain categories of subscribers were entitled to have their money back, but that others, viz., those who had contributed to collections at entertainments and so forth, had no such right. The Court of Appeal varied this order and declared that the whole fund should go to charity, but without prejudice to the right of any individual to prove that he had no general intention but only the particular intention in favour of one hospital. In *Re Ulverston* (9) the Court of Appeal decided that the whole fund had been collected with only one object and not for general charitable purposes and that so far as money had been received from identifiable sources there was a resulting trust. No claim to bona vacantia was there made and JENKINS, L.J., in explaining the position in *Re Hillier* (8), said ([1956] 3 All E.R. at p. 170):

> "I appreciate that anonymous contributors cannot expect their contributions back in any circumstances, at all events so long as they remain anonymous. I appreciate also the justice of the conclusion that anonymous contributors must be regarded as having parted with their money out and out, although I would make a reservation in the case of an anonymous contributor who was able to prove conclusively that he had, in fact, subscribed some specified amount to the fund. If the organisers of a fund designed exclusively and solely for some particular charitable purpose send round a collecting box on behalf of the fund, I fail to see why a person who had put £5 into the box, and could prove to the satisfaction of the court that he had done so, should not be entitled to have his money back in the event of the failure of the sole and exclusive charitable purpose for which his donation was solicited and made."

JENKINS, L.J., in the course of his judgment threw out the suggestion that donations from unidentifiable donors might in such a case be treated as bona vacantia.

It was argued for the Treasury Solicitor that the subscribers to this fund must be taken to have parted with their money out-and-out and that there was here as in *Cunnack* v. *Edwards* (3) and *Braithwaite* v. *A.-G.* (5) no room for a resulting trust. But there is a difference between those cases and this in that they were cases of contract and this is not. Further it seems to me that the hospital cases are not of great help, because the argument centred round general charitable intent, a point which cannot arise unless the immediate object be a charity. I have already held there is no such question here. In my judgment the nearest case is the *Re Hobourn* case (2) which, however, is no authority for the present because no claim for bona vacantia was made. In my judgment the Crown has failed to show that this case should not follow the ordinary rule merely because there was a number of donors who, I will assume, are unascertainable. I see no reason myself to suppose that the small giver who is anonymous has any wider intention than the large giver who can be named. They all give for the one object. If they can be found by inquiry the resulting trust can be executed in their favour. If they cannot I do not see how the money could then, with all respect to JENKINS, L.J., change its destination and become bona vacantia. It will be merely money held on a trust for which no beneficiary can be found. Such cases are common, and where it is known that there are beneficiaries, the fact that they cannot be ascertained does not entitle the Treasury Solicitor to come in and claim. The trustees must pay the money into court like any other trustee who cannot find his beneficiary. I conclude, therefore, that there must be an inquiry for the subscribers to this fund. A

[On the question of staying further proceedings HIS LORDSHIP directed that all further proceedings against the Attorney-General should be stayed, but did not direct a stay as against the Crown, since some donors of subscriptions might be unidentifiable and then the Crown might wish to challenge the view expressed above that their subscriptions did not become bona vacantia.] B

Declaration and inquiry accordingly.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Gillingham (for the plaintiffs); *Official Solicitor; Treasury Solicitor.*

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

WARNER *v.* SAMPSON AND ANOTHER. C

[QUEEN'S BENCH DIVISION (Ashworth, J.), November 21, 22, December 5, 1957.]

Landlord and Tenant—Lease—Forfeiture—Denial of landlord's title by one of two executors—Whether denial of title was a disclaimer within Administration of Estates Act, 1925 (15 *Geo.* 5 *c.* 23), *s.* 2 (2), *s.* 55 (1) (iii).

Executor and Administrator—Action for possession against two executors—Joint tenants—Executors—Leasehold premises—Denial of landlord's title by one executor binding on both—Whether denial was a disclaimer within Administration of Estates Act, 1925 (15 *Geo.* 5 *c.* 23), *s.* 2 (2), *s.* 55 (1) (iii). D

Counsel—Pleading—Lapse in pleading due to forgetfulness rather than mistake—Whether client bound.

In an action brought by a landlord for possession of property demised for a term of ninety-nine years from June 24, 1900, and based on breaches of covenants, the second of two defendants, who were executors of a deceased assignee of the term, delivered a defence containing a plea (a traverse of each allegation in the statement of claim save one admitted fact) that amounted to a denial of the landlord's title. The landlord, by her reply, claimed to forfeit the lease on the ground of this denial. E

Held: the landlord was entitled to forfeit the lease by reason of the denial of her title because— F

(i) the traverse was sufficiently clear and unambiguous to form the basis of a forfeiture (*Kisch* v. *Hawes Bros., Ltd.*, [1934] All E.R. Rep. 730, applied), and the second defendant was bound by her defence, since the pleading showed forgetfulness rather than mistake on the part of the pleader (*Barrow* v. *Isaacs & Son*, [1891] 1 Q.B. 417, applied), and G

(ii) the denial of the landlord's title by one executor was as effectual as if both had joined in it (*Simpson* v. *Gutteridge* (1816), 1 Madd. 609, followed), and this was not altered by the Administration of Estates Act, 1925, the plea of denial not being a "disclaimer" for which, by s. 55 (1) (iii) and s. 2 (2) of the Act of 1925, the concurrence of both executors would have been essential. H

[As to the impugning of a landlord's title as ground for forfeiture, see 20 HALSBURY'S LAWS (2nd Edn.) 248, para. 281.

As to the joint representation of executors, see 16 HALSBURY'S LAWS (3rd Edn.) 282, para. 536.

As to the effect of acting under counsel's advice, see 3 HALSBURY'S LAWS (3rd Edn.) 53, para. 78. I

For the Administration of Estates Act, 1925, s. 2 (2) and s. 55, see 9 HALSBURY'S STATUTES (2nd Edn.) 722 and 761.]

Cases referred to:

(1) *Wisbech St. Mary Parish Council* v. *Lilley*, [1956] 1 All E.R. 301; 3rd Digest Supp.

(2) *Kisch* v. *Hawes Bros., Ltd.*, [1934] All E.R. Rep. 730; [1935] Ch. 102; 104 L.J.Ch. 86; 152 L.T. 235; Digest Supp.

(3) *Barrow* v. *Isaacs & Son*, [1891] 1 Q.B. 417; 60 L.J.Q.B. 179; 64 L.T. 686; 55 J.P. 517; 31 Digest (Repl.) 547, *6696*.
(4) *Neale* v. *Gordon Lennox*, [1902] A.C. 465; 71 L.J.K.B. 939; 87 L.T. 341; 66 J.P. 757; 3 Digest 339, *291*.
(5) *Matthews* v. *Munster*, (1887), 20 Q.B.D. 141; 57 L.J.Q.B. 49; 57 L.T. 922; 52 J.P. 260; 3 Digest 340, *300*.
(6) *Lewis's* v. *Lewis*, (1890), 45 Ch.D. 281; 59 L.J.Ch. 712; 63 L.T. 84; 3 Digest 344, *336*.
(7) *Barton* v. *Reed*, [1932] 1 Ch. 362, 375; 101 L.J.Ch. 219; 146 L.T. 501; 31 Digest (Repl.) 171, *3049*.
(8) *Re Midgley, Midgley* v. *Midgley*, [1893] 3 Ch. 282; 62 L.J.Ch. 905; 69 L.T. 241; 23 Digest (Repl.) 359, *4278*.
(9) *Simpson* v. *Gutteridge*, (1816), 1 Madd. 609; 56 E.R. 224; 24 Digest 565, *6031*.
(10) *Leek & Moorlands Building Society* v. *Clark*, [1952] 2 All E.R. 492; [1952] 2 Q.B. 788; 3rd Digest Supp.
(11) *Re Schar, Midland Bank Executor & Trustee Co., Ltd.* v. *Damer*, [1950] 2 All E.R. 1069; [1951] Ch. 280; 2nd Digest Supp.
(12) *Doe d. Ellerbrock* v. *Flynn*, (1834), 1 Cr. M. & R. 137; 3 L.J.Ex. 221; 149 E.R. 1026; 31 Digest (Repl.) 522, *6443*.
(13) *Doe d. Graves* v. *Wells*, (1839), 10 Ad. & El. 427; 8 L.J.Q.B. 265; 113 E.R. 162; 31 Digest (Repl.) 522, *6441*.
(14) *Gill* v. *Lewis*, [1956] 1 All E.R. 844; [1956] 2 Q.B. 1; 3rd Digest Supp.

Action.

This was an action by a landlord for possession of demised premises in Hornsey on the ground of breaches of covenants. By a lease dated Feb. 23, 1905, the predecessors in title of Annie Mary Warner (herein called "the plaintiff") had demised the premises for a term of ninety-nine years from June 24, 1900, and this term had become vested in Mrs. Gertrude Annie Sampson before 1947. Mrs. Sampson died in 1949 having bequeathed the premises to her executors, the defendants Arthur Cecil Sampson and Esther Mary Gandy, on trust. The writ was issued on Apr. 27, 1955, against both defendants. Judgment in default of appearance was obtained against the first defendant on May 27, 1955; on June 15, 1955, the second defendant delivered her defence which contained a general denial of allegations in the statement of claim, amounting to a denial of the plaintiff's title as landlord. The plaintiff by her reply, delivered on June 29, 1955, pleaded that the second defendant's defence disputed her title; and the plaintiff further pleaded that she thereby exercised her right to forfeit the term demised by the lease. On Aug. 26, 1955, Master GRUNDY ordered that the judgment against the first defendant should be set aside and that the second defendant should be given leave to withdraw her defence. On appeal, PEARSON, J., on Oct. 6, 1955, varied this order and gave leave to the second defendant to amend but not to withdraw her defence. The plaintiff died on Nov. 8, 1956, and by order dated Mar. 1, 1957, it was ordered that the proceedings should be continued between Miss Marion Warner and Miss Kathleen Warner, the plaintiff's administratrices, and the defendants.

L. G. Scarman, Q.C., and *J. R. Phillips* for the plaintiff.

J. H. Hames for the defendants*.

Cur. adv. vult.

Dec. 5. **ASHWORTH, J.**, read the following judgment: The claim in this case is for possession of a house situate in the parish of Hornsey and known as 18, Park Avenue South. By a lease dated Feb. 23, 1905, the plaintiff's predecessors in title let the house to one East for a term of ninety-nine years from June 24, 1900, at a yearly rental of £8 8s. The lease contained covenants on the part of the lessee to repair, to paint both the inside and the outside of the house, to register with the lessors' solicitors any change resulting from assignment or the death of the lessee or assignee and to keep the property insured against fire.

---

* Counsel and solicitors acting for the defendants did not act for the second defendant at the time when the defence of June 15, 1955, was delivered.

The plaintiff's interest in the house became vested in her in or about the year 1931, and at some date before the year 1947 the term became vested in Mrs. Gertrude Annie Sampson. Mrs. Sampson died on June 23, 1949, having by her will appointed the defendants her executors and trustees: they proved the will on Feb. 16, 1950. By cl. 5 of the will, Mrs. Sampson bequeathed the house to her trustees on trust to permit the first defendant to use and occupy it or to receive the rents, profits and income thereof, he being responsible for all outgoings and for repairs and for insurance and, after his death, in trust for her son and daughter. By cl. 6 of the will Mrs. Sampson directed her trustees to set aside out of the estate a sum of £200 as a fund to meet out of the capital and income thereof the cost of any claim for dilapidations at or near the expiration of the lease.

For a few years after Mrs. Sampson's death, the rent due under the lease was paid but no payment was made at Michaelmas, 1953 or 1954, or at Lady Day, 1954 or 1955, so that when the writ was issued on Apr. 27, 1955, two years' rent amounting to sixteen guineas was owing. The default in payment of rent had prompted the plaintiff's advisers to consider the other covenants in the lease and, as a result of a survey, a notice of breaches of covenant was served on each of the defendants in January, 1955. The second defendant, Miss Gandy, was undoubtedly anxious about the position and in fact interviewed the plaintiff's solicitors, but unfortunately the first defendant would not respond to persuasion or pressure by her and others that he should perform the covenants in the lease. As a result, the writ was issued on Apr. 27, 1955.

The dates on which events occurred in the course of these proceedings are of considerable importance and I therefore set them out in chronological order:

May 4, 1955.	The writ was served on the first defendant.
May 27.	Judgment was entered against the first defendant in default of appearance.
June 15.	The defence of the second defendant was delivered.
June 29.	The reply of the plaintiff was delivered.
Aug. 26.	An order was made by Master GRUNDY setting aside the judgment against the first defendant and giving leave to the second defendant to withdraw her defence.
Oct. 6.	On appeal by the plaintiff, PEARSON, J., varied Master GRUNDY's order by giving leave to the second defendant to amend (but not withdraw) her defence.
Feb. 14, 1956.	The defence of the first defendant and the amended defence of the second defendant were delivered.
Feb. 27.	The reply of the plaintiff was delivered.
Nov. 8.	The plaintiff, Annie Mary Warner, died.
Mar. 1, 1957.	An order was made by Master HARWOOD that the proceedings should be continued between the original plaintiff's administratrices and the defendants.

There are one or two other facts which I should mention before considering the questions of law on which the result of the action depends. Shortly after the writ had been served on him, the first defendant attempted to make good his default in payment of rent and there is included both in his defence and in the second defendant's amended defence a plea of tender. In the course of the hearing before me, counsel for the defendants conceded on behalf of the defendants that this plea could not be maintained and I need not discuss it further.

Some of the breaches of covenant referred to in the statement of claim were admitted in the defence of the first defendant and the amended defence of the second defendant. In so far as they were not admitted, they were proved to my satisfaction by the plaintiff's surveyor, but he added that, when he visited the house six weeks ago, the breaches had in substance been remedied except for the renewal of a dilapidated boundary fence and the treatment of rot which was visible by the window of the lower ground floor kitchen. It appears that in the course of the spring and summer of this present year a sum of £217 has been spent on paintwork and repairs. It is to be noted that the pleading delivered on behalf of the second defendant in June, 1955, was a defence and nothing else: there was no counterclaim for relief against forfeiture. The amended pleading delivered in February, 1956, and the pleading then delivered on behalf of the first defendant, both included such a counterclaim. On behalf of the plaintiff it was contended that, having regard to the nature of the original defence delivered on behalf of the second defendant and the reply thereto, there was no jurisdiction to grant relief against the forfeiture resulting from those pleadings, and, with the assent of counsel on both sides, the argument was limited to that issue, on the understanding that if I decided it in favour of the defendants, I should then hear argument on the question whether relief should be granted in respect of the forfeiture related to the breaches of the express covenants contained in the lease. For the purposes of the issue now under consideration, the terms of the defence delivered on behalf of the second defendant in June, 1955, are of crucial importance, and as the pleading is short, I quote it in full:

> " Defence of the second defendant: 1. This defendant admits that she was appointed an executrix of the will of Gertrude Annie Sampson deceased as alleged in para. 8 in the statement of claim. 2. This defendant denies that she has committed the breaches of covenant specified in para. 9 of the statement of claim or any breach of any covenant. 3. Save and except for the admission herein contained this defendant denies each and every allegation in the statement of claim as if the same were specifically set out and traversed seriatim."

I expressly refrain from mentioning the name of counsel who drafted and signed this pleading. Mr. Hames, who conducted the defendants' case before me with tenacity and ability, was not responsible for it, and the solicitors who are now acting for both defendants were not then acting for the second defendant.

The first point may be described as a question of construction. Relying on the decision of the Court of Appeal in *Wisbech St. Mary Parish Council* v. *Lilley* (1) ([1956] 1 All E.R. 301) counsel for the defendants contended that denial by a tenant of his landlord's title must be clear and unambiguous if it was to be the basis of a claim for forfeiture, and that the pleading in question did not satisfy that condition. It was argued that the form of the denial contained in para. 2 impliedly admits the existence of the lease and of the covenants, the breaches of which are denied, and that the comprehensive denial contained in para. 3 must be construed in such a way as not to conflict with the admission implied in para. 2. In my judgment, however, the wording of para. 3 is too clear and too specific. Only one admission is excluded from the general denial, and that admission must obviously be the admission contained in para. 1. To give effect to the contention of counsel for the defendants would involve adding the letter " s " to the word " admission " in para. 3 or substituting some such expression as " save as aforesaid ". In my judgment the denial of the lessor's title contained in para. 3 is in clearer and more direct form than the denial held in *Kisch* v. *Hawes Bros., Ltd.* (2) ([1934] All E.R. Rep. 730), to be involved in the plea that the defendants were in possession.

Apart from the view which for my part I hold as to the meaning of the defence, there is another reason why I cannot give effect to his contention. Those advising the defendants in August, 1955, no doubt realised the danger created by the pleading delivered on June 15, 1955, and they accordingly sought leave to withdraw it. If Master Grundy's order giving them such leave had not been varied, there would be much force in an argument to the effect that the damage (if any) had been undone; but Pearson, J., did vary the order and his refusal to allow the second defendant to withdraw her defence indicates, in my opinion, an intention on his part not to allow the plaintiff to be deprived of a right which had already crystallised, namely, to treat that defence as containing a denial of the lease. If I were now to hold that the defence did not involve a denial of the lease, I should be giving a decision which would be contrary to the spirit, if not the letter, of Pearson, J.'s decision and I decline to do so.

Logically, the next point to consider is the contention of counsel for the defendants that the denial of the lease contained in the pleading was made by mistake or, alternatively, was not intended, and that in the circumstances the second defendant should not be regarded as bound by it. Counsel for the plaintiff was prepared to accept that the denial was a mistake by counsel, by which he meant that counsel unfortunately overlooked the possible consequence of a pleading in the form drafted by him. There is, in my view, a risk of confusion in the use of the word " mistake " in this connexion. So far as the evidence goes, there is nothing to show that counsel did not intend to draft the pleading in the form in which it was delivered, or that he was in any way misled. The instructions sent to him were produced at the hearing before me by the solicitor who then acted for the second defendant, and it is clear from them that in the solicitor's view there was no defence to the claim that the covenants in the lease had been broken. Counsel was asked to draft a defence " if only to stay the hand of the ground landlord whilst efforts are made to induce Sampson to do something in the matter ". The defence certainly achieved the object of keeping the plaintiff out of possession but, as already stated, counsel overlooked the fact that, if and when the day of reckoning came, the pleading which he drafted might prove fatal. To avoid confusion, I should prefer to call this a lapse rather than a mistake on the part of counsel and I cannot accept the submission of counsel for the defendants that "counsel's mind did not go with his signature ". In this connexion reference was made on behalf of the plaintiff to the decision of the Court of Appeal in *Barrow* v. *Isaacs & Son* (3) ([1891] 1 Q.B. 417 at p. 420) in which Lord Esher, M.R., emphasised the difference between mere forgetfulness and mistake. In my view, counsel's lapse was an instance of the former and not of mistake.

Alternatively it was contended that the form of the defence was given to it " in the teeth of the second defendant's express instructions " that the asset in question forming part of Mrs. Sampson's estate was to be preserved for the benefit of her children. In support of this contention I was referred to *Neale* v. *Gordon Lennox* (4) ([1902] A.C. 465). In that case the plaintiff was only prepared to consent to a proposed order if a certain condition were satisfied. Counsel appearing for her omitted to have this condition included when agreeing to the proposed order, and the House of Lords held that in the circumstances the lady was not bound by the agreement which her counsel had made. In my judgment, that case is plainly distinguishable from the present case and I am quite unable to hold that counsel who drafted the second defendant's defence was disregarding specific instructions. I am not satisfied that any specific instructions beyond those contained in the document to which I have referred were given to counsel; still less that any specific instructions were given by the second defendant herself. I was also referred to the decision of the Court of Appeal in *Matthews* v. *Munster* (5) ((1887), 20 Q.B.D. 141) and of Kekewich, J., in *Lewis's* v. *Lewis* (6) ((1890), 45 Ch.D. 281). Of these two decisions the former does not, in my opinion, assist the defendants in the present case, and the latter was expressly based on the existence of a misunderstanding. For the reasons already given, I am of opinion that there was no misunderstanding in the present case and accordingly the decision of Kekewich, J., is not applicable.

Before I deal with the complications arising out of the fact that the two defendants are the executors of Mrs. Sampson, I should perhaps state that if the second defendant had been in the position of a sole lessee in June, 1955, when her defence was delivered, there would have been no answer to the plaintiff's claim as soon as the reply was delivered. Apart from the decision in *Kisch* v. *Hawes Bros., Ltd.* (2), reference may be made to *Barton* v. *Reed* (7) ([1932] 1 Ch. 362), and a discussion of that case in an article in 76 Sol. Jo. 73.

The proposition in regard to executors put forward on behalf of the plaintiff was that when one of two executors by his defence disputes the landlord's title, the other executor is bound by the consequences unless he has himself put in a defence admitting the title, in which event the principle contained in *Re Midgley, Midgley* v. *Midgley* (8) ([1893] 3 Ch. 282) would be applicable, namely, that the court will have regard to the plea most favourable to the deceased's estate. It was argued that in June, 1955, when the second defendant delivered a defence in which the plaintiff's title as landlord was denied, the first defendant having entered no appearance and indeed having suffered judgment to be entered by default, the plaintiff was entitled to forfeit the term and did so by her reply delivered on June 29. In BACON'S ABRIDGMENT (Vol. III of the 6th Edn.) there appears at p. 30 this passage:

> "Hence it hath been adjudged, that if the testator dies possessed of a lease for years, and having made two executors, one of them grants all his interest to a stranger, that the whole term passes, for each had an entire authority and interest different from other joint tenants."

In *Simpson* v. *Gutteridge* (9) ((1816), 1 Madd. 609), the Vice-Chancellor (SIR THOMAS PLUMER) said (ibid., at p. 616):

> ". . . where one of the several joint-tenants, or tenants in common, executes a deed, it passes only the share of the party so executed; but several executors are considered only as one, and a gift, sale, surrender, payment, release, or judgment confessed by one executor, is as effectual as if all of them had joined. In DYER (23b) it is said: 'If two executors have a term, and one grants to a stranger all that belongs to him, the whole term passes, inasmuch as each of them has an entire authority and interest in the term as executor; but of other joint-tenants of a term it is otherwise; so there is a diversity'. This doctrine has been constantly recognised. Each executor has an entire interest in the term."

Counsel for the plaintiff did not concede that two executors of a lessee are to be regarded as joint tenants, but he went on to contend that in any event, if such executors are in any sense joint tenants, they are, so to speak, joint tenants sui generis as indicated in the passages which I have just quoted.

On the other hand, counsel for the defendants argued that for a denial of title to give rise to forfeiture the denial must be made by a lessee and that one of two executors could not be treated as the lessee for this purpose. In his submission, two executors of a lessee are joint tenants and accordingly a denial or disclaimer can only effectively be given by them both. In regard to joint tenants who are not executors of a lessee, it is no doubt true that in the absence of express words in the lease or of authority one of two joint lessees cannot surrender rights held jointly before the full period of the lease has run: see *Leek & Moorlands Building Society* v. *Clark* (10) ([1952] 2 All E.R. 492 at p. 496). The same principle has been applied in a case relating to disclaimer under a will: *Re Schar, Midland Bank Executor & Trustee Co., Ltd.* v. *Damer* (11) ([1950] 2 All E.R. 1069). But no case was cited to me in which the decision in *Simpson* v. *Gutteridge* (9) was questioned or overruled, and unless the Administration of Estates Act, 1925, has had that effect, I am of opinion that the proposition put forward by counsel for the plaintiff is correct.

Section 2 (2) of that Act provides (so far as material) as follows:

BIBL. LONDIN UNIV

> " Where as respects real estate there are two or more personal representatives, a conveyance of real estate devolving under this Part of this Act shall not . . . be made without the concurrence therein of all such representatives or an order of the court . . ."

Real estate is defined in s. 3 and plainly includes an interest in a term. The definition of " conveyance " in s. 55 (1) (iii) is of importance and is in the following terms:

> " ' Conveyance ' includes a mortgage, charge by way of legal mortgage, lease, assent, vesting, declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will . . ."

On behalf of the defendants it was argued that if, contrary to their contentions, the first defendant's defence delivered on June 15, 1955, involved a denial of the plaintiff's title, it was a disclaimer and therefore within the definition of " conveyance " set out above. It is true that the denial by a tenant of his landlord's title is often referred to as a disclaimer, and indeed in the reply of the plaintiff delivered on June 29 it was alleged that the second defendant had by her defence disclaimed and disputed the plaintiff's title as her landlord. On this point I was referred to *Doe d. Ellerbrock* v. *Flynn* (12) ((1834), 1 Cr. M. & R. 137), and *Doe d. Graves* v. *Wells* (13) ((1839), 10 Ad. & El. 427).

In my judgment, the type of disclaimer contemplated in s. 55 of the Administration of Estates Act, 1925, is one which is, so to speak, recognisable and identifiable as a disclaimer. In other words, the definition contemplates a document which would in normal course either start with the words " This disclaimer . . .", or at least contain the word " disclaim ". It would, in my view, be a misuse of language to describe a defence delivered in an action as a disclaimer, merely because that defence contained a denial of the landlord's title. Moreover, there is force in the argument of counsel for the plaintiff that all the instruments included in the definition of " conveyance " are instruments which can properly and lawfully be executed, provided that they have the concurrence of all the personal representatives. Assuming that a lessee's denial of his landlord's title can be described as a disclaimer, it is not a disclaimer which can properly or lawfully be executed, even if all the executors concur in it, since a disclaimer of that type involves a breach of the condition which the law " tacitly annexes [to every lease] that, if the lessee do any thing that may affect the interest of his lessor, the lease shall be void, and the lessor may re-enter ": see *Ellerbrock* v. *Flynn* (12) (1 Cr. M. & R. at p. 139). In my view, this so-called disclaimer is in essence a repudiation of the tenancy and I hold that the defence of the second defendant delivered on June 15, 1955, was not a disclaimer within the meaning of s. 2 (2) and s. 55 of the Administration of Estates Act, 1925.

I have not yet referred to the effect (if any) of the judgment obtained by default against the first defendant on May 27, 1955. In *Gill* v. *Lewis* (14) ([1956] 1 All E.R. 844), it was held that to obtain an effective judgment for possession against joint tenants judgment must be obtained against both of them, and counsel for the defendants relied on that decision as showing that the judgment entered against the first defendant in the present case was of no effect. Assuming this point in his favour, it does not, in my view, affect the position which resulted from the second defendant's defence and the plaintiff's reply. Although the judgment against the first defendant was set aside in August, it was then too late, and the plaintiff's rights had accrued. It is only right to add that counsel for the plaintiff did not rely on the judgment against the first defendant as an essential element in the establishment of his case.

In my judgment, therefore, the claim for possession succeeds. There is also a claim for mesne profits and damages, based on the footing that forfeiture occurred on June 29, 1955, since which date the defendants have wrongfully remained in possession of the house. The period involved is nearly two and a half years and on the evidence before me I think that a reasonable sum in respect of mesne profits would be £350. As regards damages, most of the disrepair has been made good but the boundary fence and the internal rot still require attention and in respect of them I award a further sum of £50. There will accordingly be judgment for the plaintiff for possession and for the sum of £400.

[At the close of the hearing, His Lordship reserved for argument at a later date the question whether the defendants could now apply for relief from forfeiture.]

Judgment for the plaintiff.

Solicitors: *Murray, Hutchins & Co.* (for the plaintiff); *Wilders & Sorrell** (for the defendants).

[*Reported by* E. Cockburn Millar, *Barrister-at-Law.*]

COUTTS & CO. *v.* DUNTROON INVESTMENT CORPORATION, LTD. AND ANOTHER.

[Chancery Division (Harman, J.), November 22, 26, 27, 1957.]

Mortgage—Remedies of mortgagee—Rent Restrictions Acts—Interest in arrear for twenty-one days—Subsequent payment—Whether protection restored—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5 *c.* 17), *s.* 7, *as applied by Rent and Mortgage Interest Restrictions Act,* 1939 (2 *&* 3 *Geo.* 6 *c.* 71), *s.* 3 (1).

Mortgage—Payment—Mortgage of dwelling-house divided into six flats—Four flats outside Rent Restrictions Acts and two flats within them on basis of rateable values—Apportionment of principal secured by mortgage between the two flats and the four flats—Whether protection of Rent Restrictions Acts removed from principal apportioned to four flats—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5 *c.* 17), *s.* 12 (5), *as applied by Rent and Mortgage Interest Restrictions Act,* 1939 (2 *&* 3 *Geo.* 6 *c.* 71), *s.* 3 (1).

Practice—Originating summons—Amendment—Amendment claiming remedy based on right not existing at date of summons.

By a registered charge dated July 9, 1947, property comprising six flats was charged to secure payment of £10,000 with interest payable on Jan. 9 and July 9 in each year. The property had originally been a single dwelling-house and on Apr. 6, 1939, its rateable value was £288. The division into flats took place in 1947, and each flat was then separately rated. Four of the flats were, by reason of their rateable value, outside the protection of the Rent Restrictions Acts, and two were within it. In 1956 the mortgagee served a notice apportioning the principal sum of £10,000 secured by the charge as to £2,206 to the flats falling within the Rent Restrictions Acts and as to £7,794 to the flats not within the Acts. This notice was served under s. 12 (5) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, by which " when a mortgage comprises one or more dwelling-houses to which this Act applies and other land . . . the mortgagee may apportion the principal money . . . between such dwelling-houses and such other land . . ." The apportionment was later affirmed on a reference to an arbitrator. On July 12, 1957, the mortgagee gave notice calling in the apportioned sum of £7,794 and on the same day the mortgagee issued an originating summons claiming payment of that sum. The payment of interest which fell due on July 9, 1957, was not paid until July 31, 1957, when the mortgagee acknowledged it as a payment on account, and gave a notice calling in the whole sum of £10,000 on the ground that there had been default for twenty-one days in the payment of the interest, and, therefore, that s. 7 of the Act of 1920, as applied by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1), no longer prevented the enforcement of the mortgage. On Sept. 13, 1957, the originating summons was amended to claim £10,000, and, in the alternative, £7,794, with interest in each case.

---

* See footnote, p. 45, ante.

Held: (i) the mortgagee was entitled to the payment of £10,000 because, although by Sept. 13, 1957, when the summons was amended, the interest had been paid, the failure to pay the interest for twenty-one days after it fell due removed the protection afforded by the Rent Restrictions Acts, which was not restored by subsequent payment.

Dictum of RUSSELL, J., in *Evans* v. *Horner* ([1925] Ch. at p. 178) applied; *Nichols* v. *Walters* ([1953] 2 All E.R. 1516) followed.

(ii) (alternatively) the mortgagee was entitled to claim payment of £7,794 in respect of the four flats not within the protection of the Rent Restrictions Acts because (a) the four flats were " other land " within s. 12 (5) of the Act of 1920; and (b) the arbitrator was justified in finding, by reference to the assessments to rates made in 1947, that the four flats were not within the protection of the Rent Restrictions Acts.

Per CURIAM: the amended summons was defective because the right to claim the full sum of £10,000 did not exist at the date of the issue of the summons, and the proper course would have been to issue a new originating summons, but, no objection having been taken and evidence having been filed, the matter would be treated as if a fresh summons had been issued.

[As to restrictions under the Rent Restrictions Acts on the enforcement of a mortgage, see 23 HALSBURY'S LAWS (2nd Edn.) 423, para. 625; and for cases on the subject, see 35 DIGEST 697, 698, *4402-4407*.]

Cases referred to:

(1) *Evans* v. *Horner*, [1925] Ch. 177; 94 L.J.Ch. 220; 132 L.T. 730; 35 Digest 698, *4407*.

(2) *Nichols* v. *Walters*, [1953] 2 All E.R. 1516; 3rd Digest Supp.

(3) *Wallace* v. *Fogarty*, [1926] I.R. 255, 257; 35 Digest 698 *t*.

(4) *Morelle, Ltd.* v. *Wakeling*, [1955] 1 All E.R. 708; [1955] 2 Q.B. 379; 3rd Digest Supp.

Originating Summons.

The plaintiff by the originating summons, dated July 12, 1957, claimed against the first defendant (the mortgagor) and the second defendant (the surety) an order for payment of the principal sum of £7,794 secured by a legal charge dated July 9, 1947, of the premises known as 4, Holland Park, and apportioned by an arbitration award dated June 4, 1957, together with interest at the rate of 3¾ per cent. per annum from July 9, 1957, until payment. On Sept. 13, 1957, the summons was amended, by leave, to claim payment of £10,000 (the whole sum secured by the charge) or, in the alternative, the payment of £7,794.

S. W. Templeman for the plaintiff.

N. C. Tapp and *D. H. Farquharson* for the defendants.

HARMAN, J.: The facts which I find are these. The mortgage was dated July 9, 1947, and was a registered first charge on registered land. The mortgage money was £10,000 at 3¾ per cent., later increased to four per cent., payable on Jan. 9 and July 9 in each year. The property was No. 4, Holland Park, Kensington, which had been divided into six flats. It was first registered in June, 1912, together with a mews in the rear which has since been taken off the title. It was at that time a single private dwelling-house.

The mortgagor, Duntroon Investment Corpn., Ltd., became the registered proprietor on Sept. 2, 1947, so the mortgage was created before the mortgagor appeared on the register at all. At the time the mortgage was registered the proprietors were two individuals called Blumstein and Rosowsky. On May 17, 1956, the mortgagee served a notice on the mortgagor expressing its desire under s. 12 (5) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, to apportion the principal money between such portions of the property as were within the Act and such portions as were not. The dwelling-house having been divided into six flats by the time when the mortgage was registered, the six dwelling-houses so created had been re-assessed for rates at figures which put four of the flats outside the Rent Restrictions Acts and two of them within it. The object of the mortgagee was to create, so to speak, two mortgages, and thus the mortgagee sought to exercise its remedies in respect of the flats which were outside the Act without the restrictions which the Act imposes. The notice of apportionment purported to divide the principal sum of £10,000 as to £2,206 to the property to which the Act applied and £7,794 to the property outside the Act. That was objected to, and consequently a reference to arbitration was made and the arbitrator made his award on June 4, 1957, in which he agreed with the principles on which the apportionment had been made.

On July 12, 1957, notice was given calling in the apportioned sum of £7,794. At that time there was an instalment of interest three days due, and that was the position when the originating summons was issued (on July 12, 1957). The instalment of mortgage interest due on July 9, 1957, was in fact not paid within twenty-one days of that date; it was not paid until July 31, 1957. It was acknowledged as a payment on account and on the same day notice was given calling in the entire sum on the grounds that there had been default for twenty-one days in the payment of the interest and, therefore, the Rent Restrictions Acts no longer prevented the enforcement of the mortgage.

On Sept. 13, 1957, the originating summons was amended so as to include the second claim. As to that, it seems to me that the plaintiff was clearly wrong. At the date when the summons was issued there was admittedly no claim to the whole £10,000. No interest was twenty-one days in arrear. Supposing it to be true, and I think that it is, that there was twenty-one days' default by Aug. 1, the right course was to issue a fresh summons in respect of that. An amendment cannot be made so as to include a right which was not existing at the date of the issue of the writ, and I see no difference between an originating summons and a writ for this purpose. It is not right to say, and it is not the fact, that at the date when the summons was issued on July 12, 1957, this right had accrued to the plaintiff. No objection was taken to the amendment, evidence has been filed and the matter has gone forward without notice being taken of the defect, which is nevertheless a real one. If necessary, I propose to treat the plaintiff as having issued a fresh summons for the amended amount on Sept. 13, 1957, the date when the plaintiff amended the originating summons. I think that this matter only goes to costs.

Other points are taken, however, by the mortgagor. The first is that at the date when the summons was amended, namely, Sept. 13, no interest was due—it had been paid on July 31. Therefore, says the mortgagor, if the Act ever ceased to apply, it had become applicable again and prevents the enforcement of the mortgage. That depends on s. 7 of the Act of 1920 which provides:

> " It shall not be lawful for any mortgagee under a mortgage to which this Act applies, so long as—(a) interest at the rate permitted under this Act is paid and is not more than twenty-one days in arrear . . . to call in his mortgage or to take any steps for . . . enforcing his security or for recovering the principal money thereby secured."

The mortgagor says that it is not true that on Sept. 13 any interest was more than twenty-one days in arrear and this summons cannot succeed. On this part of the case the mortgagee relies on an old authority, the decision of RUSSELL, J., in *Evans* v. *Horner* (1) ([1925] Ch. 177). The headnote is:

> " Section 7 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, suspends the rights of the mortgagee during one continuous period, which lasts as long as the conditions of the section are complied with.

> When those conditions are broken a subsequent compliance with them does not revive the protection given by the section."

In that case the interest fell due on May 19, and was still not paid on June 11 when the summons to enforce the mortgage by foreclosure was issued. On June 14, three days later, a cheque for the interest was sent and accepted on account generally, as here. It was argued that even though the mortgagee was right to start his proceedings when he did, those proceedings were bad when the condition ceased to be satisfied, but Russell, J., would not agree to that. He said (ibid., at p. 178), as the headnote states, that:

> ". . . the section only suspends the rights of the mortgagee during one continuous period [according to certain conditions] and that when once those conditions are broken a subsequent compliance with them does not revive the protection given by the section."

That decision does not cover this case, because here the payment of interest was made before the date when the proceedings were issued. But the reasoning of Russell, J., would cover this case because he speaks of one continuous period, and says that the protection only lasts so long as all the conditions are complied with; directly one of them is broken the protection is gone, and gone for ever. That case was mentioned with approval by the Court of Appeal in *Nichols* v. *Walters* (2) ([1953] 2 All E.R. 1516). In that case also there had been arrears, and there were arrears at the date of the issue of the summons. It was held that subsequent payment did not put the matter right or re-create the area of security afforded by the Act. Sir Raymond Evershed, M.R., approved (ibid., at p. 1518) of what Russell, J., had said.

My attention was called to an Irish case, *Wallace* v. *Fogarty* (3) ([1926] I.R. 255), where a contrary view was taken, but there the circumstances were rather different in that there was no right of action, so to say, at the date when the proceedings were started. The Irish Act of 1923 is exactly equivalent to the English Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, in this respect. The judge of first instance, Meredith, J., said that the Act applied because, though the mortgagor had been in arrears, he had paid up before the proceedings were brought, and he said he did not approve of the view of Russell, J., on the matter. That does not absolve me from following the Court of Appeal in any matter binding on me. Although there is a difference between *Nichols* v. *Walters* (2) and the present case, and although I must say I rather sympathise with the view that Meredith, J., took, I feel that I am bound by the decision of the Court of Appeal and that it must be taken that the period is one continuous period as Russell, J., said ([1925] Ch. at p. 178) which, once broken, can never be restored. Consequently the fact that the mortgage interest was paid, even though it was paid before the proceedings were started, would not re-create in favour of the mortgagor the protection which s. 7 of the Act of 1920 had afforded him. Therefore, subject to the technical point, I think the mortgagee was entitled on Sept. 13, 1957, to enforce the whole of the security and, therefore, was entitled to an order for the repayment of the entire sum.

If that be so, strictly speaking it is not necessary to consider the alternative claim which is a claim as originally made to the £7,794, but as this case may go further, I feel that I must say something about it. This turns on s. 12 (5) of the Act of 1920. That begins by providing:

> "When a mortgage comprises one or more dwelling-houses to which this Act applies and other land, and the rateable value of such dwelling-houses is more than one-tenth of the rateable value of the whole of the land comprised in the mortgage, the mortgagee may apportion the principal money secured by the mortgage between such dwelling-houses and such other land . . ."

This apportionment was made on the footing that this section applied as the

A mortgage did comprise one or more dwelling-houses to which the Act applied, i.e., the two flats which were below £100 in rateable value and other land, viz., the four flats which were outside the protection of the Act. The mortgagor's first argument was that " other land " where it is used in this sub-section must mean land other than dwelling-houses. It says " one or more dwelling-houses and other land " and the argument there was that there is a contrast between B " dwelling-houses " and " land ", and " land " means land without dwelling-houses on it and the apportionment could only be made where for instance there is a farm house and a park. The mortgagee's claim is that " land " means or includes " dwelling-houses " having regard to the terms of s. 3 of the Interpretation Act, 1889*, and there is nothing to give a contrary meaning to it. He argues that " other land " means any property comprised in the mortgage other C than the dwelling-houses to which the Act applies. In my judgment that is the right interpretation, because s. 12 (5) goes on to refer to the value " of the whole of the land comprised in the mortgage ". It is clear that this includes the whole of the mortgaged property: therefore " other land " means property comprised in the mortgage, not being dwelling-houses to which the Act applies. I think that s. 12 (5) is applicable.

D Another point taken is that these were all dwelling-houses to which the Act applies because for the purposes of the Act one must look, not at what the rating authority did in 1947 when this house was turned into six flats, but to the original rateable value when the property was one single dwelling-house and had a rateable value of £288. That depends on the Rent and Mortgage Interest Restrictions Act, 1939. Section 3 of that Act recontrolled a number of houses E which had been controlled at an earlier date and decontrolled others, and also brought new property into control. For the purpose of ascertaining the application of the Act of 1939, one must find out what was the rateable value on the appropriate date, which is Apr. 6, 1939, as far as London is concerned. Under s. 7 (2), if on the appropriate date there was no separate assessment, then one must assess, for the purpose of finding out whether a house would be within the F Act or not, on the original rateable value on the appropriate day, which here was £288. If, on the other hand, the dwelling-house was first assessed after the appropriate day, then it must be treated for the purpose of ascertaining the rateable value as having been assessed when it was in fact first assessed†. In the present case, these assessments were made in 1947 when for the first time this house, which had been a single dwelling-house, became six dwelling-houses, to G each of which the Act applied, and they were rated accordingly on that footing. It seems to me that anybody who wants to say that those ratings were not ratings which should be considered for the purposes of the Act, has to prove that. It is said that there is no evidence that the entities created in 1947 made the house any different from what it had been before, and *Morelle, Ltd.* v. *Wakeling* (4) ([1955] 1 All E.R. 708) was cited to me to show that when two flats, which H had been held together, were separated that did not create two new hereditaments, but that they were to be dealt with for the purposes of the Act as they were before the separation. There, however, the facts were quite different. The property had been originally built as flats. Two flats were knocked into one, and were afterwards separated again. That is an entirely different case and not one which is of very much assistance to me here, although it bears some I superficial resemblance. I hold that the arbitrator, who found as a fact that there were six flats, four of them outside the Act and two of them within it, was amply justified in so finding, and no attempt was made, as far as I can see, to contest that finding on the basis that he was not entitled to make it. If he was entitled so to find, there was plenty of evidence on which he could do so. I am of opinion, therefore, that the conditions to bring s. 12 (5) of the Act of 1920 into operation subsisted, and that the mortgagee was entitled to make the apportionment which he did. That apportionment was disputed, and under s. 12 (5) the matter went to a single arbitrator who was properly appointed, and he has confirmed the apportionment. In my opinion there is no answer to the summons so far as it claims the payment of £7,794 resulting from the apportionment. As, in my judgment, the plaintiff is entitled to the larger relief, I will make an order for the payment by the defendants of the principal money of £10,000 secured by the charge, together with interest.

---

* By s. 3 the expression land includes " messuages, tenements, and hereditaments, houses, and buildings of any tenure."

† See s. 7 (3) of the Act of 1939.

Order accordingly.

Solicitors: *Dawson & Co.* (for the plaintiff); *Charles Ross & Co.* (for the defendants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

BIRCH *v.* SULLIVAN AND ANOTHER.

[CHANCERY DIVISION (Harman, J.), November 26, 27, 1957.]

Company — Shareholder — Minority shareholder — Representative misfeasance action against sole director with controlling interest—No allegation in statement of claim that shareholder prevented from causing company to sue—Pleading defective.

Bankruptcy—Property—Rights of action—Minority shareholders' action—Whether bankrupt registered shareholder may maintain action.

The plaintiff was adjudicated bankrupt on Jan. 5, 1956, and a trustee in his bankruptcy was appointed on Jan. 11, 1956. On Sept. 4, 1957, he, being then a registered shareholder of the defendant company, issued a writ against the first defendant and the defendant company claiming a declaration that the first defendant had been guilty of misfeasance as a director of the defendant company, or of breach of trust to the plaintiff. The allegations against the first defendant were, in substance, that he had, in breach of duty as director and in fraud of the plaintiff as a shareholder, acquired for his own benefit a valuable contract of agency for a variety artiste for whom the defendant company had been acting as agents and managers. The plaintiff claimed consequential accounts and that the first defendant should contribute to the assets of the defendant company what might be found due on taking the accounts. In October or November, 1957, the trustee in the plaintiff's bankruptcy was registered as holder of the shares formerly held by the plaintiff in the defendant company. The defendants applied for the writ to be set aside as disclosing no cause of action vested in the plaintiff, and that the statement of claim should be struck out as the defendant company would alone have the right to sue the first defendant in respect of the matters alleged.

Held: (i) the action would be stayed so long as the plaintiff alone remained on the record as plaintiff, with liberty to apply to dismiss the action if the trustee in his bankruptcy did not cause his name to be put on the record as plaintiff within three months, and

(ii) the statement of claim would be struck out, because it did not allege that the first defendant prevented the plaintiff from bringing an action in the name of the defendant company and was also defective in other respects, but without prejudice to the right of the trustee, when added as plaintiff, to deliver a new statement of claim within twenty-one days of becoming plaintiff.

[As to when proceedings may be brought by a shareholder in his own name to redress a wrong done to a company, see 6 HALSBURY'S LAWS (3rd Edn.) 445, para. 863.

As to rights of action by a bankrupt passing to his trustee, see 2 HALSBURY'S LAWS (3rd Edn.) 400, 401, para. 803.]

A Cases referred to:

(1) *Pavlides* v. *Jensen*, [1956] 2 All E.R. 518; 3rd Digest Supp.

(2) *Foss* v. *Harbottle*, (1843), 2 Hare, 461; 67 E.R. 189; 9 Digest (Repl.) 662, *4382*.

Procedure Summons.

B This was an application by the defendants, Michael John Sullivan and Michael Sullivan, Ltd., in an action in which the plaintiff, by his writ, which was issued on Sept. 4, 1957, claimed, among other things, (i) a declaration that the first defendant, as director of the defendant company, had been guilty of misfeasance and breach of trust in relation to the company, or, alternatively, had been guilty of breach of duty towards the plaintiff as a shareholder of the company in acting C for his own personal gain and benefit as agent and manager for a certain variety artiste; (ii) an order for accounts and inquiries to be taken and made to ascertain what sums the first defendant was liable to contribute to the assets of the defendant company; (iii) an order that the first defendant should contribute to the defendant company all such sums as he might be found liable to contribute; and (iv) further or alternatively, damages to be paid by the first defendant to D the plaintiff.

The plaintiff's statement of claim, which was served on the defendants with the writ, included allegations to the following effect—that the defendant company was incorporated in February, 1947, to carry on business as proprietors of concerts, variety agencies and allied objects; that the plaintiff and the first defendant were at all material times shareholders of the defendant company, the E £100 issued and authorised capital of that company being held as to twenty-five preference and twenty ordinary shares by the plaintiff and as to twenty-five preference and twenty-four ordinary shares by the first defendant; that the first defendant was at all material times a director of the defendant company; that in or about 1955 the popularity of an artiste for whom the defendant company acted as agents and managers had greatly increased and she had become F and was capable of earning large salaries as a variety artiste; that in or about September, 1955, the first defendant who was in de facto control of the defendant company, had caused the defendant company to cease to trade with the purpose and effect of acquiring for his own personal benefit, in breach of his duty and trust to the company as director and in fraud of the plaintiff as shareholder, the profits to be gained from the continuance of the business of acting as agent and manager G for the variety artiste; that the first defendant had at all times thereafter, under a contract or arrangement with her, acted as her agent and manager, and had in fact diverted to himself to the loss and damage of the defendant company and of the plaintiff very substantial profits and commissions so earned. In an affidavit of the plaintiff's trustee in bankruptcy the trustee deposed, among other matters, that with the plaintiff's consent the action was being carried on on the instructions H of the trustee.

The plaintiff had been adjudicated bankrupt on Jan. 5, 1956, and a trustee in his bankruptcy had been appointed on Jan. 11, 1956. In October or November, 1957, the trustee was registered as holder of the shares formerly held by the plaintiff in the defendant company. By summons, dated Sept. 25, 1957, the defendants asked for an order that the plaintiff's statement of claim be struck I out under R.S.C., Ord. 25, r. 4, or, alternatively, under the inherent jurisdiction of the court on the grounds that (a) the plaintiff was adjudicated bankrupt on Jan. 5, 1956, since when no order had been made for his discharge, and, accordingly, the plaintiff had no right or title to sue and his statement of claim disclosed no reasonable cause of action against the defendants, or either of them, and was frivolous and vexatious; (b) the statement of claim disclosed no cause of action in the plaintiff against the defendants, or either of them, in that in respect of the matters complained of therein the defendant company alone would have any right to sue the first defendant; and (c) the statement of claim disclosed no reasonable cause of action and claimed no relief against the defendant company. The summons further asked for the action to be stayed or dismissed.

R. S. Boyd for the defendants.
M. Finer for the plaintiff.

HARMAN, J., after stating that the defendants applied to strike out the statement of claim and disposing briefly of one ground* for asking for that relief, continued: The second ground is that the plaintiff is an undischarged bankrupt and was one when the writ was issued and the statement of claim was delivered with the writ. The allegation is that any rights of the plaintiff to bring an action are rights of property, or choses in action, which have devolved on the trustee, and that, therefore, the plaintiff is not a competent plaintiff. At the date when the writ was issued and the statement of claim was delivered the plaintiff was still a registered holder of shares in the defendant company. Since those events the trustee in bankruptcy has had himself put on the register, so that the plaintiff no longer has any interest in the shares, and it is admitted that now the trustee in bankruptcy alone could maintain this action, if anyone could do so. As things now stand, I need not consider further whether, when the writ was issued, the plaintiff was entitled to sue. He certainly was not entitled to sue so far as a direct claim in his own favour was concerned, but it is possible that, as the registered holder of shares, he was entitled to complain of a wrong done to the company in which he was a registered shareholder. The circumstances are well settled in which a shareholder, if he be in the minority, may bring such an action in his own name. Supposing that all the conditions were satisfied and that the registered shareholder was in a position, if he were not bankrupt, to bring an action because of the wrongful act of the director in not paying money to the company, I am not satisfied that he could not maintain such an action as long as he remained registered. However that may be, he certainly can no longer maintain the action when he has ceased to be a registered holder. Therefore, on that part of the claim, I should certainly stay the action as long as the plaintiff alone remains the plaintiff, giving a reasonable opportunity to the trustee to put the matter right if he is minded to adopt the action.

Apart from that, it is said that the statement of claim is demurrable because it does not contain the necessary allegations. The nature of the case is that the individual defendant, in fraud of the rights of the defendant company, either terminated or did not renew a very advantageous contract which the defendant company had to manage or arrange for the services of a music hall actress. That had been done through the company for some time, while the actress was comparatively poor and obscure, but, as the plaintiff says, when she began to get into what is called "big money", the company ceased, in some mysterious way, to act for her or on her behalf and the first defendant became the only director of her activities. That is said to have been a misfeasance as against the defendant company. Whether any such case can be proved I need not consider at this stage, but, if all those facts could be proved, then there would have been misfeasance by the first defendant. The person to complain of that is, undoubtedly, the defendant company, but the first defendant is the only member of the board of that company. It is said that by reason of his position, and because he holds or controls half the shares of the company, he is in a position to prevent the company taking any action against him. If that were true, an action might lie at the suit of a minority or of a frustrated shareholder suing on behalf of himself and all other members of the company except the first defendant. The statement of claim, however, in my judgment, does not make any allegation necessary to found such an action. It would be necessary to allege, as well as thereafter to prove, that the plaintiff could not, by reason of the first defendant's opposition, obtain the name of the company to issue proceedings: that he was in the position in which the minority shareholders were in the comparatively rare cases where such actions have been allowed.

---

* The ground that the statement of claim contained no statement of the relief claimed and therefore did not comply with R.S.C., Ord. 20, r. 6.

Pavlides v. *Jensen* (1) ([1956] 2 All E.R. 518), a decision of DANCKWERTS, J., was a recent case on this subject. In that case DANCKWERTS, J., went carefully into the question: Does the law permit such an action ? He there concluded that, as only negligence and not fraud was alleged in that particular case, the action was not within the principle stated in *Foss* v. *Harbottle* (2) ((1843), 2 Hare, 461) and could not be maintained. It is, however, clear from such extracts from the pleadings as one finds in that report, that one must not only prove the essential matters at the trial, but one must also allege them in the pleadings. In my judgment, the present statement of claim is defective in several respects. Therefore, I propose, first, to stay the action so long as the plaintiff alone remains the plaintiff, with liberty to apply to dismiss it if the trustee in bankruptcy does not cause himself to be put on the record as plaintiff within three months. Secondly, I propose to strike out the statement of claim, without prejudice, nevertheless, to the right of the new plaintiff, when added, to deliver a fresh statement of claim, which he may do within twenty-one days of his becoming plaintiff. The defendants' costs of the summons will be his costs in the action.

Order accordingly.

Solicitors: *Arnold & Co.* (for the defendants); *Henry E. Goodrich* (for the plaintiff).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

WERNICK *v.* GREEN.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Devlin and Pearson, JJ.), December 6, 1957.]

Animals—Poultry—Poultry dealer—Keeping of records—Poultry purchased to be resold for slaughter—Poultry already fattened for slaughter when bought, but fed before being resold—Whether poultry "fed" for slaughter —Live Poultry (Movement Records) Order, 1954 (*S.I.* 1954 *No.* 122), *art.* 2 (1).

Contravention of the Live Poultry (Movement Records) Order, 1954, art. 3, which requires poultry dealers to keep records, is an offence under s. 78 (1) (i) of the Diseases of Animals Act, 1950. By a proviso to art. 2 (1) of the order a person was not to be deemed to be a poultry dealer by reason only that he sold for slaughter poultry " which he has purchased and fed for that purpose ". The appellant purchased poultry and sold them for slaughter. Most of the poultry so bought were already fattened. A substantial part of the poultry were retained by the appellant on his premises for a day before re-sale and were fed to avoid cruelty to them. The appellant did not keep the records required by the order and was convicted of contravening it. The magistrate found that in the farming industry the phrase " fed for slaughter " meant " fattened for slaughter ".

Held: the appellant was within the proviso to art. 2 (1), because the word " fed " in the proviso did not mean " fattened " and the appellant did feed the poultry; therefore the conviction would be quashed.

Appeal allowed.

[For the Live Poultry (Movement Records) Order, 1954, art. 3, see 2 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-Issue) 277.]

Case Stated.

This was a Case Stated by the stipendiary magistrate for South Staffordshire in respect of his adjudication as a magistrates' court sitting at Willenhall.

On Mar. 11, 1957, an information was preferred by Frederick Green, the respondent, against Joseph David Wernick, the appellant, alleging that, between Oct. 10, 1956, and Dec. 14, 1956, the appellant, being a poultry dealer, had contravened the Live Poultry (Movement Records) Order, 1954, art. 3, by failing to keep a record containing the particulars specified in art. 3, contrary to s. 78 and s. 79 of the Diseases of Animals Act, 1950. Article 2 (1) of the Order of 1954 defined a poultry dealer and provided:

> ". . . a person shall not be deemed to be a poultry dealer by reason only that he sells for slaughter poultry which he has purchased and fed for that purpose."

The following facts were found.

At all material times the appellant was habitually engaged in the business of buying and reselling poultry for slaughter, the greater part bought being already fattened for slaughter. The expression "fed for slaughter" as used in the farming industry meant "fattened for slaughter". All the poultry purchased by the appellant was sold by him for slaughter and a substantial proportion was retained on his premises for only one day before being sold; the appellant gave food to the poultry on his premises in order to keep them alive and to avoid cruelty. He did not keep records in accordance with the Order of 1954.

The appellant contended that he was not a poultry dealer within art. 2 (1) of the Order of 1954 as he sold for slaughter poultry which he had purchased and fed for that purpose; that the onus of proving he was a dealer within art. 2 (1) was on the respondent, and that the word "fed" should be given its ordinary and natural meaning. The respondent contended that the onus of proof was on the appellant; that the word "fed" meant "fattened" and the purpose of the proviso to art. 2 (1) was to protect dealers who not only sold poultry for slaughter but also fed them for slaughter; that the word "immediate" before the word "slaughter" was not inadvertently omitted from the proviso as it was omitted from a similar exemption in the Live Poultry (Restrictions) Order, 1954*, and that if the word "fed" meant merely the casual provision of sufficient food to avoid hunger, this would lead to contraventions of art. 7 (2) of the Live Poultry (Restrictions) Order, 1954.

The stipendiary magistrate found that the appellant had committed the alleged offence because the word "fed" in the proviso to art. 2 (1) of the Order of 1954 meant "fattened" and the appellant had not proved that he fattened the poultry before he sold them for slaughter; accordingly, the appellant was convicted. The question for the court was, whether on the facts found, the magistrate came to a correct conclusion in law.

P. C. Northcote for the appellant.
B. S. Wingate-Saul for the respondent.

LORD GODDARD, C.J.: By the Live Poultry (Movement Records) Order, 1954†, it is provided that poultry dealers shall keep records. I have no doubt that that is for the purpose of enabling the inspectors of the Ministry of Agriculture, Fisheries and Food to trace disease, fowl pest, and so on, and to discover the place where it started. The order states, in art. 2 (1), that a poultry dealer "means a person habitually engaged in the business of buying and reselling poultry or day-old chicks", but art. 2 (1) exempts auctioneers, and also provides that

> "a person shall not be deemed to be a poultry dealer by reason only that he sells for slaughter poultry which he has purchased and fed for that purpose."

---

* See art. 5 of the Live Poultry (Restrictions) Order, 1954.

† S.I. 1954 No. 122.

So if a person is selling poultry for slaughter he is not a poultry dealer provided that he has fed the birds for that purpose. The learned magistrate in this case has construed " fed " as meaning " fattened ". He has also found that all the poultry purchased was sold by the appellant for slaughter; that a substantial proportion of the poultry was retained by the appellant on his premises for only one day before being resold for slaughter; and that he gave food to poultry on his premises to keep them alive and avoid cruelty.

I do not think that we are entitled, in a section which creates a criminal offence, to say that " fed " necessarily means " fattened " because a man may buy poultry for sale but may also buy birds which are already fattened or partly fattened. Why should he not? If he is buying birds and is going to sell them for slaughter he would not want the birds he buys to get thin, so he would feed them. He may give the birds more food or less food, but he certainly would not let them get thin, and I think that they are being fed for the purpose for which he keeps them because he is going to sell them. If the Ministry of Agriculture want to restrict the exception, they must try their hands with some other order; but on the finding that the appellant did feed the poultry I do not think that any offence is committed, and for these reasons I would quash the conviction.

DEVLIN, J.: I agree. If, as counsel for the respondent submits, the Minister intends " prepared for slaughter " should be equivalent to " fattened ", and that is what the magistrate has found, it is difficult to see why the Minister did not use the word " fattened ". It is suggested that if he had used the word " fattened ", people might have interpreted that to mean that a bird was not being fattened while the fat content was increased and the lean content remained stationary. I should have thought the word " fattened " would have conveyed what counsel for the respondent says the Minister intended it to convey to anybody; but we have to construe the phrase " fed for slaughter " and, like my Lord, I am unable to see why if the bird is given food to prevent it getting thinner that is not just as much " fed for slaughter " as giving it food to fatten it and increase its weight.

For these reasons, I agree with the conclusion my Lord has proposed.

PEARSON, J.: I agree.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Woolley & Co.*, Wolverhampton (for the appellant); *Solicitor, Ministry of Agriculture, Fisheries and Food* (for the respondent).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

NOTE.

R. *v.* SHARP.

[BIRMINGHAM ASSIZES (Salmon, J.), July 10, 11, 12, 15, 1957.]

Criminal Law—Practice—Mute of malice or by visitation of God.
Criminal Law—Trial—Plea—Fitness to plead—Defendant standing mute—Verdict of "mute by the visitation of God".

[As to defendant standing mute on being arraigned, see 10 HALSBURY'S LAWS (3rd Edn.) 401, para. 728; and for cases on the subject, see 14 DIGEST (Repl.) 278, 279, *2467-2487*.]

Cases referred to:

(1) *R.* v. *Turton,* (1854), 6 Cox, C.C. 385; 14 Digest (Repl.) 280, *2506*.
(2) *R.* v. *Pritchard,* (1836), 7 C. & P. 303; 173 E.R. 135; 14 Digest (Repl.) 278, *2472*.
(3) *R.* v. *Dyson,* (1831), 1 Lew. C.C. 64; 7 C. & P. 305, n. (173 E.R. 135); 14 Digest (Repl.) 278, *2471*.
(4) *R.* v. *Berry,* (1876), 1 Q.B.D. 447; 45 L.J.M.C. 123; 34 L.T. 590; 40 J.P. 484; 14 Digest (Repl.) 278, *2476*.
(5) *R.* v. *Stafford Prison (Governor), Ex p. Emery,* [1909] 2 K.B. 81; 78 L.J.K.B. 629; 100 L.T. 993; 73 J.P. 284; 14 Digest (Repl.) 278, *2477*.
(6) *R.* v. *Roberts,* [1953] 2 All E.R. 340; [1954] 2 Q.B. 329; 117 J.P. 341; 14 Digest (Repl.) 285, *2611*.
(7) *R.* v. *Beynon,* [1957] 2 All E.R. 513.
(8) *R.* v. *Davies,* (1853), 3 Car. & Kir. 328; 175 E.R. 575; 14 Digest (Repl.) 280, *2505*.

Trial on Indictment.

The defendant, George Myhill Sharp, was charged before SALMON, J., and a jury, on an indictment containing a number of counts charging him with serious offences against young girls. On arraignment, the defendant stood mute, and a jury was impanelled to try the issue whether he was mute by malice or by the visitation of God. The prosecution opened their case. Evidence was called both by the prosecution and by the defence.

At the request of counsel for the prosecution for a ruling on the question who should first address the jury, SALMON, J., after expressing his provisional view that the onus was on the prosecution, and after hearing counsel for the defence, who referred to *R.* v. *Turton* (1) ((1854), 6 Cox, C.C. 385), and counsel for the prosecution not dissenting, decided that the onus of proving that the accused was mute of malice was on the prosecution, and that, as evidence had been called on both sides, counsel for the defence should first address the jury. HIS LORDSHIP then heard counsel's submissions on the question whether the standard of proof of this issue was the standard normally required in criminal cases or the standard of a balance of probabilities, and intimated that, while the balance of probabilities was one of the matters to be taken into account, he would direct the jury that before they could find the accused to be mute of malice they must be quite satisfied that that was the fact. Counsel then addressed the jury.

M. A. B. King-Hamilton, Q.C., and *H. J. Garrard* for the Crown.
B. B. Gillis, Q.C., and *W. A. L. Allardice* for the defendant.

July 10. **SALMON, J.,** summing-up to the jury on the issue mute of malice or mute by the visitation of God, said that the question which they had to decide was one of great importance, because, if the defendant failed to answer to the arraignment through no fault of his own, it would be manifestly most unfair that he should be found to be mute of malice. If, on the other hand, the muteness was assumed for the purpose of avoiding or postponing the trial, it was important from the public point of view that the ruse should not be successful. If the trial were postponed, all the witnesses might not, perhaps, be available when it eventually came on for hearing, and also, the witnesses, particularly the young witnesses, might have forgotten. HIS LORDSHIP went on to say that sometimes a defendant was mute because he had had a stroke, or because there was some injury to his larynx, or because of some other physical cause; and it was then comparatively easy for a jury to decide whether his condition was genuine. In the present case, however, it was not suggested that there was anything physically wrong with the defendant; it was suggested that his inability to speak was due to some emotional or psychological cause, and, as there had been differences of opinion among the doctors who had given evidence, the question which the jury had to decide was a difficult one. The jury must, however, do their best to decide it after a consideration of the whole of the evidence. If, after considering all the evidence, they were completely satisfied that the defendant was " shamming ", they were to find that he was mute of malice, but, if they were not satisfied of that, if, having weighed all the evidence, their minds were left in the state of faint suspicion and they were not satisfied, then they were to find that the defendant was mute by the visitation of God. HIS LORDSHIP, having reviewed the evidence on this issue, said, in conclusion, that if the defendant was mute of malice, a verdict of " Not guilty " would be entered and he would be tried, and that, if he were found to be mute by the visitation of God, then the jury would have to hear further evidence and consider whether he was fit to stand his trial.

[The jury returned a verdict that the defendant was mute by the visitation of God.]

July 11. Counsel for the prosecution, having referred to *R.* v. *Pritchard** (2) ((1836), 7 C. & P. 303), *R.* v. *Dyson* (3) ((1831), 7 C. & P. 305, n.), *R.* v. *Berry* (4) ((1876), 1 Q.B.D. 447), *R.* v. *Stafford Prison* (*Governor*), *Ex p. Emery* (5) ([1909] 2 K.B. 81), submitted that there were two questions, first, whether the accused was fit to plead and, second, whether he was fit to stand his trial, and that these two questions should be tried separately. After hearing counsel for the defence, SALMON, J., ruled that the question should be left to the jury in this form— " Is he capable of pleading to the indictment and of standing his trial? " The jury was then sworn according to the following form:

> " I swear by Almighty God that I will faithfully try whether George Myhill Sharp, the prisoner at the Bar, who stands indicted with felony and misdemeanour, is capable of pleading to and of taking his trial on the indictment, and give a true verdict according to the evidence."

Counsel for the defence then submitted that the burden of proof was on the prosecution, and referred to *R.* v. *Roberts* (6) ([1953] 2 All E.R. 340), *R.* v.

---

* The procedure followed in 1836, in *R.* v. *Pritchard* ((1836), 7 C. & P. 303), and, more recently, by CHANNELL, J., in *R.* v. *Stafford Prison* (*Governor*), *Ex p. Emery* ([1909] 2 K.B. 81) was this, that is, a jury was impanelled to try whether the defendant was mute of malice or mute by the visitation of God, and, having found that he was mute by the visitation of God, the jury was again impanelled to try whether he was capable of pleading to the indictment. In *R.* v. *Pritchard* (supra), however, the defendant made a sign that he was not guilty after the jury had been impanelled to try the issue of fitness to plead and before a decision was reached on that issue. In *R.* v. *Berry* ((1876), 1 Q.B.D. 447), on the other hand, a plea of " Not guilty " was entered after the defendant had been found mute by the visitation of God, and the issue whether he was capable of understanding was not put to the jury until after the summing-up of the evidence for the prosecution and after the question was put to the jury whether they found the defendant guilty or not on the indictment. In an earlier case, *R.* v. *Dyson* ((1831), 7 C. & P. 305, n.), after the defendant had been found mute by the visitation of God, a witness had sworn on oath that the defendant could be made to understand certain things and reply by signs. The charge was then explained to the defendant by the witness, the defendant denied the charge by signs, and a plea of " Not guilty " was entered. A jury was then impanelled to try the issue whether the defendant was sane or not.

Beynon (7) ([1957] 2 All E.R. 513) and *R.* v. *Davies* (8) ((1853), 3 Car. & Kir. 328). A
After hearing counsel for the prosecution, His Lordship ruled that the prosecution should put before the court the evidence that was available to them and should begin. Counsel for the prosecution accordingly opened the case, evidence was called for the prosecution and defence, and counsel for the defence and counsel for the prosecution addressed the jury.

B

SALMON, J., summing-up to the jury, said that, when a question arose whether a defendant was capable of pleading to the indictment and standing his trial, it was the duty of the court to make sure that he was capable of doing so before the trial was allowed to proceed, because it was repugnant to one's sense of justice that a person should be on his trial if he was unable to plead and unable properly to stand his trial. It was, therefore, the duty of the jury to decide C
whether they were satisfied that the defendant was fit to plead. If they came to the conclusion that the defendant could not communicate with his advisers, or with the jury if he were called to give evidence, he was not fit to stand his trial, and, therefore, the real question on which the jury must be satisfied was whether the defendant was fit to communicate with his advisers and with the court. The D
fact that the defendant was mute was not conclusive on this point, because, although he could not speak, he might be able to communicate sufficiently with his advisers by signs or writing, and with the court in writing. If the jury were satisfied that the defendant could communicate in writing, they must then also consider whether he could understand, because a defendant could not stand his trial unless he was able both to communicate and to understand. His Lordship E
then reviewed the evidence.

[The jury returned a verdict that the defendant was capable of pleading and of taking his trial on the indictment.

The trial then proceeded on the general issue, and the defendant was found guilty and was convicted.]

F

Solicitors: *Director of Public Prosecutions; Hawley & Phoenix*, Longton (for the defendant).

[*Reported by* Gwynedd Lewis, *Barrister-at-Law.*]

RIDING *v.* RIDING.

[COURT OF APPEAL (Lord Denning, Hodson and Morris, L.JJ.), December 9, 1957.]

Infant—Maintenance—Order of the High Court—Enforcement—Order of commitment against husband—Suspended order—Order directed to issue—Whether husband entitled to release on payment of amount not including arrears accrued since committal order made—Matrimonial Causes (Judgment Summons) Rules, 1952 (*S.I.* 1952 *No.* 2209), *r.* 6 (3).

When an order of commitment is made under r. 6 (1) of the Matrimonial Causes (Judgment Summons) Rules, 1952, and is suspended under r. 6 (2), the sum for which the debtor can be committed to prison subsequently is the amount for which the original order was made (assuming that nothing has been paid during the period of suspension which, having regard to r. 6 (3), was applicable in reduction of this amount), but is not the aggregate of that amount and any subsequent arrears. Rule 6 (3)* only applies while the suspension of the order of commitment continues.

Appeal dismissed.

[As to the duration and effect of an order of commitment of the Divorce Division for a judgment debt, see 12 HALSBURY'S LAWS (3rd Edn.) 474, para. 1058; for the Matrimonial Causes (Judgment Summons) Rules, 1952, r. 6, see 3 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-Issue) 273, 274.]

Interlocutory Appeal.

A wife petitioner, whose husband had been ordered by the Divorce Division of the High Court to pay her £1 a week for the maintenance of the child of the marriage, appealed, by leave of the judge, against the dismissal by His Honour JUDGE MADDOCKS, sitting as a special commissioner at Bolton in the county of Lancaster, on Nov. 7, 1957, of her appeal against the refusal of Mr. District Registrar DINES, on Oct. 28, 1957, of leave to issue an order of commitment for the sum of £119 1s. 6d. against the husband. The district registrar and the judge both considered that the order could issue for £62 6s. only. The facts appear in the judgment of LORD DENNING.

P. J. Corcoran for the wife, the applicant.

The husband, the debtor, did not appear and was not represented.

LORD DENNING: On Jan. 14, 1955, the wife obtained an order† against her husband to pay £1 a week for the maintenance of the child of the marriage. The husband made default in payment of the amount, and eventually a summons was issued to commit him to prison for non-payment. It was proved that he had the means to pay and had not paid, so the judge on Apr. 24, 1956, made an order to commit him to prison for forty-two days because of his default.

The sum in respect of which he was committed was £56, for which he had fallen into default up to that time, with six guineas costs of the judgment summons and order, making a total of £62 6s. The formal order for committal said he

> "shall be committed to prison for forty-two days unless he shall sooner pay the sums in payment of which he has so made default, together with costs."

That means he was committed to prison for six weeks unless he sooner paid £62 6s. That was the operative order of committal, but there was a direction by the judge that that order should be suspended on conditions which are

---

* The terms of r. 6 (3) are printed at p. 66, letter D, post.

† I.e., an order of the Probate, Divorce and Admiralty Division made in a matrimonial cause.

A contemplated by r. 6 (2) and (3) of the Matrimonial Causes (Judgment Summons) Rules, 1952. In pursuance of that rule the judge ordered that the committal was to lie in the registry and not to issue if the husband paid, in addition to the £1 a week already accruing from week to week under the order, a sum of 2s. 6d. a week off the arrears of £56, and a further 2s. 6d. a week off the costs of six guineas. So if he wanted to avoid committal to prison, he had to pay £1 5s. a week regularly every week. He did not keep up those payments. Eighteen B months passed from April, 1956, till October, 1957, and during that time £86 had accumulated; but £29 4s. 6d. only had been paid by him. The result was that a sum of £56 15s. 6d. was owing by him which he ought to have paid if he wanted to get the order suspended. So clearly the time had come when the wife was entitled to apply for the committal order to issue, and she did. The committal order was directed to issue, but the question is: how was it to be indorsed? C On what terms could the husband get out of prison when he was put there?

It is said, and has been argued before us today, that once he was in prison, he could not get out before the end of six weeks unless he paid £119 1s. 6d., that is, the original £62 6s. plus the £56 15s. 6d. that had become due since. Counsel for the wife argued that the order ought to have been indorsed accordingly, whereas the registrar and the judge said that the husband should be released D from prison at once if he paid the original debt of £62 6s.

The legal position depends on the true construction of r. 6 (3), which provides:

> "If an order of commitment is suspended on such terms as are mentioned in the last foregoing paragraph, all payments thereafter made under the order shall be deemed to be made, first, in or towards the discharge of any sums from time to time accruing due under the judgment and secondly, E in or towards the discharge of the debt in respect of which the judgment summons was issued and the costs of the summons."

It seems to me that that rule deals with payments which are made whilst the order of commitment is suspended. So long as it is suspended, all payments made by the debtor go first in discharge of the current maintenance, before they F go against the original debt at all. But that is applicable only so long as the order of commitment is suspended. When it ceases to be suspended and the debtor is actually committed to prison, then it is quite plain he is committed to prison because of the original default in respect of the sum of £62 6s. That being the sum for which he was committed to prison, it is the sum which he has to pay in order to get released from prison before the end of the six weeks. G

I would dismiss the appeal accordingly.

HODSON, L.J.: I agree.

MORRIS, L.J.: I agree.

Appeal dismissed.

Solicitor: *Anthony Uwins*, The Law Society Divorce Department, Manchester (for the wife, the applicant).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

A

DAVIE *v.* NEW MERTON BOARD MILLS, LTD. AND OTHERS.

[Court of Appeal (Jenkins, Parker and Pearce, L.JJ.), November 6, 7, 8, 26, 1957.]

Master and Servant—Liability of master—Accident to servant—Tool bought B *from reputable suppliers who had bought it from reputable manufacturers—Defect due to negligence in manufacture—Defect not discoverable by employers, but patent to manufacturers.*

An employer who takes reasonable care to provide his employee with a reasonably safe ordinary tool, but in fact provides a defective one, is not liable for the manufacturer's negligence in making the tool, where there was C no contractual relationship between the employer and the manufacturer; in such circumstances the manufacturer is not regarded as having had the task of making the tool notionally entrusted to him by the employer (see p. 83, letters D to F, post; cf., p. 87, letters D to F, and p. 90, letter C, post).

In 1946 toolmakers, who were an old established firm, made a drift (a tool consisting of a tapered steel bar about twelve inches long) which had a D defect, viz., excessive hardness of the steel, which they ought to have discovered if they had used reasonable care and skill in its manufacture. The manufacturers sold the drift to B., a reputable supplier of tools of this kind, who in July, 1946, sold and delivered a batch of drifts, including this tool, to the employers of D. The defect in the drift was not discoverable by reasonable examination by the employers. The drift was used little, E if at all, until Mar. 8, 1953, when D. used it in the course of his employment. Owing to the defect in its manufacture a piece flew off the drift when it was struck by D. in the course of using the tool, and he was seriously injured.

Held (Jenkins, L.J., dissenting): the employers had used reasonable care and skill in providing the tool, and were not liable to D. for the injury which it caused to him.

F Scope of the duty of a master to his servant as laid down by Lord Herschell in *Smith* v. *Baker & Sons* ([1891] A.C. at p. 362) considered.

Macdonald v. *Wyllie & Sons* ((1898), 1 F. (Ct. of Sess.) 339) and dicta of Lord Maugham in *Wilsons & Clyde Coal Co., Ltd.* v. *English* ([1937] 3 All E.R. at p. 646) and of Lord Wright in *Thomson* v. *Cremin* ([1953] 2 All E.R. at p. 1191) considered and explained.

G *Donnelly* v. *Glasgow Corpn.* ([1953] S.L.T. 161) distinguished.

Per Parker, L.J.: I am inclined to the view that *Taylor* v. *Sims & Sims* ([1942] 2 All E.R. 375) and *Cilia* v. *H. M. James & Sons* ([1954] 2 All E.R. 9) cannot stand with *Biddle* v. *Hart* ([1907] 1 K.B. 649) (see p. 85, letter E, post).

Decision of Ashworth, J. ([1957] 2 All E.R. 38) reversed in part.

H

[**Editorial Note.** The employers would have been responsible if an employee of theirs had made the drift or if an independent contractor had made the drift to their order (see p. 71, letter B, and p. 90, letter D, post); but they had bought the tool from a supplier who was not the manufacturer, and thus they had no relation with the manufacturer. The absence of agency or contractual I relationship between the employers and the manufacturer is essential to the majority decision of the Court of Appeal. Moreover the present decision would not necessarily govern a case where the tool was a special tool not ordinarily supplied by manufacturers.

The standard of care which the majority of the Court of Appeal decide in the present case to be owed by the employers to their employees in relation to tools supplied, viz., that of using reasonable care and skill in providing the tool, is the same as that which it was decided was owed at common law by an owner of a motor car to other road users in relation to the fitness of his vehicle for use on the road; see *Phillips* v. *Britannia Hygienic Laundry Co., Ltd.*, [1923] 1 K.B. 539 (affirmed on another point, [1923] 2 K.B. 832). Compare, as regards the liability of suppliers, etc., *Herschtal* v. *Stewart & Ardern, Ltd.*, [1939] 4 All E.R. 123; *Andrews* v. *Hopkinson*, [1956] 3 All E.R. 422.

As to a master's duty of care at common law, see 22 HALSBURY'S LAWS (2nd Edn.) 187, 188, para. 314; and for cases on the subject, see 34 DIGEST 194-196, *1580-1601*.

As to the liability of the manufacturer of dangerous goods, see 23 HALSBURY'S LAWS (2nd Edn.) 632, para. 887; and for cases on the subject, see 36 DIGEST (Repl.) 85-88, *455-470*.]

Cases referred to:

(1) *Wilsons & Clyde Coal Co., Ltd.* v. *English*, [1937] 3 All E.R. 628; [1938] A.C. 57; 106 L.J.P.C. 117; 157 L.T. 406; Digest Supp.

(2) *Bain* v. *Fife Coal Co.*, 1935 S.C. 681; Digest Supp.

(3) *Rudd* v. *Elder Dempster & Co., Ltd.*, [1933] 1 K.B. 566; 102 L.J.K.B. 275; 148 L.T. 337; 25 B.W.C.C. 482; *on appeal*, [1934] A.C. 244; Digest Supp.

(4) *Thomson* v. *Cremin*, [1953] 2 All E.R. 1185; 3rd Digest Supp.

(5) *Indermaur* v. *Dames*, (1866), L.R. 1 C.P. 274; 35 L.J.C.P. 184; 14 L.T. 484; *affd.* Ex.Ch., (1867), L.R. 2 C.P. 311; 36 Digest (Repl.) 46, *246*.

(6) *Wilkinson* v. *Rea, Ltd.*, [1941] 2 All E.R. 50; [1941] 1 K.B. 688; 110 L.J.K.B. 389; 165 L.T. 156; 2nd Digest Supp.

(7) *Pickard* v. *Smith*, (1861), 10 C.B.N.S. 470; 4 L.T. 470; 142 E.R. 535; 36 Digest (Repl.) 72, *384*.

(8) *Dalton* v. *Angus*, (1881), 6 App. Cas. 740; 50 L.J.Q.B. 689; 44 L.T. 844; 46 J.P. 132; 34 Digest 158, *1234*.

(9) *Hughes* v. *Percival*, (1883), 8 App. Cas. 443; 52 L.J.Q.B. 719; 49 L.T. 189; 47 J.P. 772; 7 Digest 300, *240*.

(10) *London Graving Dock Co., Ltd.* v. *Horton*, [1951] 2 All E.R. 1; [1951] A.C. 737; 36 Digest (Repl.) 54, *296*.

(11) *Macdonald* v. *Wyllie & Sons*, (1898), 1 F. (Ct. of Sess.) 339; 36 Sc. L.R. 262; 6 S.L.T. 209; 36 Digest (Repl.) 138, *1103*.

(12) *Stephen* v. *Thurso Police Comrs.*, (1876), 3 R. (Ct. of Sess.) 535; 13 Sc. L.R. 339; 26 Digest 409, *1300 viii*.

(13) *Naismith* v. *London Film Productions, Ltd.*, [1939] 1 All E.R. 794; Digest Supp.

(14) *Paine* v. *Colne Valley Electricity Supply Co., Ltd., & British Insulated Cables, Ltd.*, [1938] 4 All E.R. 803; 160 L.T. 124; 24 Digest (Repl.) 1031, *63*.

(15) *Taylor* v. *Sims & Sims*, [1942] 2 All E.R. 375; 167 L.T. 414; 36 Digest (Repl.) 153, *806*.

(16) *Cilia* v. *James (H. M.) & Sons*, [1954] 2 All E.R. 9; 3rd Digest Supp.

(17) *Hodgson* v. *British Arc Welding Co., Ltd., & B. & N. Green & Silley Weir, Ltd.*, [1946] 1 All E.R. 95; [1946] K.B. 302; 115 L.J.K.B. 400; 174 L.T. 379; 24 Digest (Repl.) 1089, *403*.

(18) *Mason* v. *Williams & Williams, Ltd. & Thomas Turton & Sons, Ltd.*, [1955] 1 All E.R. 808; 3rd Digest Supp.

(19) *Donnelly* v. *Glasgow Corpn., Henderson* v. *Glasgow Corpn., Ross* v. *Glasgow Corpn.*, [1953] S.L.T. 161; 1953 S.C. 107; 3rd Digest Supp.

(20) *Smith* v. *Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 36 Digest (Repl.) 154, *812*.

(21) *M'Alister (or Donoghue)* v. *Stevenson*, [1932] A.C. 562; 1932 S.C. (H.L.) 31; 101 L.J.P.C. 119; 147 L.T. 281; 36 Digest (Repl.) 85, *458*.

(22) *Fanton* v. *Denville*, [1932] 2 K.B. 309; 101 L.J.K.B. 641; 147 L.T. 243; Digest Supp.

A (23) *Read* v. *Lyons (J.) & Co., Ltd.*, [1946] 2 All E.R. 471; [1947] A.C. 156; [1947] L.J.R. 39; 175 L.T. 413; 36 Digest (Repl.) 83, *452*.

(24) *Biddle* v. *Hart*, [1907] 1 K.B. 649; 76 L.J.K.B. 418; 97 L.T. 66; 36 Digest (Repl.) 63, *342*.

(25) *Howe* v. *Finch*, (1886), 17 Q.B.D. 187; 51 J.P. 276; 34 Digest 224, *1881*.

(26) *Weir (or Wilson)* v. *Merry & Cunningham*, (1867), 5 Macph. (Ct. of Sess.)
B 807; sub nom. *Wilson* v. *Merry*, (1868), L.R. 1 Sc. & Div. 326; 19 L.T. 30; 32 J.P. 675; 40 Sc. Jur. 486; 34 Digest 207, *1697 xiv*; 211, *1747*.

(27) *McKillop* v. *North British Ry. Co.*, (1896), 23 R. (Ct. of Sess.) 768; 33 S.L.R. 586.

(28) *Weems* v. *Mathieson*, (1861), 4 Macq. 215; 36 Digest (Repl.) 207, *1971*.

C (29) *Toronto Power Co., Ltd.* v. *Paskwan*, [1915] A.C. 734; 84 L.J.P.C. 148; 113 L.T. 353; 34 Digest 196, *1611*.

Appeal.

A workman, James Gibson Davie, lost the sight of his right eye through the breaking of a tool supplied to him by his employers, who had bought it from a
D reputable supplier who had bought it from the manufacturers. In an action by the workman against both the employers and the manufacturers, ASHWORTH, J., by his judgment dated Mar. 14, 1957, and reported [1957] 2 All E.R. 38 and 384, awarded the workman £2,030 damages with costs against both the employers and the manufacturers and awarded the employers full contribution against the manufacturers in respect of these damages. The employers appealed; the manu-
E facturers did not appeal on the question of liability, but they and the workman served cross-notices of appeal as to various questions of costs.

The facts appear in the judgment of JENKINS, L.J.

Marven Everett, Q.C., and *Tudor Evans* for the employers, the first defendants.
Martin Jukes, Q.C., and *Malcolm Morris* for the workman, the plaintiff.
M. R. Hoare for the manufacturers, the second defendants.

F

Cur. adv. vult.

Nov. 26. The following judgments were read.

JENKINS, L.J.: This is an appeal by the first defendants, the New Merton Board Mills, Ltd., from a judgment of ASHWORTH, J., dated Mar. 14, 1957, which awarded the plaintiff workman, James Gibson Davie, against the
G first defendants and the second defendants, Frank Guylee & Son, Ltd., the sum of £2,030 damages, with costs, in respect of the loss of the sight of his left eye through the breaking of a tool called a " drift ", manufactured by the second defendants (" the manufacturers ") and provided for his use by the first defendants (" the employers "), by whom he was employed as a maintenance fitter at their factory at Merton. The judgment further dealt with the question of
H contribution between the defendants by directing that the employers should have against the manufacturers a full indemnity in respect of the damages, and an indemnity in respect of the plaintiff workman's costs limited to two-fifths thereof.

There is no appeal by the manufacturers in respect of their liability to indemnify the employers against the full amount of the damages awarded; but the
I employers' appeal includes a claim to the effect that even if they fail to secure the reversal of the learned judge's decision as regards their liability to the workman, they should not be ordered to pay any part of the workman's costs. The manufacturers have accordingly served a notice of their intention to support the learned judge's order as to costs, and if necessary to raise various alternative contentions in that regard. The workman on his part has served a notice of his intention to raise various contentions as to the incidence of costs in the event of the employers succeeding in their appeal on the issue of liability.

The accident happened on Mar. 8, 1953. On that day the workman in the ordinary course of his employment was working on a machine and had occasion to separate certain parts which were fitted together too tightly for separation by hand. The appropriate tool for this purpose was a drift, which may be described as a tapered bar or strip of metal, say twelve inches long. The proper method of using a drift is to hold the pointed end against the point of junction between the parts to be separated and to beat the thick end with a hammer so as to force them apart. The workman went to a cupboard where drifts provided by the employers for the use of their employees were kept, took one which appeared to be nearly new and proceeded to work with it in the way I have described; but unfortunately at the second stroke of the hammer the drift broke and a piece flew off, striking, and destroying the sight of, his left eye.

The history of the defective drift can be shortly stated. It was made by the manufacturers, who are tool makers carrying on business at Sheffield, in the year 1946, and on a date prior to July in that year it was sold by the manufacturers to a company called Baldwin & Co., Ltd., who are suppliers of tools of this kind. In July, 1946, the employers ordered a supply of drifts from Baldwin & Co., Ltd., and the drifts delivered to them by Baldwin & Co., Ltd., in response to this order included the defective drift with which we are now concerned. Nearly seven years later this drift, which had in the meantime apparently been seldom if ever used, was put into use by the workman with the disastrous result I have mentioned. The drift was defective in that the steel of which it was made was excessively hard and consequently liable to fracture when subjected to blows of the force to which a drift in ordinary use would be subjected. This was a defect which ought to have been discovered by a manufacturer using reasonable skill and care in the making of drifts.

There is no dispute as to the facts, but it is right to refer specifically to the following findings of the learned judge. He said*:

> " On the evidence I am satisfied in regard to the drift used by the workman (a) that it was made of silico-manganese steel; (b) that the hardness of its head was 622 according to the Vickers Pyramid hardness scale; (c) that this hardness was greatly in excess of the hardness which should have existed, having regard to the fact that the drift was intended and designed to be struck on the head with a hammer; (d) that in the circumstances the drift was dangerous, in that chips or particles might fly off it when struck . . . As already indicated, I am satisfied that the drift P.2 was of excessive hardness, a condition which would not have occurred if proper care had been taken during the heat treatment process."

He continued ([1957] 2 All E.R. at p. 40):

> " The problem of liability must be considered on the basis that the . . . [employers] provided for their employee, the plaintiff, a dangerous tool which had been negligently made by the [manufacturers]. I consider first the question whether in these circumstances the employers are liable.
>
> " In the first place, it is clear that no negligence can be attributed to any of the employers' own servants or agents. The drift P.2 was apparently in good condition and no allegation was or could be made that the employers' system of maintenance or inspection was at fault. Moreover, the employers bought the drift from a reputable supplier and paid a reasonable price for it."

The learned judge then proceeded to state the question of law arising on his findings of fact in these succinct terms:

> "The problem arises in naked simplicity: Are they [that is, the employers] responsible to the [workman] because the drift was negligently manufactured by the [manufacturers] ? "

---

* These findings are summarised in [1957] 2 All E.R. at p. 39.

A One may take as a starting point in the discussion of this question *Wilsons & Clyde Coal Co., Ltd.* v. *English* (1) ([1937] 3 All E.R. 628), which clearly established that an employer's duty to take reasonable care for the safety of his employees is a duty personal to him, of which he cannot divest himself by entrusting the performance of it to a servant or agent however competent. It follows that if in the present case the employers had employed some competent B person as their servant or agent to make drifts for the use of their fitters, and if the person so employed had negligently made the defective drift which broke and injured the workman, the employers would clearly have been liable to the workman for breach of their common law duty to take reasonable care to provide sound tools, and the fact that they had employed a competent servant or agent to perform that duty would have afforded no defence.

C It must also be regarded as settled that the same result would have ensued if the defective drift had been made by the manufacturers to the order of the employers, the manufacturers being in the position of independent contractors, as distinct from servants or (in the strict sense) agents of the employers. It is true that the speeches in *Wilsons & Clyde Coal Co., Ltd.* v. *English* (1) do not in terms refer to independent contractors, for the very good reason that the case D then before the House was one in which the employers claimed to have delegated their statutory duty of providing a reasonably safe system of work to an agent in the strict sense, and to have thereby performed it, with the result that any negligence on the part of the agent would, as between the agent and any employee injured thereby, be negligence on the part of a fellow employee to which (as the law then stood) the doctrine of common employment afforded the employers E a complete defence. However, the same ratio decidendi must be taken to apply where the performance of the employer's duty has been entrusted to an independent contractor. This seems to me to be implicit in the passage from *Bain* v. *Fife Coal Co.* (2) (1935 S.C. 681 at p. 693) cited with approval by LORD THANKERTON ([1937] 3 All E.R. at pp. 636, 637) and also expressly commended by LORD ATKIN (ibid., at p. 630), LORD MACMILLAN (ibid., at p. 639) and LORD F MAUGHAM (ibid., at pp. 645, 646). From the complete citation I need take only this concluding passage of the Lord Justice-Clerk (LORD AITCHISON) (1935 S.C. at p. 693):

> "The duty may not be absolute, and may be only a duty to exercise due care, but, if, in fact, the master entrusts the duty to someone else instead of performing it himself, he is liable for injury caused through the G want of care of that someone else, as being, in the eye of the law, his own negligence."

I should add the following citations from the speeches in *Wilsons & Clyde Coal Co.'s* case (1). LORD MACMILLAN said ([1937] 3 All E.R. at p. 638):

> "Now, I take it to be settled law that the provision of a safe system of H working in a colliery is an obligation of the owner of the colliery. He cannot divest himself of this duty, though he may—and, if it involves technical management, and he is not himself technically qualified, must—perform it through the agency of an employee. It remains the owner's obligation, and the agent whom the owner appoints to perform it performs it on the owner's behalf. The owner remains vicariously responsible for the negli- I gence of the person whom he has appointed to perform his obligation for him, and cannot escape liability by proving merely that he has appointed a competent agent. If the owner's duty has not been performed, no matter how competent the agent selected by the owner to perform it for him, the owner is responsible."

LORD WRIGHT said (ibid., at p. 640):

> "In *Rudd* v. *Elder Dempster & Co., Ltd.* (3) ([1933] 1 K.B. 566), the Court of Appeal, applying their general views which I have just stated, held that the

> employers could escape liability by showing that they had appointed competent servants to see that the duty was fulfilled. This House held [[1934] A.C. 244] that, on the contrary, the statutory duty was personal to the employer, in this sense, that he was bound to perform it, by himself or by his servants. The same principle, in my opinion, applies to those fundamental obligations of a contract of employment which lie outside the doctrine of common employment, and for the performance of which employers are B absolutely responsible. When I use the word absolutely, I do not mean that employers warrant the adequacy of plant, or the competence of fellow-employees, or the propriety of the system of work. The obligation is fulfilled by the exercise of due care and skill . . . [And [1937] 3 All E.R. at p. 641] If I may take an analogy or instance of a similar personal obligation, I note that the Carriage of Goods by Sea Act, 1924, requires a ship- C owner to exercise due diligence, or to take reasonable care, to provide a seaworthy ship. The shipowner is almost certainly not an expert naval architect, engineer, or stevedore. So far as I know, it has never been claimed that this obligation is fulfilled by the shipowner taking reasonable care to appoint a competent expert; the shipowner is absolutely held to the fulfilment of the obligation. It is the obligation which is personal D to him, and not the performance."

A

LORD MAUGHAM said ([1937] 3 All E.R. at p. 645):

> " The earlier English authorities are not so clear as regards the real point in the present case, which may be stated thus: Admitting that the employer was liable to provide a reasonably safe system of working the E colliery, was not this a liability which he could delegate to skilled persons, with the consequence that his personal liability would be discharged? It must, I think, be admitted that, in England, the early authorities on this point were not very clear. In Scotland, it was not so. The admirable opinion of the Lord Justice-Clerk in *Bain* v. *Fife Coal Co.* (2) (1935 S.C. 681), and that of the Lord President in the present case, establish, in my F view, that there has been a long and uniform practice in Scotland, repeatedly approved in this House, to the effect that an employer cannot divest himself of responsibility in regard to the three matters which are in his peculiar province . . . it has already been pointed out that the employer's liability is fulfilled by the exercise of due care and skill, and I may be allowed to point out that it is this circumstance which has led, on occasion, to a misappre- G hension of the true position. An illustration will demonstrate the mistake. Suppose some new machinery is necessary in a factory, and the employer is absent, or completely unskilled in such things. He necessarily leaves the matter to a manager, let us suppose a highly skilled person, who, however, is negligent in this case. An accident follows, due to a defect in the machine. If the liability of the employer is stated as being an obligation to use his H best endeavours to supply and install good machinery, it may well be said on his behalf that he left the matter to a highly skilled man, and it may be asked, with force, what more could he do ? I should reply, nothing; but I should add that the premise is incorrect. The possessive pronoun ' his ' is that which leads to the error. The proposition would be more correctly stated to be that his duty is to supply and install proper machinery so far I as care and skill can secure this result. He can, and often he must, perform this duty by the employment of an agent, who acts on his behalf; but he then remains liable to the employees unless the agent has himself used due care and skill in carrying out the employer's duty. This has sometimes been expressed by saying that the duty is personal to the employer; but the adjective if unexplained is apt to mislead, like the word ' absolute ' and the word ' delegate '. The employer can, of course, and often must, delegate the performance of any of his duties to skilled agents; but it

> A would need an altogether new implied term in the contract between employer and employee before a court could properly hold that this delegation has the result of freeing the employer from his liability. This becomes apparent if we imagine the contract between employer and workman to be written out in full, with all the implied clauses. There would be, for the reasons given by the Lord Justice-Clerk in *Bain* v. *Fife Coal Co.* (2) and by your B Lordships, no clause to the effect that the employer was to be freed from his special obligations to the workmen if he delegated them to an agent; and, in the absence of such a clause, the employer would plainly remain liable if the agent was guilty of not using proper care and skill, since, in the contract law of Scotland, as in England, it is impossible to transfer a liability towards the other party to the contract without the consent of that C party."

I think that these citations taken together point strongly to the conclusion that their Lordships would have drawn no distinction for the present purpose between a servant or agent (in the strict sense) of the employer and an independent contractor engaged by the employer. But the matter does not rest there. In *Thomson* v. *Cremin* (4) ([1953] 2 All E.R. 1185) (a case decided by the House D of Lords in 1941 but not reported till 1953) the House had to consider the position of an invitor who had entrusted to an independent contractor the performance of certain work, the proper performance of which was essential to the safety of the premises (in this instance the hold of a ship) which the invitee had to enter in the course of his work. The duty of the invitor was taken as being a duty to take reasonable care for the safety of the invitee; and VISCOUNT E SIMON, L.C., said (ibid., at p. 1188):

> "The shipowner's responsibility for the safety of the structure is not, indeed, absolute, but, on the principle of *Indermaur* v. *Dames* (5) ((1866), L.R. 1 C.P. 274), he owes to the invitee a duty of adequate care. If adequate care was not exercised in fitting and securing the shore, it would be no F answer (as the appellant's counsel candidly admitted) to say that the shipowner employed an independent contractor at Fremantle to do the work. For this last proposition, reference may usefully be made to a recent decision of the Court of Appeal in *Wilkinson* v. *Rea, Ltd.* (6) ([1941] 2 All E.R. 50), and especially to the observations of LUXMOORE, L.J. (ibid., at p. 60). I can see no ground for drawing a distinction between the permanent structure G of the ship and the temporary erections put up in her holds for the purpose of the special cargo she was carrying."

LORD WRIGHT said ([1953] 2 All E.R. at p. 1191):

> "That the first respondent was working on the appellant's premises, the steamship Sithonia, as an 'invitee' and not as a mere licensee has not been H questioned. Thus, the case fell within the general rule enunciated in *Indermaur* v. *Dames* (5). The rule there laid down as to the duty of the 'invitor' to the 'invitee' has been affirmed in several decisions of this House, whether the particular case was held to fall within or without the rule. In the present appeal, however, the failure to exercise due care for the safety of the invitee which has been found was due, not to the negligence I of the appellant or his servants, but to that of independent contractors, the Australian shipwrights who constructed the shifting-boards before the grain was loaded. I agree with the Lord Chancellor in his approval of the decision of the Court of Appeal in *Wilkinson* v. *Rea, Ltd.* (6), where it was held by LUXMOORE, L.J., with whom MACKINNON, L.J., concurred, that the invitor was not excused for a failure to perform his duty to the invitee merely because he had entrusted performance to another. LUXMOORE, L.J., adopted the view of WILLIAMS, J., in *Pickard* v. *Smith* (7) ((1861), 10 C.B.N.S. 470). The duty of the invitor towards the invitee is, in my opinion,

> a duty personal to the former, in the sense that he does not get rid of the obligation by entrusting its performance to independent contractors. It is true that the invitor is not an insurer: he warrants, however, that due care and skill to make the premises reasonably safe for the invitee have been exercised, whether by himself, his servants, or agents or by independent contractors whom he employs to perform his duty. He does not fulfil the warranty merely by leaving the work to contractors, however reputable or generally competent. His warranty is broken if they fail to exercise the proper care and skill. This is only an instance of the general rule which was stated by Lord Blackburn in another connexion in *Dalton* v. *Angus* (8) ((1881), 6 App. Cas. 740 at p. 829), where he distinguished the case of what has been called the collateral negligence of a sub-contractor from their negligence in failing to perform a duty resting on the principal himself 'who cannot escape from the responsibility attaching to him of seeing that duty performed by delegating it to a contractor'. Lord Blackburn again enunciated the same principle in *Hughes* v. *Percival* (9) ((1883), 8 App. Cas. 443 at p. 446). More recently this House, again in a different context of fact, applied this rule in *Wilsons & Clyde Coal Co., Ltd.* v. *English* (1). It is always a question of the extent of the duty incurred. In the present case, the invitee is not concerned with the course which the invitor adopts by way of discharging the duty. He is entitled, when he comes on the invitor's premises, to rely on the warranty that the invitor's duty to him has been performed and to complain if he is injured because the duty has not been properly performed."

I would respectfully adopt this comment made by the learned judge ([1957] 2 All E.R. at p. 43) on *Thomson* v. *Cremin* (4):

> "It is true that Lord Wright is there dealing with the position of an invitor, but the duty of an employer to his workmen is certainly no less. Indeed, in *London Graving Dock Co., Ltd.* v. *Horton* (10) ([1951] 2 All E.R. 1 at p. 5) Lord Porter said 'Admittedly the duty of a master to his servant is higher than that of an invitor to his invitee'".

As was recognised in *Wilsons & Clyde Coal Co., Ltd.* v. *English* (1) (itself a Scottish case) the Scottish law on this question is the same as English law. In addition to the passage from *Bain* v. *Fife Coal Co.* (2) cited above, we were referred to a number of Scottish decisions, including *Macdonald* v. *Wyllie & Sons* (11) ((1898), 1 F. (Ct. of Sess.) 339). In that case a firm of builders, having a contract to take down certain high walls, contracted with a firm of joiners for the erection of a scaffold, which, after it had been taken over by the builders, collapsed. It was admitted that the fall of the scaffold was due to a defect which might have been discovered by any skilled person inspecting it. A workman in the employment of the builders was injured by the fall of the scaffold, and brought an action for damages against the builders. The action was tried with a jury, and the Lord Justice-Clerk directed the jury as follows (ibid., at p. 340):

> "That if the jury are satisfied that the defender, not having the knowledge and skill to erect the scaffolding in question, selected a tradesman having skill and experience of such work, and contracted with him to provide such a scaffold, he would not be liable as for fault if the scaffolding fell in consequence of its being erected in an unskilful manner through the fault of the skilled person who contracted to erect it."

On a bill of exceptions, it was held that this direction was erroneous in law. Lord Young said (ibid., at p. 343):

> "This bill of exceptions comes before us on the footing that the scaffold was defective and dangerous. It is admitted that for the purposes of this discussion that must be conceded, and it is stated by the learned judge

> who tried the case that it was upon that supposition that the ruling now in question was given by him, and also that it was given upon the further supposition that the defect was not a latent defect, but one which could have been discovered by a proper inspection by a reasonably skilled person. Therefore the question of latent defect does not arise here. The ruling was asked and given on the footing that the scaffolding was defective and dangerous, and that the defect was not latent. Accordingly the learned judge who tried the case, in accordance with the defence put forward by the defenders, gave this direction—[HIS LORDSHIP read the Lord Justice-Clerk's direction]. This ruling was given on the assumption that the joiner employed by the defenders was a properly skilled person. The direction given practically amounts to this, that the defenders discharged their whole duty to the pursuer by entrusting the erection of the scaffolding to a properly skilled joiner, and that, however unskilfully that joiner might erect the scaffolding, the defenders would not be liable in consequence to the pursuer. We have now to determine whether this ruling is in accordance with the law of Scotland. I am of opinion that it is not . . . The basis of the workman's claim against his master is that there is a responsibility on the part of his employer for the scaffolding being in a reasonably safe condition to enable the workman to perform the work which he has been engaged to do. It is no answer to him for the master to say,—'I am not a joiner and I employed a skilled joiner to do the work for me'. It is no more an answer for him to say so to his workman, than it would be an answer for a person who had erected a scaffolding for people to see a procession, to one of the persons who had engaged a seat upon it, and who had been injured through a defect in it, to say to that person that he himself was not a competent joiner, that he had employed a fit joiner to erect the scaffolding, and that he was not responsible for that joiner's fault."

LORD TRAYNER said (ibid., at p. 345):

> "If a master buys a machine, let us say, necessary for the execution of his work, and gives it to his workman, it is the master's machine, not the workman's or manufacturer's. If the machine turns out to be faulty, defective, or otherwise insufficient, the master must answer for it. He may have his relief against the maker or manufacturer, but the injured workman has no claim against the maker of the machine; there was no contractual or other relation between them; the maker of the machine had no duty towards the workman. When the scaffolding or the machine passes out of the hands of the man who erected or made it, it becomes the scaffolding or the machine of the man who ordered it and gave it to his workman. It is the master's scaffolding or machine, although erected or made per alium, and he is directly responsible for its insufficiency.
>
> "The rule that a person is not responsible for damage done through the neglect or fault of an independent contractor does not apply to a case like this. It applies in cases where there is no relation between the person injured and the person who employs or engages with the contractor. But 'the case is wholly different where a distinct duty is imposed upon the person sued towards the person injured, and where the duty has not been performed'—(per Lord Justice-Clerk MONCREIFF in *Stephen* v. *Thurso Police Comrs.* (12) (1876), 3 R. (Ct. of Sess.) 535 at p. 540). That correctly represents the case now before us.
>
> "It was argued by the defenders that they were not responsible for defects in their appliances which were latent, and that their duty was limited to supplying the workman with appliances which were reasonably sufficient. I am not prepared to admit the soundness of this argument to the extent to which it was carried by the defenders. But it is not a point raised for decision by the exception before us. The charge excepted to is absolute, and

> neither states nor suggests any limitation in the direction to which the defenders' argument points. I therefore give no opinion upon the question so raised."

LORD MONCREIFF said (1 F. (Ct. of Sess.) at p. 346):

> " So viewed, I am of the opinion that the direction is not exhaustive, and that therefore it is defective. As it stands the jury may have supposed that the defenders sufficiently discharged their duty to their servants by entrusting the construction of the scaffold to a competent joiner. In order to make the direction complete I think his Lordship should have added the words ' unless by the exercise of reasonable care the defenders could have discovered the insufficiency of the scaffold,' or words to that effect.
>
> " A master is bound to supply safe and sufficient plant for the use of his workmen, but he is not bound to warrant the sufficiency of the plant. He is not personally bound to make it or to keep it in repair. He is only bound in a question with his servant to take reasonable care that it is sufficient; and in order to render him liable there must be proof of fault or negligence on his part or those for whom he is responsible.
>
> " In judging whether an employer has or has not used reasonable care regard must be had to the whole circumstances of each case. The fact that he has entrusted the manufacture or construction of the plant to a skilled tradesman under an independent contract will go far to establish that he had taken reasonable care. But of itself it is not necessarily sufficient, because if he could on inspection have discovered the defect he will not be freed from liability. It is for the jury to decide in each case what is reasonable care and what defects are to be considered latent in a question with the employer."

Finally, the Lord Justice-Clerk, who had given the direction under consideration, said this (ibid., at p. 347):

> " But having now heard a full debate and citation of authorities upon the point I have come to be of opinion that the direction which I gave to the jury was erroneous in respect that it was incomplete. I think it was right as far as it went, but that I should have added some words to the same effect as the addition suggested by LORD MONCREIFF in his opinion.
>
> " In this connexion, questions of latent defect often present considerable difficulty. A defect might be latent to one person and not latent to another who was highly skilled."

The case is important in that the firm who provided the faulty scaffolding were undoubtedly independent contractors. The members of the court were not entirely at one, but I think it can fairly be said that none of them regarded the fact that the employers had entrusted the erection of the scaffolding to skilled independent contractors as sufficient in itself to discharge the employers' duty to their workman. LORD YOUNG and LORD TRAYNER seem to have been clearly of opinion that employers cannot be held to have discharged their duty to a workman by the employment of skilled independent contractors if the contractors do their work negligently and damage to the workman results, with a possible exception in favour of the employers where the defect which does the damage is latent. LORD MONCREIFF and the Lord Justice-Clerk on the other hand thought that the employer's duty would be discharged by the employment of skilled independent contractors, unless by the exercise of reasonable care the employers could have discovered the insufficiency of the scaffold. LORD MONCREIFF regarded the question whether an employer has or has not used reasonable care as depending on the circumstances of each case, but thought that the fact that an employer had entrusted the relevant work to a skilled independent contractor would go far to establish that he had used reasonable care, but was not necessarily of itself sufficient to do so, because if he could on inspection have discovered the defect he would not be free from liability. Lord Moncreiff and the Lord Justice-Clerk appear, in effect, not only to have admitted an exception in favour of the employer in respect of latent defects in the independent contractor's work, but to have regarded a latent defect as a defect not discoverable by the employer on reasonable inspection. That is, of course, a view far more favourable to the employer than the alternative conception of a latent defect as a defect not discoverable by the use of reasonable skill and care on the part of the independent contractor. I will later return to this important aspect of the matter. But so far as the effect of the employment of an independent contractor is concerned, I do not think *Macdonald* v. *Wyllie & Sons* (11) can be regarded as authority for the proposition that the entrusting of the relevant work to a skilled independent contractor in itself discharges an employer's duty of care to his workman.

To revert to English cases, in *Naismith* v. *London Film Productions, Ltd.* (13) ([1939] 1 All E.R. 794), Lord Maugham's definition of an employer's duty to his employee was expressly adopted by Sir Wilfrid Greene, M.R., in this court. The Master of the Rolls said (ibid., at p. 796):

> " The law on this point has recently been laid down by the House of Lords in the case of *Wilsons & Clyde Coal Co., Ltd.* v. *English* (1), and for present purposes I can take the very concise statement of Lord Maugham ([1937] 3 All E.R. at p. 646): ' The proposition would be more correctly stated to be that his duty is to supply and install proper machinery so far as care and skill can secure this result '."

MacKinnon, L.J., said ([1939] 1 All E.R. at p. 797):

> " Such standard of duty is explained by *Wilsons & Clyde Coal Co., Ltd.* v. *English* (1), to which Sir Wilfrid Greene, M.R., has referred."

Goddard, L.J., referred ([1939] 1 All E.R. at p. 797) to the *Wilsons & Clyde Coal Co.'s* case (1) as having " done so much to clarify the law on that point ", and continued:

> " The relationship of the parties was not that of invitor and invitee, but that of employer and employee, and it follows that the jury should have been directed that the defendants' duty was not merely to warn against unusual dangers known to them, and not to the plaintiff, but also to make the place of employment, and the plant and material used, as safe as the exercise of reasonable skill and care would permit."

I think MacKinnon and Goddard, L.JJ., must be taken to have had in mind the particular passage from the speech of Lord Maugham which the Master of the Rolls had just cited.

In *Paine* v. *Colne Valley Electricity Supply Co., Ltd., & British Insulated Cables, Ltd.* (14) ([1938] 4 All E.R. 803) Goddard, L.J., sitting as a judge of first instance, said (ibid., at p. 807):

> " It follows, in my opinion, not only that there had been a breach of the Factory and Workshop Act, 1901, but also that the first defendants had failed to provide a safe place for their workmen, and had, therefore, committed a breach of their common law duty as recently laid down in *Wilsons & Clyde Coal Co., Ltd.* v. *English* (1). This is a duty which cannot be avoided by delegation. It is no answer to say, as counsel for the first defendants submitted: ' We employed competent contractors to provide a safe place or plant.' The class of cases in which the employment of a competent contractor affords a defence belongs to a wholly different category in the law of negligence. I have no hesitation in holding that the first defendants have no defence whatever to the plaintiff's claim."

It is right to note that on the facts of that case it seems reasonably plain that the defect in the electrical apparatus which brought about the death of the employee could have been discovered by the employers on reasonable inspection. Goddard, L.J., was clearly of opinion, however, that the fact that the employers had entrusted the provision of the plant in question to reputable independent contractors afforded the employers no defence to a claim based on breach of their duty of reasonable care, and in the present state of the authorities I think that this must be taken to be the law.

It is said that is not this case. Here the employers did not cause the defective drift to be made to their order by the manufacturers. They bought it ready made from the suppliers, against whom no negligence is alleged. Here at least, it is claimed, a line should be drawn; and the employers should not be saddled with responsibility for a defect in the drift which they could not reasonably have been expected to detect, and which was due to negligence on the part of manufacturers, with whom the employers were never in contractual privity, and whom the employers had never in any sense entrusted with the performance of their duty to take reasonable care to provide their employees with safe tools.

I cannot accept this argument. The employers, when they set about the provision of drifts, must be taken to have been alive to their duty to take reasonable care to provide sound drifts. If they were alive to that duty they must, in purchasing the drifts of which the defective drift was one, be taken to have assumed that reputable suppliers such as Baldwin & Co., Ltd., from whom they purchased the drifts, would have obtained them from reputable manufacturers who could be relied on as having exercised due skill and care in their manufacture. In other words, the employers must be taken to have relied on the reputation of Baldwin & Co., Ltd., as a sufficient assurance that in providing their employees with drifts purchased from Baldwin & Co., Ltd., they would be providing them with drifts made with reasonable care and skill, and thus performing their duty of taking reasonable care to provide their employees with sound drifts. If, however, the duty is, as Lord Wright said in the *Wilsons & Clyde Coal Co.'s* case (1) ([1937] 3 All E.R. at p. 641), a duty " personal to the employer, and one to be performed by the employer per se or per alios ", or if the duty is, as Lord Maugham termed it (ibid., at p. 646), a duty " to supply " sound tools " so far as care and skill can secure this result ", I do not see how reliance on Baldwin & Co., Ltd., or on their manufacturers, for the soundness of the drifts could amount to performance of the duty, if the manufacturers actually concerned had in fact failed to use reasonable care and skill in the making of them. If the law was, as it might quite reasonably be, that an employer discharged his duty of taking reasonable care to provide sound tools by having them made by a reputable manufacturer or buying them ready made from reputable suppliers, the employers here could no doubt repel the charge of negligence now brought against them by showing that they bought the drift which turned out defective from reputable suppliers, and that the defect was not one which they could have discovered by reasonable inspection. But the law as it is does not, as I understand it, accept reliance on the care and skill of others as a performance of the duty. Therefore (to apply Lord Wright's language), the employers did not, in buying the drift from Baldwin & Co., Ltd., perform the duty per se; nor did they perform it per alios, since the manufacturers unfortunately failed to take reasonable care in the making of the drift. Nor (to apply Lord Maugham's language) did the employers provide, in the shape of the defective drift, a sound drift so far as care and skill could secure this result; for due care and skill were not in fact exercised in the manufacture of this drift.

The argument for the employers is based on the broad propositions that there should be no responsibility without fault, and that an employer's duty to his workmen is not an absolute duty, but only a duty to take reasonable care. It is said that the learned judge's decision in favour of the workman can only be justified either (a) on the ground that the employers were vicariously responsible for the manufacturers' negligence or (b) on the ground that the workman's contract with the employers included a warranty by the employers to the effect that the tools provided for him by the employers would be sound tools. As to the former ground, it is pointed out that this can only be appropriate where an employer has entrusted the performance of his duty to a servant or agent, and that servant or agent has negligently failed to perform it. Even if " agent " for this purpose can properly be regarded as including an independent contractor, it cannot possibly be retrospectively extended to a manufacturer making for the market tools which ultimately find their way into the hands of an employer through some supplier with whom he may happen to deal. As to the latter ground, the warranty imputed to the employers could only be a warranty that reasonable care had been taken by the employers, their servants or agents. But there was no lack of reasonable care on the part of the employers themselves, or on the part of Baldwin & Co., Ltd., if they can properly be termed the employers' agents. As to the manufacturers, who were admittedly negligent, they were never in any sense the employers' agents, and accordingly the warranty could not extend to their acts or defaults. The argument goes on to point out the inconsistency between the view that an employer is to be responsible on the basis of warranty for the failure of persons over whom he has no control to take reasonable care in the manufacture of goods which he buys in the market, and the authorities to the effect that an employer is not in general responsible to his workmen for the safety of premises of third parties, which proceed on the ground that the employer has no control over those premises. In this connexion reference was made to *Taylor* v. *Sims & Sims* (15) ([1942] 2 All E.R. 375) and *Cilia* v. *H. M. James & Sons* (16) ([1954] 2 All E.R. 9); and also to *Hodgson* v. *British Arc Welding Co., Ltd., & B. & N. Green & Silley Weir, Ltd.* (17) ([1946] 1 All E.R. 95), where employers (specialist sub-contractors) were held not to be liable at common law for injuries to their workmen through a defect in scaffolding provided, maintained and controlled by the head contractors for the repair of a ship.

An authority directly in the employers' favour is to be found in *Mason* v. *Williams & Williams, Ltd. & Thomas Turton & Sons, Ltd.* (18) ([1955] 1 All E.R. 808), where in circumstances closely comparable to those of the present case, FINNEMORE, J., held that certain employers were not liable to their workman for an injury to his eye caused by the breaking of a defective chisel. ASHWORTH, J., found himself unable to follow that case in view of the other authorities, but the employers claim that he ought to have followed it as containing a correct statement of the law.

As to *Wilsons & Clyde Coal Co., Ltd.* v. *English* (1) it is said on the employers' side that in so far as the speeches contain language capable of carrying the implication that an employer cannot divest himself of his duty by entrusting its performance to an independent contractor, and in particular in so far as the speech of LORD MAUGHAM contains language capable of being construed as supporting the view that an employer who buys tools from a reputable supplier is answerable for defects in them due to the negligence of the manufacturer by whom they may turn out to have been made, albeit a complete stranger to the employer, they go far beyond what was necessary for the decision of the actual case in hand, and accordingly should not be regarded as providing binding authority for the extreme proposition contended for by the workman. As to this last point, I think it was necessary for the decision of the matter in question in *Wilsons & Clyde Coal Co., Ltd.* v. *English* (1) for their Lordships to examine the character and incidents of an employer's duty of care to his workmen, and in particular the question whether it could be discharged by entrusting its performance to others, and I think that what was said by them on that question must be regarded as authoritative.

As to the alleged inconsistency of the workman's proposition with the cases concerning work on the premises of third parties, I doubt if it would ever be possible to reconcile all the cases which have been decided on an employer's duty A to his workmen at common law, and each case depends to a great extent on its own facts. However, I do not think that this particular charge of inconsistency is well founded. Where a workman is put by his employer to work on premises belonging to third parties the employer in no sense provides or selects or controls the premises. In cases such as the present case the employer decides what tools he will buy and from whom he will buy them. B

As to the impossibility of imputing to the employers vicarious liability for the negligence of the manufacturers, who were neither their servants nor their agents nor their independent contractors, to this, as a general proposition, I agree. I do not think, however, that the principle on which an employer is held not to have performed his duty of care, where he has entrusted its performance to somebody else who has in fact failed to perform it, is confined in its application to cases in C which the employer is vicariously liable for that other person's negligence in the sense in which a principal may be held liable for the negligence of his agent. Nor in my view can there be any valid distinction for this purpose between an employer who has tools made for him by a manufacturer, thereby entrusting to the manufacturer the performance of his duty to take reasonable care to provide sound tools, and an employer who buys tools ready made on the assumption D that they have been made with that degree of skill and care which the performance of his duty demands.

As to the terms of any implied warranty, a verbal point can no doubt be made. But I think the case really turns on the nature of the employers' duty of reasonable care and the manner in which it is capable of being discharged. As I understand the *Wilsons & Clyde Coal Co.'s* case (1), it is an absolute duty to take reasonable E care which can be discharged only by showing that all reasonable care has in fact been taken to ensure the soundness of the tools provided, and not by showing that the employer entrusted to somebody else the taking of all reasonable care, or assumed that somebody else had taken all reasonable care, to ensure the soundness of those tools. If the duty must be expressed as a warranty, I think the warranty would be that (to paraphrase LORD MAUGHAM's language F in the *Wilsons & Clyde Coal Co.'s* case (1)) the tools were as sound as reasonable care could make them.

I have left to the last the question of latent defect. The employers' duty being to take reasonable care, they clearly could not be held liable if the defect could not have been detected either by the employers themselves on such inspection G as they could reasonably be expected to make or by the manufacturers using reasonable skill and care in the manufacture of the tool. But the learned judge, while holding that the employers could not have been reasonably expected to discover the defect, found that the manufacturers could by the exercise of reasonable skill and care have discovered it, and were negligent in failing to do so. The defect may thus be said to have been latent quoad the employers, but it was H clearly not latent quoad the manufacturers, the manufacturers of the tool. Therefore reasonable care was not in fact taken by the manufacturers in the manufacture of the tool, and it follows that the employers' duty of care, as I have endeavoured to define it above, was in fact not performed, and it is immaterial that the defect may be said to have been latent quoad the employers themselves. I

My conclusion as to the law on this point, and indeed on the whole case, is strongly borne out by *Donnelly* v. *Glasgow Corpn.* (19) ([1953] S.L.T. 161). In that case the plaintiffs were employed by the defendant corporation as driver and conductor of an omnibus, and they claimed damages from the corporation in respect of personal injuries which they had sustained due to a defect in the chassis of the omnibus. The case came before the court on an application by the plaintiffs in which they attacked the relevance of certain defences raised by the corporation. The Lord Justice-Clerk (Lord Thomson) said (ibid., at p. 168):

> "The main defence put forward by the corporation is that this defect was a defect of design for the non-discovery of which they cannot be blamed as they relied and were entitled to rely first on the manufacturers of the chassis, and second on the circumstances that they had been issued with a certificate of fitness under s. 68 of the Road Traffic Act, 1930 (20 & 21 Geo. V c. 43), applicable to this omnibus. So far as the driver's and conductor's cases are concerned, they both being servants of the corporation, I have no doubt that the defences are irrelevant. It is admitted by the corporation that the omnibus was defective and they aver that their suppliers were responsible for the defective condition. But on this branch of the law a master cannot escape liability to his servant for defective plant by blaming his agents. The personal responsibility which the law lays on the master in respect of plant covers the activities of any person whom the master employs to provide that plant. The supplier and the master are as one. If then the supplier erred, the master is saddled with the results of that error. It may be that the master is able to have recourse against the supplier on account of his error, but that is no concern of the injured servant and, indeed, one of the reasons behind the development of this branch of the law is to give the workman the advantage of being able to go directly against his master. Of course, the master does not warrant the plant and he is not liable in the case when the defect is latent in the sense that it was not discoverable by the exercise of reasonable care. If the position in the present case had been that the corporation had been able to say that neither they, nor their suppliers, could have discovered the defect by means of any reasonable inspection, the defence would be relevant. But, as I have already said, the corporation agree that the defect was patent to their suppliers and that in this branch of the law means that it was patent to them."

Those observations, while not binding on us, are of great persuasive force, and they substantially accord with what I take to be the law on this subject as deducible from the English authorities.

It may be said with some force that the conclusion to which I think we should come places on the employer a heavier burden than the broad principle of reasonable care enunciated by Lord Herschell in *Smith* v. *Baker & Sons* (20) ([1891] A.C. 325 at p. 362) would appear to involve according to the ordinary meaning of the language used. However, I think that it is a conclusion which this court is constrained on the authorities to adopt. I would, moreover, observe that it does not entail the substitution of an absolute duty to ensure safety for the duty of reasonable care enunciated in *Smith* v. *Baker & Sons* (20), and accepted passim by the House of Lords in the *Wilsons & Clyde Coal Co.'s* case (1). The duty remains a duty of reasonable care, but the obligation to take that degree of care per se or per alios is an absolute obligation.

As to the merits of this conclusion, while it may be said to bear somewhat hardly on the employer, on the other hand an employee has to use the tools provided by the employer and has no voice in the selection of the tools or as to the manufacturer or supplier from whom they are obtained. If he is injured through a defect in one of the tools provided by his employer, it is surely not unreasonable that the employer should be held liable if the defect was due to the negligent manufacture of the tool, whether by the employer himself or by somebody else. Otherwise the employee might well be without remedy. He would not know and might not be able to find out who the manufacturer was. If he could find out who the manufacturer was, he might have a good claim on the *M'Alister (or Donoghue)* v. *Stevenson* (21) ([1932] A.C. 562) principle. But claims of that kind are not always easy to make out, though in the present case the workman did in fact succeed against the manufacturers on that principle, as well as succeeding against the employers for breach of their common law duty as his employers. At all events, it would, as I think, be an irrational and intolerable refinement to distinguish for this purpose between tools made by a manufacturer to the order of the employer and tools bought by the employer ready made.

For the reasons I have endeavoured to state, I agree with the conclusion reached by the learned judge and would, for my part, dismiss this appeal.

PARKER, L.J.: With reluctance and diffidence I feel constrained to take a different view to that which my Lord has expressed and I would allow this appeal.

The duty owed by a master to his servant at common law can be stated in general terms as a duty to take reasonable care for the safety of his servants. It is, as LORD HERSCHELL said in *Smith* v. *Baker & Sons* (20) ([1891] A.C. 325 at p. 362):

> " . . . the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk."

Even before the Employers Liability Act, 1880, it was regarded as a personal duty in this sense that if the master delegates, as he often must, the performance of that duty to another he remains liable for the failure of that other to exercise reasonable care. In *Bain* v. *Fife Coal Co.* (2) (1935 S.C. 681 at p. 693), the Lord Justice-Clerk (LORD AITCHISON), after referring to the decision of this court in *Fanton* v. *Denville* (22) ([1932] 2 K.B. 309), said this:

> " It ignores what has always been regarded as a fundamental doctrine of the law of master and servant, viz., that there are certain duties owed by a master to his servant so imperative and vital to safety that the master cannot divest himself of responsibility by entrusting their performance to others, so as to avoid liability in the event of injury arising to the servant through neglect of any of these duties. The master's liability as for breach of these paramount duties is unaffected by the doctrine of fellow-servant, for in the eye of the law they are duties that cannot be delegated. If, in fact, they are entrusted by the master to others, the maxim applies qui facit per alium facit per se. The duty may not be absolute, and may be only a duty to exercise due care, but, if, in fact, the master entrusts the duty to someone else instead of performing it himself, he is liable for injury caused through the want or care of that someone else, as being, in the eye of the law, his own negligence."

I have quoted that statement since it was expressly approved by all their Lordships in *Wilsons & Clyde Coal Co., Ltd.* v. *English* (1) ([1937] 3 All E.R. 628), as representing the law of England as well as of Scotland. See also the principle as enunciated in that case by LORD THANKERTON (ibid., at p. 637), LORD MACMILLAN (ibid., at p. 638), LORD WRIGHT (ibid., at p. 640 and p. 644) and LORD MAUGHAM (ibid., at pp. 645, 646).

Further, it is I think clear that this principle holds good whether the person employed by the master is a servant, a full-time agent or an independent contractor. It is true that in *Wilsons & Clyde Coal Co.* case (1) the person under consideration was a manager employed by the owner of a mine, but all that was said there is equally applicable to the case of an independent contractor. Indeed LORD WRIGHT gave as an illustration (ibid., at p. 641) the case of a shipowner who employed an expert naval architect, engineer or stevedore to make his ship seaworthy—persons who in general would be independent contractors. Further, in *Paine* v. *Colne Valley Electricity Supply Co., Ltd., & British Insulated Cables, Ltd.* (14) ([1938] 4 All E.R. 803), GODDARD, L.J., sitting as an additional judge of the King's Bench Division, expressly included independent contractors as within the principle. Again, in *Thomson* v. *Cremin* (4) ([1953] 2 All E.R. 1185), the defendant was held liable for the negligence of independent contractors employed to perform the duty. It is true that that was a case of invitor and invitee, but the duty of a master to his servant is certainly no less than that of an invitor to his invitee.

The principle is, I think, clear, but difficulties at once arise when it is sought to apply it in the present case. Is it to be said that in ordering a standard tool from Baldwin & Co., Ltd., wholesale suppliers, the employers were delegating a duty owed to the workman or were employing Baldwins to perform their duty, or were appointing Baldwins their agents in that regard, to employ phrases often used in the cases ? I cannot believe that the matter can be looked at in this way when there is nothing more than the purchase and sale of a standard article, and this whether the seller is a distributor or the manufacturer. Of course if the employers purchased the tool from suppliers or manufacturers whom they had reason to believe were unreliable or if the defect was patent to the employers or one which they ought to have suspected, the position might be different. It would then be a question of fact whether in all the circumstances they had failed to exercise reasonable care. No consideration of this kind, however, arises here. Even if Baldwin & Co., Ltd. fell in some way to be considered as the employers' agents, there is no suggestion that they were negligent. They in turn bought from reputable manufacturers, and had no reason to suspect any defect in the tool.

In these circumstances it seems to me that the workman can only hold the employers liable if the true duty of a master is not merely to take reasonable care to provide a reasonably safe tool, but to provide a tool which has been manufactured with reasonable skill and care even when the manufacturer is in no contractual relationship with the master. Unless constrained to do so by authority I would be loath to hold that there was any such duty. Subject only to a defect latent to the manufacturer, and ordinarily this will not arise by reason of his expert knowledge, such a duty would amount to a warranty that the tool was safe. Indeed such a duty would be one incapable of performance in that the master would have no control over the processes of the ultimate manufacturer. Viewed as a matter of contract I find it difficult to imply any such term. Viewed as a matter of tort it would be a retrograde step towards the theory of liability without negligence: cf. *Read* v. *J. Lyons & Co., Ltd.* (23) ([1946] 2 All E.R. 471 per Lord Macmillan at p. 476 and per Lord Simonds at p. 480).

What then is the position on the authorities ? Oddly enough the question has never fallen to be decided in England until recently. In *Mason* v. *Williams & Williams, Ltd. & Thomas Turton & Sons, Ltd.* (18) ([1955] 1 All E.R. 808), Finnemore, J., decided that an employer who buys tools from reputable makers is entitled to assume that they are such as will be proper for their intended purpose. Apparently, however, no cases were referred to in argument. Much reliance in the present case was put on two passages, one in the speech of Lord Maugham in *Wilsons & Clyde Coal Co., Ltd.* v. *English* (1) and one in the speech of Lord Wright in *Thomson* v. *Cremin* (4). In the former case Lord Maugham said ([1937] 3 All E.R. at p. 646):

> " Suppose some new machinery is necessary in a factory, and the employer is absent, or completely unskilled in such things. He necessarily leaves the matter to a manager, let us suppose a highly skilled person, who, however, is negligent in this case. An accident follows, due to a defect in the machine. If the liability of the employer is stated as being an obligation to use his best endeavours to supply and install good machinery, it may well be said on his behalf that he left the matter to a highly skilled man, and it may be asked, with force, what more could he do ? I should reply, nothing; but I should add that the premise is incorrect. The possessive pronoun ' his ' is that which leads to the error. The proposition would be more correctly stated to

> be that his duty is to supply and install proper machinery so far as care and skill can secure this result." A

Taken out of their context these words are no doubt wide enough to embrace the higher duty contended for, but I cannot bring myself to believe that LORD MAUGHAM was intending to lay down such a duty. *Wilsons & Clyde Coal Co., Ltd.* v. *English* (1) concerned the manager of a mine; it decided that though an B employer can, and often should, delegate his duty to servants, agents and even independent contractors, he remains liable for their negligence. The House was not considering the question which arises here which is not a case of delegation. That LORD MAUGHAM had no such question in mind is, I think, made clear by the words which follow the passage cited above. LORD MAUGHAM goes on (ibid., at p. 646): C

> " He can, and often he must, perform this duty by the employment of an agent, who acts on his behalf; but he then remains liable to the employees unless the agent has himself used due care and skill in carrying out the employer's duty. This has sometimes been expressed by saying that the duty is personal to the employer; but the adjective if unexplained is apt to mislead, like the word ' absolute ' and the word ' delegate '. The employer D can, of course, and often must, delegate the performance of any of his duties to skilled agents . . . "

In *Naismith* v. *London Film Production, Ltd.* (13) ([1939] 1 All E.R. 794), LORD MAUGHAM's statement was cited and followed, and GODDARD, L.J., expressed (ibid., at p. 798) the duty as one E

> " to make the place of employment, and the plant and material used, as safe as the exercise of reasonable skill and care would permit."

In that case also, however, the court were not concerned with the point which arises in the present case.

The second passage particularly relied on is that of LORD WRIGHT in *Thomson* F v. *Cremin* (4) ([1953] 2 All E.R. at p. 1191):

> " The duty of the invitor towards the invitee is, in my opinion, a duty personal to the former, in the sense that he does not get rid of the obligation by entrusting its performance to independent contractors. It is true that the invitor is not an insurer: he warrants, however, that due care and skill to G make the premises reasonably safe for the invitee have been exercised, whether by himself, his servants, or agents or by independent contractors whom he employs to perform his duty. He does not fulfil the warranty merely by leaving the work to contractors, however reputable or generally competent. His warranty is broken if they fail to exercise the proper care and skill." H

The warranty there referred to, however, does not extend to the care and skill of persons not in any contractual relationship with the defendant but only to the care and skill of those " whom he employs to perform his duty ".

I would also refer to *Biddle* v. *Hart* (24) ([1907] 1 K.B. 649), a decision of this court. In that case a stevedore's workman was injured as a result of a defect in I tackle gratuitously provided by the ship as was customary. The Divisional Court had held, affirming the county court judge, that in such circumstances the master was under no duty in regard to the tackle. The Court of Appeal, however, ordered a new trial, holding that the defendant was under a duty and that it was for the jury to consider whether the duty had been performed. It is true that the claim was made under the Employers Liability Act, 1880, but under that Act the plaintiff to succeed had to prove negligence, and the court clearly did not consider that the stevedore's duty was such that he was responsible for the defect in the shipowner's tackle. Thus FARWELL, L.J., said (ibid., at p. 654):

> "The Act of 1880 was a mode of depriving the employer of particular defences which were open to him at common law, such as common employment and the like. That is pointed out by A. L. SMITH, J., in *Howe* v. *Finch* (25) ((1886), 17 Q.B.D. 187). The case must therefore be considered as if this plaintiff were an ordinary person employed to use this tackle by the defendant for the purposes and for the profit of the defendant. In such a case the defendant has to take reasonable care that the tackle, whether his own, or hired, or lent, is reasonably fit for the purpose for which he employed the plaintiff to use it."

SIR GORELL BARNES, P., said ([1907] 1 K.B. at p. 653):

> "It may be that in a case of this character, although he had that duty, yet, if he had dealt with these shipowners before and had never had any cause for complaint, the jury might think that he had reasonably discharged that duty. On the other hand, when you have evidence that the plant was old and had been in use for a long time, the jury might say they were not satisfied that reasonable care had been taken to see that it was in a proper condition. Once establish the duty the question is, What would the jury consider a discharge of that duty?"

Finally, as far as the English authorites are concerned, reference has been made to the position when premises, on which the servant is required to work, are not in the occupation or control of the master: cf. *Taylor* v. *Sims & Sims* (15) ([1942] 2 All E.R. 375), *Cilia* v. *H. M. James & Sons* (16) ([1954] 2 All E.R. 9). In both those cases it was held that the master owed no duty to see that the premises were safe, but that if there were any duty it had been performed. These cases were, of course, relied on by the employers. Though it is unnecessary for the purposes of the present case to come to a final conclusion, I am inclined to the view that these decisions, in so far as they decided that there was no duty, cannot stand with the decision in *Biddle* v. *Hart* (24). The duty, as it seems to me, is always there, and it is a question for the jury whether that duty has been performed, bearing in mind that the premises are not in the occupation or under the control of the master. That, as I understand his judgment, was the approach of HILBERY, J., in *Hodgson* v. *British Arc Welding Co., Ltd.* (17) ([1946] 1 All E.R. 95).

Turning to the Scottish authorities, these were strongly relied on by the workman. Thus, in *Macdonald* v. *Wyllie & Sons* (11) ((1898), 1 F. (Ct. of Sess.) 339), a workman was injured by the fall of a scaffold due to the negligence of a firm of joiners whom his employers, builders, had employed to erect. At the trial the Lord Justice-Clerk had directed the jury that if they were satisfied that the defender, not having the knowledge and skill to erect the scaffolding in question, selected a tradesman having skill and experience of such work and contracted with him to provide such a scaffold, he would not be liable. On a bill of exceptions it was held that there must be a new trial. LORD YOUNG said (ibid., at p. 344):

> "The basis of the workman's claim against his master is that there is a responsibility on the part of his employer for the scaffolding being in a reasonably safe condition to enable the workman to perform the work which he has been engaged to do . . . According to the law of Scotland in the contract of master and servant, apart from special stipulation to the contrary, it is implied that the employer is responsible to his workmen for the condition of the scaffolding which he has provided for them to work upon, and that without any reference to the mode employed by him to erect it."

Further, LORD TRAYNER said (ibid., at p. 345):

> "If a master buys a machine, let us say, necessary for the execution of his work, and gives it to his workman, it is the master's machine, not the

> workman's or manufacturer's. If the machine turns out to be faulty, defective, or otherwise insufficient, the master must answer for it."

The words used in these passages read apart from their context strongly support the workman's contentions. But in their context I think that they do no more than emphasise that the master's duty is personal in the sense referred to in *Wilsons & Clyde Coal Co.* case (1) ([1937] 3 All E.R. 628). The basis of the case was that the master had employed the joiners to erect the scaffold. It is also to be observed that LORD MONCREIFF and the Lord Justice-Clerk took a different view, and only granted a new trial on the ground that the direction was incomplete in that the question whether the defect could have been discovered by the master had not been left to the jury.

In *Weir* (*or Wilson*) v. *Merry & Cunningham* (26) ((1867), 5 Macph. (Ct. of Sess.) 807), where the defence of common employment was raised, Lord President INGLIS said (ibid., at p. 811):

> " I think that wherever the master of a coal-pit, or of any other work, has occasion to purchase and provide a machine or apparatus to be used by his workpeople, or for the protection of his workpeople, he is liable for the insufficiency of that machine or apparatus if it should turn out to be insufficient . . . "

These again are wide words, but again the Lord President was not considering a case where the insufficiency arose as a result of the negligence of a person with whom the master was in no contractual relationship. The next case is *McKillop* v. *North British Ry. Co.* (27) ((1896), 23 R. (Ct. of Sess.) 768), but this is authority for no more than this, that a railway company is not relieved by the appointment of competent engineers and managers from responsibility for injury arising to a servant from a defect in the construction of the works. Nor can I find anything in the Lord Justice-Clerk's judgment in *Bain* v. *Fife Coal Co.* (2) (1935 S.C. 681), which supports the duty contended for by the workman.

The last case is *Donnelly* v. *Glasgow Corpn.* (19) ([1953] S.L.T. 161). The driver and conductor of a bus were injured as a result of a defect in the chassis of a bus belonging to their employers. The employers averred that the defect was one of design, the fault of the manufacturers from whom they had bought the bus. It was held that the employers could not escape liability for damages arising from the provision of defective plant by blaming the manufacturers, and that the defences, so far as imputing fault against the manufacturers, were irrelevant. The Lord Justice-Clerk, with whom LORD MACKAY and LORD PATRICK concurred, said (ibid., at p. 168):

> " So far as the driver's and conductor's cases are concerned, they both being servants of the corporation, I have no doubt that the defences are irrelevant. It is admitted by the corporation that the omnibus was defective and they aver that their suppliers were responsible for the defective condition. But on this branch of the law a master cannot escape liability to his servant for defective plant by blaming his agents. The personal responsibility which the law lays on the master in respect of plant covers the activities of any person whom the master employs to provide that plant. The supplier and the master are as one. If then the supplier erred, the master is saddled with the results of that error."

While not binding on this court that decision is, of course, most persuasive authority. Once more, however, the decision appears to be based on agency, but in so far as it treats the manufacturer as the employer's agent I crave leave to doubt its correctness. As I understand the facts there was no suggestion that the chassis had been made to the employer's requirements. It was a standard chassis. Moreover there was no averment that the master could not with reasonable care have discovered the defect. But in any event that decision, as I read it, is no authority for the duty contended for in the present case, since the

A employers here were in no contractual relationship with the negligent manufacturers.

Having considered the authorities, I have come to the conclusion that a judgment in favour of the workman involves an extension of the duty owed at common law by a master to his servant. Now that the doctrine of common employment is abolished, and now that the workman can recover direct from the negligent B manufacturer, I can see no justification for extending the duty to exercise reasonable care as enunciated by LORD HERSCHELL in *Smith* v. *Baker & Sons* (20) ([1891] A.C. at p. 362).

Accordingly I would allow this appeal.

PEARCE, L.J.: I, too, feel reluctance and diffidence at taking a different C view from that expressed by JENKINS, L.J.

We have to decide what is the legal responsibility of an employer in respect of a tool bought by him without negligence from a reputable supplier who, without negligence, had bought it from a reputable manufacturer, who was guilty of negligence in its manufacture. It is clear from the learned judge's findings that no one save the manufacturer has been at fault.

D It is important to consider the exact extent of the employer's duty. If the duty is to exercise care in supplying plant, then one would think at first sight that he must be discharged from liability if he or those to whom he has entrusted the duty have with due care bought a standard tool from a reputable middleman who has bought it from a reputable manufacturer. To hold him liable in such circumstances seems to me tantamount to saying that his duty is to make and E that the manufacturer must be regarded notionally as having had that task entrusted to him by the employer. The duty of an employer in respect of the provision of plant has been put in various phrases, all based on a duty to take reasonable care—e.g. he has "the duty of taking reasonable care to provide proper appliances" (per LORD HERSCHELL in *Smith* v. *Baker & Sons* (20), [1891] A.C. 325 at p. 362): "a duty to furnish [workmen] with adequate materials and F resources for the work" (per LORD CAIRNS, L.C., in *Wilson* v. *Merry* (26) (1868), L.R. 1 Sc. & Div. 326 at p. 332): "a duty of providing good and sufficient apparatus" (per LORD WENSLEYDALE in *Weems* v. *Mathieson* (28) (1861), 4 Macq. 215 at p. 226): and of "providing proper plant" (*Toronto Power Co., Ltd.* v. *Paskwan* (29), [1915] A.C. 734 at p. 738). Nowhere does one find it described as a duty to make. In the case last cited it was said (ibid.):

G

> "It is true that the master does not warrant the plant, and if there is a latent defect which could not be detected by reasonable examination, or if in the course of working plant becomes defective and the defect is not brought to the master's knowledge and could not by reasonable diligence have been discovered by him, the master is not liable, and, further, a H master is not bound at once to adopt all the latest improvements and appliances. It is a question of fact in each case, was it in the circumstances a want of reasonable care not to have adopted them."

LORD THANKERTON in *Wilsons & Clyde Coal Co., Ltd.* v. *English* (1) ([1937] 3 All E.R. 628 at p. 636) accepted that passage as adequately expressing the law. I In that case LORD WRIGHT said (ibid., at p. 640):

> "The same principle, in my opinion, applies to those fundamental obligations of a contract of employment which lie outside the doctrine of common employment, and for the performance of which employers are absolutely responsible. When I use the word absolutely, I do not mean that employers warrant the adequacy of plant, or the competence of fellow-employees, or the propriety of the system of work. The obligation is fulfilled by the exercise of due care and skill."

Lord Maugham said (ibid., at p. 645):

> " In such employments, it was held that there was a duty on the employer to take reasonable care, and to use reasonable skill, first, to provide and maintain proper machinery, plant, appliances, and works . . . it has already been pointed out that the employer's liability is fulfilled by the exercise of due care and skill . . . "

It is clear, therefore, that the duty is merely to use reasonable care and skill in providing adequate plant. This duty, as was pointed out in that case, is one of which the employer cannot rid himself. Lord Wright said (ibid., at p. 641):

> "But in truth the employer's obligation, as it has been defined by this House, is personal to the employer, and one to be performed by the employer per se or per alios. If I may take an analogy or instance of a similar personal obligation, I note that the Carriage of Goods by Sea Act, 1924, requires a shipowner to exercise due diligence, or to take reasonable care, to provide a seaworthy ship. The shipowner is almost certainly not an expert naval architect, engineer, or stevedore. So far as I know, it has never been claimed that this obligation is fulfilled by the shipowner taking reasonable care to appoint a competent expert: the shipowner is absolutely held to the fulfilment of the obligation. It is the obligation which is personal to him, and not the performance."

Lord Maugham put the proposition in these words (ibid., at p. 646):

> " . . . it has already been pointed out that the employer's liability is fulfilled by the exercise of due care and skill, and I may be allowed to point out that it is this circumstance which has led, on occasion, to a misapprehension of the true position. An illustration will demonstrate the mistake. Suppose some new machinery is necessary in a factory, and the employer is absent, or completely unskilled in such things. He necessarily leaves the matter to a manager, let us suppose a highly skilled person, who, however, is negligent in this case. An accident follows, due to a defect in the machine. If the liability of the employer is stated as being an obligation to use his best endeavours to supply and install good machinery, it may well be said on his behalf that he left the matter to a highly skilled man, and it may be asked, with force, what more could he do ? I should reply, nothing; but I should add that the premise is incorrect. The possessive pronoun ' his ' is that which leads to the error. The proposition would be more correctly stated to be that his duty is to supply and install proper machinery so far as care and skill can secure this result. He can, and often he must, perform this duty by the employment of an agent, who acts on his behalf; but he then remains liable to the employees unless the agent has himself used due care and skill in carrying out the employer's duty."

Four years after *Wilsons & Clyde Coal Co., Ltd.* v. *English* (1) in *Thomson* v. *Cremin* (4) ([1953] 2 All E.R. 1185), Lord Wright again defined (ibid., at p. 1191) the rule which he said the House had in a different context applied in *Wilsons & Clyde Coal Co., Ltd.* v. *English* (1).

> " The duty of the invitor towards the invitee is, in my opinion, a duty personal to the former, in the sense that he does not get rid of the obligation by entrusting its performance to independent contractors. It is true that the invitor is not an insurer: he warrants, however, that due care and skill to make the premises reasonably safe for the invitee have been exercised, whether by himself, his servants, or agents or by independent contractors whom he employs to perform his duty. He does not fulfil the warranty merely by

A leaving the work to contractors, however reputable or generally competent. His warranty is broken if they fail to exercise the proper care and skill."

As long as the employer's liability is based on want of care it is a difficult concept to regard him as vicariously liable for the negligence of a manufacturer whom he did not employ, who never had any business relations with him, and B who (if they are both companies) may even have ceased to exist before the employer came into existence. The employer can hardly be said in such a case to have made the tool per se or per alios. Yet, here, it was only in the making that there was negligence. Such a concept would presumably make an employer liable if he bought a factory which through the negligence of the original builder years before had a defect (undiscoverable by reasonable examination when once C the building was completed) which subsequently harmed his employee. To call this a vicarious liability would be to use the words in quite a different sense from any in which, as far as I can see, they have hitherto been used. If the liability were based on a breach of a warranty of the fitness of the plant, the concept would be a neat and easy one; but such a warranty has always been expressly disclaimed D by the courts. One is bound therefore to inquire closely whether the words in the opinions on which the workman chiefly relies fairly compel one to the conclusion reached by the learned judge.

It strikes me as strange that, if LORD WRIGHT and LORD MAUGHAM were intending their words to cover such a case as this, they made no mention of it. Defects in machinery or tools that have been bought from suppliers or manu- E facturers must have been a possibility present to their minds. Indeed LORD MAUGHAM gives a specific illustration dealing with a defect in new machinery in the passage I have read. In speaking of " a defect in the machine " he is referring, as I understand it, to a defect which would have been discovered by a careful manager, and he bases the liability of the employer on the manager's negligence. F If the workman's argument is correct, the employer would have been liable in any event (since ex hypothesi the defect was discoverable), and the manager's negligence would have been irrelevant. Again it is noticeable that LORD WRIGHT in the passage which I have read refers to the naval architect, the engineer, the stevedores, as people for whose neglect the shipowner will find himself vicariously liable. He does not refer to the shipbuilder. It seems to me unlikely that he was G intending to express a principle by which every subsequent purchaser of the ship will be liable to his employee for some undiscoverable defect due to the original negligence of the shipbuilder. By undiscoverable defect I mean a defect that, though patent to the shipbuilder during the construction, was not discoverable by subsequent purchasers, using reasonable care.

It seems to me that the opinions read fairly in their contexts are dealing only H with the negligence of persons to whom the employer has " entrusted " the provision of plant and are concerned to make the point that although they be independent contractors, yet anything that they do is the act of the employer acting per alios. If those opinions were intending to define a rule of such far reaching consequence that it would make the employer responsible for defects I due to the negligence of the manufacturer and undiscoverable by a purchaser even in respect of small standard articles that he buys, I would think it probable that they would have said so in express terms.

When LORD MAUGHAM in the passage which I have read expressly eliminates the word " his ", and says ([1937] 3 All E.R. at p. 646):

> " The proposition would be more correctly stated to be that his duty is to supply and install proper machinery so far as care and skill can secure this result ",

he follows it with the sentence,

> "He can, and often he must, perform this duty by the employment of an agent, who acts on his behalf; but he then remains liable to the employees unless the agent has himself used due care and skill in carrying out the employer's duty."

I think that, in the context, he is removing the limitation of the pronoun "his" in order to widen the principle only to the extent of substituting (by implication) the words "the care and skill of any persons whether agents or independent contractors who have been entrusted by the employer with the fulfilment of his duty".

I would therefore regard the workman's contention in this case as extending the words of Lord Wright and Lord Maugham beyond their true intention. To regard the tool in question on the facts of this case as having been manufactured by the employer per alios seems to me unreal and artificial and I venture to think it cannot be right in principle.

I see the force of the argument that the view of the matter which I have expressed may seem to draw a capricious line between the employer who buys a standard article of plant from a middleman and the employer who makes it himself or the employer who has the article specially made for him by a manufacturer to his special requirements (as in *Paine* v. *Colne Valley Electricity Supply Co., Ltd.* (14), [1938] 4 All E.R. 803). Every line is liable, however, to have anomalies along its borders; and I do not think that that is a sound argument for not drawing a line at all if principle seems to demand that it should be drawn.

I agree with Parker, L.J., in his observations on the Scottish cases and I have nothing to add to them.

For the reasons I have given and those more clearly and cogently set out by Parker, L.J., I would allow the appeal.

Appeal allowed: judgment for the employers against the workman. Leave to appeal to the House of Lords granted.

Solicitors: *E. P. Rugg & Co.* (for the employers); *W. H. Thompson* (for the workman); *Doyle, Devonshire & Co.*, agents for *Kershaw, Tudor & Co.*, Sheffield (for the manufacturers).

[*Reported by* Henry Summerfield, Esq., *Barrister-at-Law.*]

A

NATIONAL COAL BOARD *v.* GALLEY.

[COURT OF APPEAL (Jenkins, Parker and Pearce, L.JJ.), October 29, 30, 31, November 1, 4, 5, 27, 1957.]

Contract—Breach—Damages—Measure—Contract by colliery deputy to work B *such days as reasonably required—Refusal in concert with other deputies to work Saturdays extending over several months—Writ issued after first Saturday's abstention from work—Relevance of breach being in concert to assessment of damages—Whether damages for failure to work Saturdays after issue of writ recoverable in the action—R.S.C., Ord.* 36, *r.* 58.

Master and Servant—Contract of service—Certainty of term—Coal mining C *service agreement—Agreement by deputy to work such days or part days in each week as may reasonably be required by the management—Measure of damages for refusal to work shift by deputy—Relevance of concerted refusal by other deputies to work same shift.*

G., a deputy (i.e., a person in charge of miners and responsible for various safety precautions) employed by the plaintiffs, the National Coal Board, D in their Oxcroft Colliery was a member of a trade union, which was itself a member of another trade union, National Association of Colliery Overmen and Deputies and Shotfirers, known as "Nacods". In April, 1947, Nacods agreed with the plaintiffs that deputies should work reasonable overtime if required. By a written service agreement, dated Mar. 1, 1949, between G. and the plaintiffs, G. agreed to serve the plaintiffs and that his E wages should be regulated by " national agreement . . . for the time being in force and that this contract of service shall be subject to those agreements and to any other agreements relating to or in connexion with or subsidiary to the wages agreement ". By agreements on revised terms and conditions of employment of deputies made between Nacods and the plaintiffs on July 29 and, more formally, on Aug. 25, 1952, it was agreed that, among F other terms, " deputies shall work such days or part days in each week as may reasonably be required by the management ".

Since 1947 miners had worked a five-day week under national agreement but, owing to the demand for and scarcity of coal, national yearly agreements for working Saturday shifts at overtime rates had been in operation. Deputies at the Oxcroft Colliery between 1952 and 1956 worked on the G average six shifts a week, which included an alternating Saturday shift. Under the Nacods agreement of 1952 the deputies received a fixed wage without extra payment for week-end work. By 1956 the payments to miners had risen to a level at which, it was alleged, they were earning more than the deputies for shorter hours. On Thursday, May 14, 1956, the Oxcroft Colliery deputies, acting in concert, gave the management notice H that they would not in future turn coal on Saturdays. G., whose turn it was to work the Saturday shift on Saturday, June 16, and on alternating Saturdays thereafter, accordingly failed to present himself for work on Saturday, June 16, when he was due to do safety work, and on all succeeding Saturdays until February, 1957. The other deputies did likewise and no productive work was therefore possible at the colliery on a Saturday until I Aug. 25, 1956, when the plaintiffs succeeded in obtaining substitute deputies at a cost of £3 18s. 2d. for each substitute per Saturday shift. The loss of production was £535 on June 16, 1956, and £3,395 between June 16 and Aug. 18, 1956. The plaintiffs continued to employ G., but on June 21, 1956, issued a writ against him claiming damages for breach of contract.

Held: (i) G. was liable in damages for breach of contract because—

(a) his personal contract of service with the plaintiffs was regulated by the Nacods agreement, and by working on the terms of that agreement he had accepted it (see p. 97, letter C, post), and

(b) the Nacods agreement was meant to have binding effect and the term that deputies should " work such days or part days as may reasonably be required " was sufficiently certain to be legally enforceable (see p. 97, letter I, post; *Foley* v. *Classique Coaches, Ltd.*, [1934] All E.R. Rep. 88 applied, and *May & Butcher* v. *R.*, [1934] 2 K.B. 17, n., distinguished) and

(c) by the contract thus constituted the reasonableness of the requirement to work was made the test, and in all the circumstances of the case it had been reasonable to require G. to work the Saturday shift on June 16, 1956; moreover any question whether wages of deputies had not been increased in step with wages of miners was irrelevant to the issue whether Saturday shift working was reasonably required under the Nacods agreement.

(ii) in assessing the damages, G.'s abstention from Saturday shifts after the issue of the writ ought not to be taken into account, because repeated breaches of recurring obligations did not constitute a continuing cause of action, and these subsequent abstentions were not continuations of the course of action constituted by G.'s failure to work on June 16, 1956; therefore, R.S.C., Ord. 36, r. 58 (which required damages to be assessed in respect of a continuing cause of action down to the time of assessment), did not apply (see p. 102, letter B, post).

Hole v. *Chard Union* ([1894] 1 Ch. 293) distinguished.

(iii) the measure of damages in contract (the tort of inducing breach of contract or of conspiracy not being alleged in the present case) was the loss of output caused to the plaintiffs by G.'s failing to work the Saturday shift on June 16, 1956, and, though G. had acted in concert with others, it had not been shown that his breach of contract contributed to any loss greater than the cost of a substitute for him viz., £3 18s. 2d., and any loss consequent on the cessation of work by others was not recoverable from G.

Ebbw Vale Steel, Iron & Coal Co. v. *Tew* ((1935), 1 L.J.N.C.C.A. 284), followed.

Per Curiam: where breaches of contract by A and B acting in concert each contribute to the loss it would be right to value the loss of services of each as half the loss (see p. 103, letter A, post).

Appeal allowed.

[As to the assessment of damages for a continuing cause of action, see 11 Halsbury's Laws (3rd Edn.) 228, para. 396; and for cases on the subject, see 17 Digest (Repl.) 86, *65-72*, 87, 88, *81-89*.

As to the irrelevance of motive in assessing damages for breach of contract, see 11 Halsbury's Laws (3rd Edn.) 243, para. 412.

As to uncertainty in relation to the law of contract, see 8 Halsbury's Laws (3rd Edn.) 83, para. 144.]

Cases referred to:

(1) *May & Butcher* v. *R.*, [1934] 2 K.B. 17, n.; 103 L.J.K.B. 556, n.; 151 L.T. 246, n.; Digest Supp.

(2) *Foley* v. *Classique Coaches, Ltd.*, [1934] All E.R. Rep. 88; [1934] 2 K.B. 1; 103 L.J.K.B. 550; 151 L.T. 242; Digest Supp.

(3) *Hillas & Co., Ltd.* v. *Arcos, Ltd.*, (1932), 147 L.T. 503; Digest Supp.

(4) *Bishop & Baxter, Ltd.* v. *Anglo-Eastern Trading & Industrial Co., Ltd.*, [1943] 2 All E.R. 598; [1944] K.B. 12; 113 L.J.K.B. 26; 169 L.T. 351; 12 Digest (Repl.) 98, *587*.

(5) *Hole* v. *Chard Union*, [1894] 1 Ch. 293; 63 L.J.Ch. 469; 70 L.T. 52; 17 Digest (Repl.) 88, *88*.

(6) *Ebbw Vale Steel, Iron & Coal Co.* v. *Tew, Same* v. *Richards, Same* v. *Lewis*, (1935), 1 L.J.N.C.C.A. 284; 79 Sol. Jo. 593; Digest Supp.

Appeal.

The defendant, Stanley Galley, a deputy employed by the plaintiffs at the Oxcroft Colliery, Derbyshire, appealed against the decision of Finnemore, J., A given at Nottingham Assizes on Mar. 26, 1957, awarding the plaintiffs £100 damages for breach of contract with costs on the High Court scale. The facts, which are summarised in the headnote, appear in the judgment.

Gerald Gardiner, Q.C., and *J. R. Bickford Smith* for the defendant, the employee.

Sir David Cairns, Q.C., A. J. Flint and *M. K. Harrison-Hall* for the plaintiffs, the National Coal Board, the employers.

B

Cur. adv. vult.

Nov. 27. **PEARCE, L.J.**, read the judgment of the court: In this case the defendant appeals from a judgment of FINNEMORE, J., at Nottingham Assizes awarding to the plaintiffs £100 damages for breach of contract and costs on the High Court scale. The defendant contends that he is not liable in C damages and that, even if he be liable, the damages should only be nominal. Although not strictly a test case, this is the first of eighty-five actions brought by the plaintiffs against other defendants raising similar issues. Probably the fate of those actions will be decided by this.

The defendant is employed by the plaintiffs as a deputy in their colliery at Oxcroft in Derbyshire. The case arises out of the defendant's deliberate refusal D to attend for work at the plaintiffs' mine on Saturday voluntary shifts, in breach, it is alleged, of his terms of employment. All the other deputies at the mine refused similarly and simultaneously. Deputies, like overmen (who are immediately above them in status), and shotfirers (who are immediately below them), have been described as the non-commissioned officers of the industry. The deputy is in charge of the miners and has to see that various safety precautions E are observed. He is first in and last out in a shift. As a result, his shift is longer than the ordinary miner's, and even when the miners are only working a five-day week the deputy has certain safety duties at the week-end. The defendant's trade union is the National Association of Colliery Overmen, Deputies and Shotfirers (Midlands Area). This body is in turn a member of the National Association of Colliery Overmen and Deputies and Shotfirers, an unregistered F trade union that is composed of area associations and has no individual members; it is known popularly and referred to in this case as " Nacods ". It was Nacods who discussed and arranged with the plaintiffs any alteration of the terms of the deputies' employment.

In April, 1947, following nationalisation, a five-day week was introduced for miners by agreement between the plaintiffs and the National Union of Mineworkers. G In May, 1947, a similar agreement in respect of deputies was made between the plaintiffs and Nacods. This agreement provided that local arrangements should be made to provide the working of additional shifts where it was necessary under statutory provisions and to ensure the safety and efficient working of the pit, and that the deputies should work reasonable overtime if required. In October, 1947, shortage of coal produced a very serious crisis. H In that month the National Union of Mineworkers made an agreement with the plaintiffs that the five-day week agreement should remain in force but that a proportion of miners would voluntarily do as many Saturday shifts as possible for the next six months. Provisions were made for overtime pay. Thereafter voluntary Saturday shifts were worked at most other mines, and at this mine in particular. In April, 1948, the agreement for voluntary shifts on Saturdays I was extended for a further year. Thereafter it was extended year by year up to April, 1952. The Saturday working was a serious attempt by miners and management to increase the output of coal. It necessitated each year an Order in Council under s. 4 of the Coal Mines Regulation Act, 1908, based on the existence of a great emergency or a grave economic disturbance due to the demand for coal exceeding the supply.

On Mar. 1, 1949, the defendant entered into a written contract of service with the plaintiffs. That contract is not a felicitous document and its terms are far from clear. The plaintiffs thereby agreed to engage the defendant and the defendant agreed to serve the plaintiffs on terms and conditions set forth in the contract rules for the time being in force at the plaintiffs' collieries. No one appears to know what these rules are. By cl. 4 the defendant declares that he

> "will serve the board as regularly as the state of trade and interruptions from accident or repairs to its mines and works or the non-arrival of wagons or general holidays will from time to time permit and that my wages shall be regulated by such national agreement and the county wages agreement for the time being in force and that this contract of service shall be subject to those agreements and to any other agreements relating to or in connexion with or subsidiary to the wages agreement and to statutory provisions for the time being in force affecting the same."

It is contended by the plaintiffs that this contract incorporates any alteration in deputies' terms of employment that might be agreed between the plaintiffs and Nacods. From that time onward the defendant as a deputy was working at week-ends, doing on an average approximately six shifts a week. But the shifts which he did on Saturday were voluntary and he received overtime pay in respect of them.

In April, 1952, the national yearly agreement for the Saturday voluntary shift ran out, and it was not renewed until Aug. 22, 1952. From that date up to the present it has continued in force with yearly renewals not merely in respect of winter months but in respect of summer months (May to August inclusive) as well. Although many collieries had worked Saturday voluntary shifts in the summer the Oxcroft Colliery had never done so before August, 1952.

Some time prior to April, 1952, Nacods had put in a wage claim in respect of deputies. During the summer of 1952, while the Saturday voluntary shift was in abeyance, there were various discussions between the plaintiffs and Nacods about deputies' pay and duties. The plaintiffs held the view that deputies (and overmen and shotfirers) were men of responsibility in the working of the mine who should hold a position more analogous to the management than to the miners. They suggested to Nacods that deputies should receive an upstanding weekly wage to include overtime. Minutes and transcripts of these negotiations were produced and put to the witnesses in evidence. It is clear that Nacods were afraid that the fixing of an upstanding weekly wage inclusive of overtime might result in men being put upon and being asked to work in excess of six shifts a week. (By "six shifts a week" we are referring to the average produced by an alternation of five shifts in one week and seven in another.) They were trying to ensure that this would not occur. The plaintiffs were in effect saying that the average working week was now about six shifts a week but that deputies cannot have a maximum of six shifts a week since emergencies in the pits may on occasion demand more, but that it was not the intention that the men would work more than six shifts. No one was saying that six shifts a week was unreasonable or excessive. In order to avoid the abuse of excessive unpaid overtime the plaintiffs offered to keep records showing the overtime worked, and it was agreed that if the new agreement resulted in unreasonable impositions on the men the matter should be discussed. No doubt both sides were then thinking that Saturday voluntary shifts would probably become unnecessary in a year or two, and it is said that no one at Oxcroft was anticipating summer Saturday voluntary shifts. Certainly no one was anticipating that Saturday voluntary shifts would still be worked by 1957.

As a result of these discussions an agreement "on revised terms and conditions of employment of deputies" between Nacods and the plaintiffs was reached on July 29, 1952. This agreement was interspersed with notes to explain what the various clauses meant. It is clear that the defendant was at all material times aware of it, though he personally was not in favour of the change to an upstanding wage and had voted against it. The clauses relevant to this dispute are as follows:

A "5. Deputies grade I and II shall be paid an upstanding weekly wage for each week worked without any additional payments in respect of overtime or week-end work.

"6. The amount of such weekly wage in respect of deputies grade I shall not be less than £14 per week, nor more than £16 10s. per week.

"12. Except where prevented by sickness, accident or industrial disease B to which the provisions of part E of this schedule apply, deputies shall work such days or part days in each week as may reasonably be required by the management in order to promote the safety and efficient working of the pit and to comply with statutory requirements.

"13. The management at each pit shall cause to be kept a record showing in respect of each week and each deputy grade I or grade II the C number of days and part days worked by him in that week, and will so organise the work during the week as to ensure that, as far as is practicable, time worked is fairly distributed between deputies in the same grade in each pit. If, in any case, it is alleged that the amount of time worked by any deputy or deputies is unreasonable or is not reasonably distributed between deputies in the same grade in the pit, such matter shall be settled D by discussion in such manner as the board and the association in the division shall agree.

"Note (i). The objects of the revised arrangements are to improve the status and quality of deputies grade I and II. The institution of an upstanding weekly wage carries with it the responsibility, on the part of the deputies, to work all such time as may be reasonably required of them by E the management. It imposes upon management the responsibility of ensuring that, so far as possible, work is organised so that time to be worked is distributed fairly between deputies of the same grade in each pit.

"Note (ii). Both the board and the association have given assurances that these responsibilities will be accepted and implemented in the spirit in which they are intended.

F "Note (iii). Except when prevented from working due to sickness, accident, or industrial disease, deputies will be required to work all reasonable time required of them and will be expected not to absent themselves without the prior approval of the manager.

"Note (iv). The agreement does not make any provision, and no such provision is intended, in relation to financial penalties or deductions from G the weekly wage in cases where a deputy is voluntarily absent from work. No deductions are to be made from the weekly wage in such circumstances otherwise than as provided in the arrangements for sickness, accident, and industrial disease provisions of the agreement. It will be the responsibility of management to deal with such circumstances by disciplinary measures, including, where appropriate, downgrading or dismissal."

H

A more formal agreement in similar terms (omitting the notes) was signed by the plaintiffs and Nacods on Aug. 25, 1952, by which date Saturday voluntary shifts had once more come into force. This agreement expressly rescinded the five-day week agreement of May 20, 1947. Wages were then fixed at divisional level, as envisaged by the agreement, at an upstanding weekly wage of £16 10s.; I and thereafter the defendant worked for the plaintiffs on the basis of the Nacods agreement. He continued to work about six shifts. Between 1952 and 1956 the miners received substantial increases of pay whereas the defendant and other deputies received only two small increases. As the differential between themselves and the miners decreased they became more conscious of the hardship of the long hours that they worked without any overtime pay. Finally, as a result of dissatisfaction with the treatment of a wage claim, all the deputies at the Oxcroft Colliery refused to work the Saturday voluntary shift. The plaintiffs did not accept this refusal as a repudiation of the contract of service but continued to employ the defendant.

On Apr. 23 the manager of the Oxcroft mine received a letter saying that at a branch meeting of the deputies they had decided to take no further part in coal turning on Saturdays. At the same time they informed him that they were very upset at the smallness of the increase in wages that they had just received. As a result the plaintiffs were unable to do any coal turning on Saturday, Apr. 28, and a notice had to be posted cancelling the ordinary work for that day. The same thing happened on the next three Saturdays; but on May 26 the deputies returned to normal Saturday work, and it was possible to work a Saturday voluntary shift on that day and on the next two Saturdays. On June 14 the deputies gave notice that they would not be turning coal on Saturdays in future and therefore no productive work was possible on Saturday, June 16. That position continued up to and including Aug. 18. On Aug. 25 the plaintiffs arranged for substitute deputies at a cost of £3 18s. 2d. for each substitute for the Saturday shift, and the Saturday voluntary shift was resumed. From that date the deputies refused to do work of any kind on Saturdays. In February, 1957, the deputies returned to their normal Saturday work. The loss of production on June 16, 1956, was £535 and between June 16 and Aug. 18 it was £3,395.

On June 21, 1956, the plaintiffs issued a writ against the defendant (and others) claiming damages for breach of contract. They alleged that the defendant was directly bound by agreement between the plaintiffs and Nacods of Aug. 25, 1952 (which we will call the Nacods agreement), since he impliedly authorised them to conclude it on his behalf. Alternatively, by the defendant's individual contract of employment of Mar. 1, 1949, his terms of service were expressed to be subject to any national agreements that might be entered into, and, since the Nacods agreement was a national agreement, it became incorporated in the defendant's contract of employment. Further, the defendant, by working on Saturday voluntary shifts from and after Aug. 25, 1952, recognised that that was one of the duties of his employment. Such duty was a reasonable requirement of the plaintiffs, and by refusing to do it he was in breach of his contract.

The defendant by his defence denied that Nacods had any right to bind him by the Nacods agreement of Aug. 25, 1952, but he admitted and asserted that from the beginning of August, 1952, he was employed on the basis of the earlier, less formal agreement between Nacods and the plaintiffs of July 29, 1952. The term in that document as to doing such work as might be required by the management was too vague and uncertain to have any contractual effect. Alternatively, by reason of a number of circumstances, the requirement for Saturday working was not a reasonable requirement. He counterclaimed for a declaration that the plaintiffs were not entitled to require him to work at week-ends in excess of about eight and a half hours on one Saturday (or Sunday) once in every four weeks, or to work for more than forty-two and a half hours in each week save in an emergency.

The learned judge heard a considerable volume of evidence and was referred to a number of documents. It was made clear at the hearing that there is no personal feeling in this action that the plaintiffs have brought against the defendant. They regard him as a faithful servant and a good worker, but as a matter of principle they wish to establish that men in responsible positions must honour their contracts. The case has been fought throughout on that note. The learned judge thought that, since one of the objects of Nacods was to negotiate the wages and conditions of all members and the defendant was a member of the local trade union which was itself a member of Nacods, the defendant was individually bound by the Nacods agreement. But, in any event, by the defendant's personal contract his wages were to be regulated by national agreements for the time being in force and the contract was to be subject to those agreements; and, therefore, since the Nacods agreement was a national agreement, the defendant was bound by it. The learned judge continued:

> "He has in fact accepted it and worked under it. He has taken the advantages of it and accepted the responsibilities of it for a period of some four years before this particular trouble arose. On the point that the agreement itself was not properly made, I think the complete answer would be that it is expressly admitted in the defence that the National Coal Board, the plaintiffs, and the union did enter into an agreement which in fact contains the vital matters which are in dispute here."

Counsel for the defendant contends that the learned judge was wrong in holding that the defendant was personally bound by the Nacods agreement. If that point fell to be decided it might well be a matter of some difficulty. But, as the learned judge said, it is clear that the defendant's personal contract of service is regulated by the Nacods agreement and the defendant by working on the terms of the Nacods agreement has entered into an agreement which contains the term now in dispute.

The defendant next contends that, even though the Nacods agreement was applicable to the defendant's employment, yet it had no contractual force, because it was too vague. It is an industrial agreement, he argues, covering a wide area, with no intention that it shall have a specific or enforceable effect. Collieries differ, and what is reasonable in one will be unreasonable in another. The court has no yardstick to measure what are reasonable requirements. For instance, the stringency of those requirements depends on the number of deputies employed. It is a case within the principle of *May & Butcher* v. *R.* (1) ([1934] 2 K.B. 17, n.) rather than that of *Foley* v. *Classique Coaches, Ltd.* (2) ([1934] All E.R. Rep. 88). It seems to us, however, on a consideration of the Nacods agreement, that it was meant to have a binding effect. Realising the difficulties inherent in the situation, it provided for discussions if it appeared to be working out unfairly for the deputies. To define with exactitude what are the duties of a servant is no easy task. The court will supply an implied condition as to reasonableness in many contracts where duties are not fully defined, as in *Hillas & Co., Ltd.* v. *Arcos, Ltd.* (3) ((1932), 147 L.T. 503), and *Foley* v. *Classique Coaches, Ltd.* (2).

Counsel for the defendant also relies on the provision in cl. 13* for discussion in the event of complaints. He contends that this is typical of an industrial agreement not intended to be enforceable in the courts. We do not, however, see how in principle such a provision differs from that in *Foley* v. *Classique Coaches, Ltd.* (2), which provided for the price to be agreed between the parties. It may be that discussion is a condition precedent to action, but once discussion is repudiated or fails the matter falls to be determined by the courts. Moreover, the defendant is in this further difficulty. He is asserting that the agreement as a whole exists while seeking to deny the enforceability of cl. 12*. If cl. 12 is too vague to be enforceable the whole agreement is not legally binding on either side (see *Bishop & Baxter, Ltd.* v. *Anglo-Eastern Trading & Industrial Co., Ltd.* (4), [1943] 2 All E.R. 598).

In this contract the parties have expressly provided that reasonableness shall be the test. The fact that it is difficult to decide in a given case should not deter the court from deciding what is a reasonable requirement by a master in the light of the surrounding circumstances. In our view, therefore, the learned judge was right in deciding that the term as to working was legally binding.

We come now to the central point in this appeal, namely, whether the defendant became in breach of his contract of employment when he refused to obey his employer's request to work the Saturday voluntary shift on June 16, 1956. He had already worked eleven shifts on the preceding eleven days. Could he reasonably be required to work a twelfth day before having two days off? In A other words, was it reasonable to require him to work twelve days in the fortnight? It is, of course, clear that the court is in no way concerned with what are reasonable hours in the abstract. Its task is to consider the agreement made in 1952 and to determine on the evidence whether or not the defendant was being required to work in breach of that agreement. The only yardstick stated in the agreement is what is reasonably required by the management in order to B promote the safety and efficient working of the pit and to comply with statutory requirements. But this clearly is not the only yardstick, since the hours of work a deputy could reasonably be required to work for these purposes would depend on the number of deputies employed. Ultimately the question must be whether the defendant himself was being required to work reasonable hours. If, of course, he was being required to work longer hours than other deputies, C that, in the absence of some exceptional circumstances, would be evidence that the requirement made on him was unreasonable. There is, however, no suggestion of that in this case. True he was a good and reliable worker who was never absent without just cause; but on the evidence his average hours of work converted into shifts amounted to 5.82 shifts per week in the forty-four weeks up to Apr. 21, 1956, together with mid-week overtime when necessary, which D was only slightly above the number of shifts worked by other deputies at Oxcroft Colliery. Further, the evidence was that throughout the county a very large percentage of deputies worked at least six shifts per week. That being so, the defendant's case must be that deputies generally were by the summer of 1956 being required to work unreasonable hours. At once one asks oneself how the hours of work in 1956 compare with the hours being worked prior to the agree- E ment of 1952. That, of course, is not a conclusive consideration; but, if it appears that the hours worked in 1956 were no more than those worked prior to the agreement of 1952, that is strong evidence that the former were reasonable, in the absence of any supervening circumstances which could be said to make them unreasonable.

---

* See p. 95, ante, for the terms of this clause in the agreement of July 29, 1952.

The position prior to the agreement of 1952 was this. For about twenty years F prior to nationalisation deputies were guaranteed six days' work or six days' pay. In 1945 there was an award providing that the normal working hours for deputies should be fifty-one hours, made up of six shifts of eight and a half hours. In May, 1947, after nationalisation, the miners and the deputies succeeded in getting agreements for five-day weeks, but almost at once an emergency arose in the autumn of 1947 as a result of which the Saturday voluntary shift was G introduced. If miners were going to work that shift, deputies were needed; and by February, 1952, deputies throughout Great Britain were working an average of 5.92 shifts per week, and in North Derbyshire, where Oxcroft Colliery is situate, six shifts per week, both figures including any necessary mid-week overtime. Mr. Bunting, the manager at the Oxcroft Colliery, who had long experience in the industry, said in his evidence that deputies worked an average H of six shifts a week. Further, Mr. Edwards, when the agreement of 1952 was being negotiated, referred to the current hours as about six shifts. Accordingly, it seems clear the hours of work converted into shifts in 1956 were no more than those prior to the agreement of 1952. Counsel for the defendant, however, stressed that, prior to the agreement of 1952, the defendant and other deputies were not bound to work more than five shifts a week, though they volunteered I to work an extra shift in order to earn extra money. Having regard to the emergency in the autumn of 1947 and its continuance, which, in effect, caused a suspension of the May, 1947, agreements, we are by no means certain that the extra shift can be regarded as voluntary in the true sense. However, be that as it may, it makes no difference to our minds, how far the work being done was voluntary or compulsory. The object of the agreement of 1952 was not to reduce the hours of work then being worked. Indeed, the five-shift week agreement was rescinded. Furthermore, if and in so far as it is possible to look at the negotiations leading up to the agreement, it is clear that a six-shift week was contemplated.

Accordingly, the next question is whether any circumstances have supervened since the agreement of 1952 to make a six-shift week, with some mid-week overtime in case of emergency, unreasonable. Counsel for the defendant has made a number of points in this connexion:

(1) That, though some extension of Saturday voluntary shifts may have been contemplated, no one contemplated that it would extend for more than one year or possibly two years, and that the object of the plaintiffs as stated in the negotiations was to return to a five-shift week. It is, we think, clear that some extension was contemplated: indeed, an agreement to that effect was made on Aug. 22, 1956, three days before the 1952 agreement was signed. No doubt Saturday voluntary shifts have continued longer than was anticipated, but we do not see how that, of itself, can make hours worked in 1956 unreasonably required.

(2) It is then said that no Saturday voluntary shifts had ever been worked between May and August inclusive at Oxcroft Colliery prior to 1952 and accordingly that no one then contemplated Saturday voluntary shifts being instituted, as they were, during those months. Even if this be so, we cannot think that the institution of these summer Saturday voluntary shifts resulted in unreasonable hours of work. Some work on Saturday was anyhow necessary for safety purposes, and if any increased hours of work resulted they were very few. Indeed, as already indicated, it did not result in any increase in the average weekly shifts over the year.

(3) An attempt was also made to suggest that all Saturday voluntary shifts were unreasonable in that they did not result in any increase in coal production. It was said that it encouraged miners to absent themselves in the week and come and earn a higher rate of pay on Saturdays. The learned judge found as a fact that this was not so; and there was ample evidence to support his finding.

(4) It was also said that further safety precautions had been introduced which increased the hours when deputies had to work. As to this, it is sufficient to say that the further safety precautions were already known when the 1952 agreement was made and that in any event it is not proved that they caused increased hours of work.

(5) One of the chief complaints was in regard to the method of summoning deputies for Saturday shifts at Oxcroft Colliery. Mr. Bunting, the manager, in fact summoned all the deputies who had worked the day shifts on the preceding weekdays. The result was that on some occasions, depending on the number of miners who turned up, there was insufficient deputies' work for all the deputies summoned, and they would be put on to other work. This was said to be not only unnecessary but the work of a foolish manager exploiting the deputies. It is, however, difficult on the evidence to see what else Mr. Bunting could do. An attempt had been made to summon only such number of deputies as were likely to be required, but this broke down, since some of those summoned failed to turn up. Indeed, on one Saturday the number who turned up were insufficient to enable the pit to work.

The learned judge said this:

> "I do not think that it could be said that the National Coal Board, through its manager or other officials of the pit, were doing anything unreasonable, having made these efforts to work the agreement to which both sides had agreed, if, when they found it did not work in that way by calling in some, they decided, in order to keep the pit going, to call in everybody, subject always, of course, to the fact that no man must have an unreasonable burden imposed upon him. By 'unreasonable' I mean judged by the agreement itself, judged by what they had been doing before and judged by the necessities of the work which they were doing, because one cannot treat

> coal mining, as everyone knows, in just the same way as other industries, however important they may be." A

We entirely agree with that conclusion.

(6) Lastly it is contended that the reasonableness of the hours worked must be judged in the light of the remuneration being paid. By 1956 it is said that face workers were earning more than deputies and were not working such long B hours. Seeing that deputies were over the face workers it was quite unreasonable, so runs the argument, that they should work longer hours. It destroyed discipline and made the recruitment of deputies difficult. We will assume, without deciding the matter, that the deputies by 1956 were worse off than the face workers; but, in our judgment, it does not follow that the hours worked were unreasonable. No doubt in a sense hours of work and remuneration are C inter-related; but, if a six-shift week was reasonable for deputies in 1952, it did not cease to be reasonable in 1956 merely because the increase in remuneration had not kept pace with the increase paid to the face workers. If anything had become unreasonable it was the remuneration. Indeed, this is borne out by the complaints made between 1952 and 1956. The complaints centred on the wages being paid. No complaint was made in regard to hours of work until D Oct. 31, 1955, and then only in regard to hours in excess of the six-shift week. It was not until May 18, 1956, that any suggestion was made to reduce the six-shift week; and it is to be observed that it was then put forward as an alternative to an increase in wages, since it was recognised that wages was a matter for agreement at the national and not the divisional level. We agree with the learned judge when he said: E

> "I do not think it is relevant at all to the issues I have to decide in this case. It may be a matter for consideration when negotiating a new agreement, but it cannot, in my opinion, alter the plain meaning of the agreement which has been made."

Two points arise on damages. The first is the question whether, in assessing F damage, the court can take into account matters that occurred after the issue of the writ. The learned judge held himself entitled to do so under R.S.C., Ord. 36, r. 58, and therefore he took into consideration the continued abstention of the defendant from the Saturday shifts from June 16, 1956, until February, 1957. If he was not entitled to do so, the only Saturday that falls to be considered on the case as pleaded is Saturday, June 16, since there is no reference G to earlier Saturdays in the statement of claim, and the writ was issued on June 21. It is not contended that apart from the provisions of R.S.C., Ord. 36, r. 58, there would be power to take account of the breaches of contract on Saturdays subsequent to the writ. The terms of the rule are:

> "Where damages are to be assessed in respect of any continuing cause of action, they shall be assessed down to the time of the assessment." H

The learned judge relied on *Hole* v. *Chard Union* (5) ([1894] 1 Ch. 293), where damages for nuisance by pollution of a stream were assessed subsequent to the writ by virtue of R.S.C., Ord. 36, r. 58. LINDLEY, L.J., said (ibid., at p. 295):

> "What is a continuing cause of action? Speaking accurately, there is I no such thing; but what is called a continuing cause of action is a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought. In my opinion, that is a continuing cause of action within the meaning of the rule. The cause of action complained of and existing in the present case appears to me precisely the kind of mischief at which r. 58 was aimed, its object being to prevent the necessity of bringing repeated actions in respect of repeated nuisances of the same kind. To adopt the argument of the defendants would be to

> render the rule altogether a nullity. I feel no doubt that the present case is a continuing cause of action within the rule. It is a repetition of acts of the same kind as those which had been investigated at the trial, and had been decided to constitute a nuisance."

A. L. SMITH, L.J., said (ibid., at p. 296):

> "The principal question in this appeal turns upon the construction of Ord. 36, r. 58. It is contended by the appellants, that when the act on which an action is brought is established the cause of action can have reference to that one act and to no other. In my opinion, that is not necessarily so. If once a cause of action arises, and the acts complained of are continuously repeated, the cause of action continues and goes on de die in diem. It seems to me that there was a connexion in the present case between the series of acts before and after the action was brought; they were repeated in succession, and became a continuing cause of action. They were an assertion of the same claim—namely, a claim to continue to pour sewage into the stream—and a continuance of the same alleged right. In my opinion, there was here a continuing cause of action within the meaning of the rule."

Other cases were cited to us, but none was on all fours with this case or threw any real light on it. It must be a question of degree whether separate acts are so knit up together, so close in time and quality as to be properly described in the words "a continuing cause of action".

The general proposition that persistence in tortious conduct of particular kinds such as trespass or nuisance constitutes a continuing cause of action must be regarded as established. It also must be accepted that in contract also breaches of obligation of various kinds may amount to continuing breaches. But that must depend on the nature of the particular obligation broken. For example, a contract of service for a specified term might contain a stipulation that the employee should not during the period of his service carry on or be concerned in any other business of the same kind as the employer's business. If the employee in breach of such a stipulation did proceed to carry out some other business of the kind in question, the breach would, we think, clearly be a continuing one, in that the employee would de die in diem be continuously in breach of the stipulation so long as the prohibited business was carried on. Where, however, a contract requires payments to be made on stated dates (for example, a contract to pay an annuity of £1,000 per annum in equal monthly instalments on the first day of each calendar month) failure to pay the instalment due on Feb. 1 is not, we should have thought, a continuance of the cause of action constituted by failure to pay the instalment due on Jan. 1, but a distinct cause of action arising for the first time on Feb. 1 and at no earlier date.

Here, the obligation broken by the defendant was the obligation to work the Saturday voluntary shift every other Saturday. The defendant having failed to perform this obligation on Saturday, June 16, 1956, the writ in the action was issued on June 21. Can it be said that the defendant's failure thereafter to work the Saturday voluntary shift on each of the alternate Saturdays on which it was his turn to do so was a continuation of the cause of action constituted by his failure to work the Saturday voluntary shift on June 16? We cannot see that it was. It cannot to our minds rightly be said that during the period between June 16, 1956, and the next Saturday on which it was his turn to work the Saturday voluntary shift the defendant was in continuing breach of his obligation to work it on June 16. The breach constituted by that failure was complete, over and done with on June 16, and could not be continued thereafter. If and when the defendant failed to work the shift on any subsequent Saturday when it was his turn to do so a distinct cause of action in respect of that failure would arise on that day and not before. The fact that the defendant prior to June 16 manifested an intention not to work the Saturday voluntary shift any more, coupled with his actual failure to do so on June 16, might have entitled the plaintiffs to treat the contract as repudiated and to claim damages on that A footing, but they did not do so. They chose to allow the contract to remain in force, and while it stood their cause of action in respect of his failure to work the Saturday voluntary shift on any given Saturday when it was his turn to do so arose if and when he failed to work the shift on that day and not otherwise. A "continuing cause of action" is not constituted by repeated breaches of recurring obligations nor by intermittent breaches of a continuing obligation. B There must be a quality of continuance both in the breach and in the obligation. We sympathise with the learned judge's view that convenience and common sense are in favour of dealing with the damages under R.S.C., Ord. 36, r. 58, but the defendant is entitled to insist on this point if he properly can. We reluctantly come to the conclusion that these Saturday breaches of contract cannot be dealt with as a continuing cause of action and that if the plaintiffs C wish to pursue their remedy in respect of them they must issue a fresh writ.

The last point which arises concerns the measure of damages. The learned judge found that the plaintiffs had proved a loss of profit of £535 due to the impossibility of working the Saturday voluntary shift on June 16, 1956. He then went on to hold that the defendant and others—namely, all the deputies and shotfirers concerned with the loss—should be treated as being responsible for D that loss and that the defendant was liable to the plaintiffs for his share. Having regard to the view that he took on the first point in connexion with damages, it became unnecessary for him to fix the number of those responsible.

For the defendant it is contended that the learned judge was wrong in assessing the damage in this way. In contract, as opposed to tort, it is argued, a defendant is only liable for the damage caused by his own breach, not that caused by E others even if they have all acted in concert. The mere failure of the defendant to work on June 16 would not have prevented the working of the shift, and accordingly he is only liable for a proportion of his wages or for the cost of a substitute.

In our judgment, it is going too far to say that in no circumstances can A be liable for a share of the loss caused by A and B acting in concert. Indeed, were F this not so it would in many cases be impossible to compensate a plaintiff for his real loss. This was recognised in *Ebbw Vale Steel, Iron & Coal Co.* v. *Tew* (6) ((1935), 1 L.J.N.C.C.A. 284). In that case the court was concerned with the measure of damages where a face worker broke his contract. Having stated that the correct measure was the value of the output lost less the expense which would have been incurred in obtaining it, ROCHE, L.J., said (ibid., at p. 288): G

> "In the case of a hewer such as Tew, the application of these principles is not difficult. It may be more difficult with another class of workman not so directly concerned in getting coal from the seam. But with another class of workman, a tribunal must do its best either to assess the contribution of the workman in question to output and arrive at a figure representing H his notional output during the period of default, or if it cannot do that, it must decide upon the evidence what would have been the value to the employer of the services he did not give.
>
> "It will be observed that in this judgment the output of or referable to the particular workman or workmen who are defendants in the proceedings has been throughout treated as the output which is material to be considered I and dealt with by the trial judge. Apart from allegation and proof of a case of conspiracy or some clear allegation and proof of other good ground in fact and in law for connecting further and consequential loss of output, such as loss of output due to the cessation of work by men other than the defendant, with the particular workman's breach of contract, that further and consequential loss of output does not constitute a head of damage recoverable from a defendant."

A Where the breaches of contract by A and B acting in concert each contribute to the loss, then it would prima facie be right to value the loss of services of each as half the loss. Here the defendant is charged with breach of his contract of service in that he failed to work the Saturday voluntary shift on June 16, 1956, when it was his turn to do so. It is said that he took this course in concert with his fellow deputies. But he is not charged with the tort of inducing his fellow
B deputies to break their contracts or with the tort of conspiracy which might be constituted by the defendant and his fellow deputies mutually inducing each other to break their contracts in this respect. Therefore the matter must be dealt with as being simply a matter of breach of contract, albeit the defendant knew when he committed the breach that his fellow deputies intended to do the same.

C What then is the measure of damages in this particular case? If the defendant alone and on his own initiative had failed to work the Saturday voluntary shift on June 16, the measure of damages would have been the net value to the plaintiffs of the work which he would have performed if he had worked that shift as he ought to have done. Prima facie, the measure of damages cannot be different because when he broke his contract in this respect he knew that his fellow
D deputies intended to commit similar breaches, except in so far as it would then be apparent that any damage likely to flow from the breach could not be avoided or lessened by their presence. Suppose that no question of supervision entered into the matter and that five face-workers were obliged by the terms of their contracts of service to work a special shift. Suppose further that if they did work it they would produce between them coal of the net value to their em-
E ployers of £500, each contributing equally to the total. Suppose further that one of these face-workers failed, in breach of his contract, to work the special shift. The damages resulting from the breach would, we should have thought, be £100, whether or not the other four face-workers intended, to his knowledge, to absent themselves as well. There would be no question of charging him with the whole loss of £500. The present case only differs from that hypothetical
F one in that deputies exercise supervisory functions, so that the absence of any one of them may entail a far greater loss of output than the absence of one more face-worker. The question still is: what loss of output did the absence of the particular deputy charged with breach of his contract entail? The question in each case must be: what would his services have contributed to the net value
G of the output of the shift if the deputy concerned had duly worked it? That is in each case a question of fact.

In the present case, though the defendant was undoubtedly acting in concert with others, it is not shown that his breach contributed to the loss. He would not, as we understand it, have worked at a coal face, but would have been doing safety work. How then can it be said that loss of output is any measure of his
H liability? In these circumstances we do not think it can be said that any damage has been proved against him beyond the cost of a substitute, say £3 18s. 2d.

For these reasons we would allow the appeal to the extent of varying the amount of the judgment from £100 to £3 18s. 2d.

[There was then discussion on the question of costs of the trial and of the appeal, reference being made to s. 47 of the County Courts Act, 1934, as amended
I by s. 1 (2) of the County Courts Act, 1955. JENKINS, L.J., intimated that the court could not say that this was not a case in which it was reasonable to bring proceedings in the High Court instead of in the county court and that, therefore, the order of the trial judge, who had awarded the plaintiffs costs on the High Court scale should stand, but that the defendant should have half his costs of the appeal. HIS LORDSHIP intimated that it should be understood that the award of costs of the trial should not be regarded as a precedent in relation to any of the other eighty-four actions.]

Appeal allowed only to the extent of reducing the damages to £3 18s. 2d.; plaintiffs awarded costs of the trial on the High Court scale; defendant awarded half his costs of the appeal; leave to appeal to the House of Lords refused.

Solicitors: *Helder, Roberts & Co.*, agents for *Fidler & Pepper*, Sutton-in-Ashfield (for the defendant, the employee); *Donald H. Haslam*, agent for *Lawrence C. Jenkins*, Arnold (for the plaintiffs, the National Coal Board, the employers).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

HAREWOOD HOTELS, LTD. *v.* HARRIS.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Ormerod, L.JJ.), December 9, 1957.]

Landlord and Tenant—New tenancy—Business premises—Terms of tenancy—Rent—Evidence—Evidence of earnings of occupant—Admissibility—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2 c. 56), *s.* 34 (*a*), (*b*).

County Court—Appeal—Evidence—Weight to be given to evidence—Terms of new tenancy under Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2 *c.* 56), *s.* 34*—Whether weight given to particular evidence properly the subject of appeal—County Courts Act,* 1934 (24 *&* 25 *Geo.* 5 *c.* 53), *s.* 105 (*as amended by the County Courts Act,* 1955 (4 *&* 5 *Eliz.* 2 *c.* 8), *s.* 12).

Landlord and Tenant—New tenancy—Costs—Terms of tenancy in dispute—Tenants asking for fourteen year lease, seven year lease granted—Rent nearer to figure of tenants' proposal—Landlord to pay half tenants' costs.

A hotel comprising three adjacent dwelling-houses, which had been formed into one unit, was held by the tenants under a lease expiring in 1955 at a rental of £300 per annum. The tenants were entitled to a grant of a new tenancy pursuant to the Landlord and Tenant Act, 1954, Part 2. The premises were not suitable for other use than as a hotel and had been properly run as a hotel by the tenants. The landlord contended that the rent under a new lease should be £750 per annum and that the term should be seven years only. The tenants contended that the proper rent was £400 per annum, or £450 per annum if the liability to paint the premises was transferred to the landlord, and that the term should be for fourteen years. The evidence admitted included (i) evidence of the financial results of the operations of the tenants in running the premises as a hotel during the previous five years, (ii) evidence of surveyors as to what was a fair rent, and (iii) evidence as to offers of rent of £250 per annum each which the landlord had received for adjacent dwelling-houses providing less accommodation than the houses comprised in the hotel. The county court judge held that the proper rent was £450 per annum for three years and £500 per annum for the following four years, the term being seven years only, and ordered the landlord to pay half the tenants' costs. The landlord appealed, contending that by reason of s. 34 (a) of the Landlord and Tenant Act, 1954*, the evidence of the financial results of the hotel was inadmissible.

Held: (i) evidence of the financial results of the tenants' hotel business, they having properly conducted the business, was admissible with a view to showing what rent could reasonably be expected to be got for the hotel premises in the open market, though the evidence would not be admissible for such a purpose as, e.g., showing what the tenants could afford to pay in rent; accordingly the county court judge had not misdirected himself in law in taking into account the evidence of financial results, and the appeal would be dismissed, it not being open (under the County Courts Act, 1934,

---

* The material terms of the Landlord and Tenant Act, 1954, s. 34, are set out at pp. 106, 107, post.

A s. 105, as amended by the County Courts Act, 1955, s. 12) to an appellant on a matter such as this to complain merely of the weight attached by the county court judge to particular categories of admissible evidence.

(ii) the order as to costs could not be said to be a non-judicial exercise of the county court judge's discretion and there was no ground on which it ought to be reviewed.

B *Le Witt* v. *Cannon Brookes* ([1956] 3 All E.R. 676) distinguished.

Appeal dismissed.

[**Editorial Note.** For considerations relevant to the determination of the length of a new tenancy to be granted under Part 2 of the Landlord and Tenant Act, 1954, cf. *Upsons, Ltd.* v. *E. Robins, Ltd.* ([1955] 3 All E.R. 348).

For the Landlord and Tenant Act, 1954, s. 34, see 34 HALSBURY'S STATUTES C (2nd Edn.) 418.

For the County Courts Act, 1934, s. 105, see 5 HALSBURY'S STATUTES (2nd Edn.) 82.

For the County Courts Act, 1955, s. 12, see 35 HALSBURY'S STATUTES (2nd Edn.) 34.]

D Case referred to:

(1) *Le Witt* v. *Cannon Brookes*, [1956] 3 All E.R. 676; 3rd Digest Supp.

Appeal.

This was an appeal by the landlord from an order of His Honour JUDGE GLAZEBROOK dated July 5, 1957, and made at Tunbridge Wells County Court. The tenants by their originating application dated Apr. 20, 1955, applied for E the grant of a new tenancy pursuant to Part 2 of the Landlord and Tenant Act, 1954, of premises known as Harewood Hotel, being No. 30, No. 31, No. 32, London Road, Tunbridge Wells, Kent. The tenants proposed that the terms of the new tenancy should be fourteen years at a rental of £400 subject to similar terms and conditions as provided by the old lease dated Aug. 1, 1935, which expired in 1955. The landlord did not oppose the grant of a new tenancy, but F contended that it should be for a term of seven years at a rental of £750. The county court judge granted a lease of seven years from June 24, 1957, at £450 per annum for the first three years and £500 per annum for the next four years, with other terms as agreed, and ordered that the landlord should pay half of the tenants' costs on scale 4.

M. A. B. King-Hamilton, Q.C., and *Aron Owen* for the landlord.

G *W. D. Collard* for the tenants.

LORD EVERSHED, M.R.: In this appeal a landlord challenges the assessment of the learned county court judge (in accordance with s. 34 of the Landlord and Tenant Act, 1954) of the rent properly payable under a new tenancy (which admittedly the tenants are entitled to be granted) of premises H in Tunbridge Wells known as the Harewood Hotel. The premises in question comprise three adjacent, individual structures in a row of six such structures. Originally six comparable houses were built, no doubt for private dwellings, but three of these, in the middle of the six, were at some time put together, or, as the phrase is used in the judgment, "knocked into one", so as to constitute (for present purposes) a single subject-matter. It should also be added that as I regards two of the three an extension or excrescence was at some time built in the rear so that the capacity of two out of the three is to that extent, at each floor, greater than the capacity of any one of the other four individual houses.

The tenants (who are respondents in this court) are Harewood Hotels, Ltd., and they had been for some time in occupation of this combined hotel structure under a lease granted in August, 1935, which expired in 1955. Under the expired lease, they had paid a rent of £300 a year. It was the contention of the landlord that the rent properly payable under the new lease should be £750 a year, and that the new lease should be for a term of seven years only. The tenants, on the other hand, said that £400 per annum was an appropriate rent, subject to this, that if the liability to do painting was transferred to the landlord it should be £450, and that the term of the lease should be double that suggested by the landlord, i.e., fourteen years, and not seven.

Those being the issues, the learned judge had before him evidence which falls under three heads or categories. In the first place, the managing director of the tenants gave evidence in the course of which he put in, and referred to, figures which showed what had been the financial results of his operations as a hotelier in this place for the preceding five years. That was head No. 1. Second, there was expert evidence: there were called on the part of the tenants two surveyors, who gave evidence, as experts, of what in their opinion would be a fair rent that a willing lessor in such circumstances should accept in the open market. Third, there was evidence of actual offers which the landlord had received, not for these premises, but for one or other, or (in one or more instances) two combined together, of the other premises in what I have called the row, No. 28, No. 29 and No. 33 of this row (the numbers appropriate to the Harewood Hotel being No. 30, No. 31 and No. 32).

The effect of the judgment was that, in the opinion of the judge, the proper rent, having regard to the painting obligations transferred to the landlord, was £450 for three years, rising to £500 for the next four years; and he thought that seven years would be long enough for a grant. In reaching that conclusion, he undoubtedly took account of all the three heads of evidence which I have mentioned. If the extent of the emphasis which he gave to any one of them be measured by the mere number of lines used, it may be said that he paid more attention to the evidence about the experience of the managing director of the tenants than to some of the other matters. He undoubtedly took account of what those figures showed. For what purpose he took account of them, I will say presently. He also clearly took account of the third matter, namely, the offers received for the other premises. Finally, he took account (and I think for myself that in the end of all he placed perhaps most reliance on this) of the expert evidence, and expressed in this regard a preference for the tenants' experts to the experts of the landlord, whom he described as optimistic but not in fact so well acquainted with this particular type of subject-matter.

The challenge has been first (and this is, I think, the really significant question that we have to decide) on the admissibility of the first item of evidence. Before I read the relevant parts of the Landlord and Tenant Act, 1954, s. 34, and consider that matter, it is as well to bear in mind that, this being an appeal from a county court judge's decision, the matter is covered, and the extent or scope of the appeal is limited, by the terms of the County Courts Act, 1934, s. 105, as amended and altered by the County Courts Act, 1955, s. 12. In my judgment, it is tolerably plain from those sections that it is not open to an appellant, on such a matter as this, to complain merely of the weight which the judge attached, in arriving at a conclusion, to individual matters or subjects of evidence themselves admissible. It is not, in other words, like an appeal, say, from the High Court, on a matter of fact, where the real case is that the conclusion turns out to be against the proper weight of the evidence. As I understand these sections, it is incumbent on counsel for the landlord to show—and he has indeed assumed the burden of showing—that there was here some misdirection of himself by the judge amounting to an error in law. That indeed is the burden of this first point which I have already indicated, viz., that the learned judge misdirected himself by giving weight to matters of fact which were in truth wholly inadmissible.

The relevant terms of the Landlord and Tenant Act, 1954, s. 34, are as follows:

> "The rent payable under a tenancy granted by order of the court under this Part of this Act shall be such as may be agreed . . . or as, in default of such agreement, may be determined by the court to be that at which,

> A having regard to the terms of the tenancy (other than those relating to rent), the holding might reasonably be expected to be let in the open market by a willing lessor, there being disregarded—(a) any effect on rent of the fact that the tenant has or his predecessors in title have been in occupation of the holding, (b) any goodwill attached to the holding by reason of the carrying on thereat of the business of the tenant . . . (c) any effect on rent of any B improvement carried out by the tenant . . ."

It has been the main argument of counsel for the landlord that the terms of para. (a), on their ordinary sense, must exclude any evidence about the occupation of the tenants; because its only possible admission could be to affect the rent; and it is said, according to the argument, that the quantum of rent cannot be allowed to be affected in any way by considerations derived from the tenants' C occupation. If that argument is right, then it would follow that the judge here must be treated as having in that regard misdirected himself; and even though, in the end of all, the right sum should turn out not to be very different from that awarded, still, counsel for the landlord would be entitled to have the matter remitted for reconsideration. I am not able, however, for my part to go as far with counsel as to produce a total exclusion of any evidence based on or derived D from the tenants' previous occupation.

In the course of his reply, counsel for the landlord referred us to this passage in WOODFALL ON LANDLORD AND TENANT (Permanent Supplement, 1, Business Tenancies), at p. 71. There, the author, having cited para. (a), says:

> " This seems to dispose equally of any accretion to the rent attributable E to such occupation (the premises have to be envisaged as empty premises in the market) and of the 'sitting tenant' concession which was sometimes allowed for in assessing a 'reasonable' rent under the Act of 1951."

I am entirely willing to accept that passage; but it does not seem to me to serve the purpose for which counsel invokes it. If the evidence was led for the purpose of showing that these tenants ought to be granted some concession because of F some particular hardship that they had suffered, that might be another matter: and I agree also that the terms of the paragraph serve to exclude the consideration that a tenant might be expected to be willing to pay rather more than an outsider because he would not wish to be disturbed in his occupation. But, in my judgment, it is plainly legitimate for a judge to hear evidence which bears on the question which he has to decide, viz.: At what rent would the particular G holding reasonably be expected to be let in the open market? Plainly, I should have thought, in arriving at a conclusion on that question it is legitimate to hear evidence of what similar premises which are being let for a particular purpose (as the one in suit is) can be expected to earn for a potential lessee in the market in the place where the premises are: and, if so, then similar evidence is, in my judgment, admissible for proving the same point about the premises in suit. H In other words, if the purpose of the evidence of the figures was for that limited objective, then I think for my part that they were perfectly admissible and that no objection can be made to them.

It is significant that the landlord himself sought before the trial to see the figures; and if it had turned out that the business of letting this sort of accommodation in Tunbridge Wells was there shown by that evidence to be a very profitable I one, i.e., if it was proper to infer from such evidence that letting rooms of this kind in Tunbridge Wells was a profitable business, then it would be, I should have thought, proper for the judge to infer that in the open market a person seeking to take a lease of premises for this purpose would be expected to pay an appropriately large rent. In this particular case it appears that the letting of the Harewood Hotel during the last five years was not particularly profitable. As appears from what the judge says, the kind of persons who will take the rooms are largely people who have retired. Apart from some who go there during certain special seasons, they are not therefore the class of persons from whom high rates can be taken. The judge also was able to draw attention to the physical circumstances of the hotel, for he visited it with the consent, and indeed in the company, of the counsel for both sides. He pointed out that it was one which was somewhat old-fashioned; its furnishings were old-fashioned, and it had no lift. It seems to me that the purpose for which the judge used this evidence was just that which I have tried to indicate, viz., to enable him to form a conclusion, based on the experience of these particular premises, of what sort of rent this kind of property, let as a hotel in Tunbridge Wells, would in the open market bring to a willing lessor.

In his judgment, the learned judge used this language: " Accounts could not be of any value unless I were satisfied that the place was properly run " and he went on to say that, so far as he could judge, it was properly run. He said that it was old-fashioned. Then he dealt with the custom, which I have already mentioned.

> " Tunbridge Wells is a place retired people tend to come to. Solution from an economic point of view may be that residents are undercharged "

—unless the price to residents is raised the price to visitors cannot be raised; and that limits the type of service which can be provided. He says that it is a difficult kind of place to run, with three staircases and all the extra cleaning. He refers to the fall in the value of money. After saying all that, he then comes, as being relevant to the same question, to the evidence with regard to the other houses, No. 28, No. 29 and No. 33. In that context, I am not prepared to say that the learned judge used this material in any way illegitimately. I think that he was simply trying to find out what property of this kind in Tunbridge Wells, offered to a potential lessee for a hotel, would, in the open market, be likely to fetch. It is true that he used the conclusion which he reached as to the amount of profit such a person could make as supporting the view he took of preference for the experts called by the tenants; but that again, I think, was a legitimate use of it.

I therefore am not persuaded that, in referring to these figures for the purpose for which he did and in the way in which he did, the learned judge did that which para. (a) of s. 34 told him he was not entitled to do. That ground, therefore, seems to me not to suffice. I add that if para. (a) has the wide significance for which counsel for the landlord contends, then para. (b) would appear to be otiose.

Counsel for the landlord naturally placed considerable emphasis on the third head of evidence which I have mentioned, the actual offers for the other premises, No. 28, No. 29 and No. 33. There is no doubt that that evidence, on the face of it, is impressive. Putting it quite briefly, but not inaccurately, it may be summarised in this way: that the landlord was receiving, in answer to his advertisements, offers, in respect of a single one of these houses in the row, and a house which provided less accommodation in fact than two of the three which comprised the Harewood Hotel, at figures of £250 a year or thereabouts (rising after a certain period); from which it might well be said that one could and should treble that figure at least if the offer was not for one single house but was for three combined to constitute one hotel. I will say at once that, so far as I am able to form an opinion without having seen or heard the witnesses, I get the impression that the figure which the judge eventually hit on, £450, was on the low side, particularly in the light of what I may call these other comparable offers. It would be, however, a fallacy to suppose that if £x per annum is offered for No. 28, at least £x multiplied by three would be fair, and would be a fair figure to fix, for the Harewood Hotel. It may be that, for one reason or another, the smaller premises are more attractive. In any case that is a matter not of error of law, I think, but of weight. The learned judge heard, on the other side, the strong view of Mr. Neill and Mr. Stokes that these figures which apparently had been offered—and there is no doubt of the genuineness of the

A offers—were, for some reason or another, surprising and extraordinary; and neither Mr. Neill nor Mr. Stokes would, according to their own view, have advised any client of theirs to make such an offer. However, the result is that the learned judge, though he took account of those offers, did not feel, in the light of everything else that he had put before him, that they ought to be the final arbiters, so to speak, of the figure to be arrived at. At the end of his B judgment he expressed his difficulty: "I find it difficult to make up my mind, bearing in mind the terms of the section and what I have to put out of my mind ", a phrase which seems to me to indicate that he had well in the forefront of his mind the excluding words of the paragraphs in s. 34. Having so instructed himself, he came to the conclusion that £450 for this property was the rent at which the holding might reasonably be expected to be let in the open market by a C willing lessor. If I am right in the view that I take as to the matters of law, the only criticism that can be made is that, as a matter of fact, as a mere question of weight of evidence, that figure might be criticised as being too low; but such a criticism, if valid (and I am not saying that it is) is not one which is available in this court to the landlord.

That being so, the only other matter is that of costs. After stating his con- D clusion in the passage which I have reached in the judgment, the learned judge then said: " Respondent [the landlord] to pay half of applicants' [the tenants'] costs ". It is, of course, too well known to need anything more than mere statement that the question of costs prima facie is one entirely within the discretion of the judge. Counsel for the landlord argued that such an award must have been a non-judicial exercise of the discretion—that £450 for seven years E was something very different from that which the tenants had themselves offered, which was £400, possibly £450 (with the painting obligations transferred), not for seven years but for fourteen years, a period twice as long. We were referred to *Le Witt* v. *Cannon Brookes* (1) ([1956] 3 All E.R. 676) in which this court had set aside a county court judge's award in the matter of costs. In that case, however, it was made quite plain that what the learned judge had done was to say F that if a landlord's offer turned out to be less favourable than that which the court awarded, then the tenant prima facie was entitled to the costs as though the landlord had paid into court, in an action for damages against him, a sum less than the figure ultimately awarded; and the court had little difficulty in saying that that principle was quite inapplicable. As DENNING, L.J., pointed out in his leading judgment, it was a question for the county court judge to G consider in the exercise of his discretion to what extent the offers made on the one side or the other were reasonable approaches to his conclusion.

In this case I am quite unable to say that there has been any misdirection: the judge has, in the exercise of his discretion, applied for himself the proper test. It is clear from what I have said on this matter of the amount of rent, at any rate, that he took the view that the tenants' evidence was a far nearer approxima- H tion to the right result than that of the landlord. It is quite true that the judge rejected the tenants' claim for a fourteen years' lease as against seven years; but I think that that is reflected in the circumstance that he did not give the tenants all their costs but only half of them. In the circumstances, I am quite unable to see any grounds on which this court ought to review the order which the learned judge made as to costs. For the reasons which I have given, I I think that this appeal must be dismissed.

ROMER, L.J.: I agree; and I only want to add a very few words on one aspect of this case which appears to me to be the only point of any general importance that has arisen. It arises out of the submission of counsel for the landlord that the learned judge was in error in looking, for any purpose, to the accounts of this hotel company which were placed before him in the quest which he was undertaking for the proper rent to be fixed under s. 34 of the Landlord and Tenant Act, 1954. The contention is that the accounts of the company were, by inference, barred from consideration as irrelevant under para. (a) and para. (b) of s. 34, which Lord Evershed, M.R., has read and which I will not read again. I cannot take that view of the matter at all. It seems to me that para. (a) and para. (b) are really directed to saying that (e.g.) the fact that the sitting tenant has been in occupation for some time past and has built up a goodwill is to be disregarded in assessing the rent which he is to pay under his new lease. Normally, of course, a man who is in the position of sitting tenant and has built up a business and been there for some years and established himself would be prepared to pay a higher rent than anybody else then coming in for the first time. It is that kind of thing, in my view, to which para. (a) and para. (b) are directed. I cannot find anything in the language of those provisions which renders it irrelevant to look at such material as the accounts of this company as part of the material on which the judge must make up his mind as to what rent might reasonably be expected to be obtained for the premises in the open market. I should have thought that one of the first things that anybody who was going to set up a hotel business in this type of premises in this locality would want to know would be what prospects he had of making a good thing out of it, and, therefore, what rent he would be prepared to pay for the premises, if indeed he decided to take a tenancy of the premises at all. I cannot see any ground, either on common sense or the language of the section, on which that consideration should be relegated to the realm of the irrelevant. I do not think that the judge would be entitled to look at the accounts for the purpose of seeing what the company could afford to pay. Counsel for the landlord suggested that that really was what the judge did in the present case, that he looked to see what profit they made in one year and what loss they made in another year, and so on, and said that this company, having regard to those figures, ought not to be expected to pay more than a particular rent. I should be disposed to agree that that was wrong, if the judge did it; but I do not think that he did do it. He came to the conclusion that this hotel was being run efficiently; he came to the conclusion and indeed it was agreed on all hands, that the premises could only be used as a hotel, and then, for the purpose which I have mentioned of seeing what a new person, an outsider, would pay as rent for these premises, he looked into the question of what kind of prospects, having regard to the law of supply and demand, this hotel would have. I am quite in agreement with Lord Evershed, M.R., that the learned judge was justified in looking at the accounts for that purpose. It is not suggested that he dismissed all other considerations from his mind. He shows in the judgment that he did take into account other matters, the evidence of the experts and the offers which had been made for the adjoining property, which, although comparable in some sense, could hardly be described as completely comparable, and were certainly not offers in relation to these premises themselves. The weight which the judge should attribute to those respective considerations, so long as he bore them all in mind, appears to me to be primarily a matter for him; and I cannot see that he went wrong on any point of law in this case either in disregarding matters which he ought to have regarded, or in having regarded matters of which he ought to have taken no notice at all.

I agree with Lord Evershed, M.R., in thinking that this appeal fails, and I have nothing to add to what he has said on the various other points, including that of costs, which were argued before us.

ORMEROD, L.J.: I agree.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Dod, Longstaffe & Fenwick* (for the landlord); *Templer, Thomson & Passmore,* Tunbridge Wells (for the tenants).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

SHAMIA *v.* JOORY.

[QUEEN'S BENCH DIVISION (Barry, J.), November 11, 12, December 6, 1957.]

Money—Money had and received—Creditor instructing debtor to pay third person out of fund—Acceptance of instructions by debtor—Action by the third person against the debtor—What constitutes a sufficient fund to enable the action to lie—Whether consideration moving from the third person to the creditor is necessary.

For the purposes of the principle stated by BLACKBURN, J., in *Griffin* v. *Weatherby* ((1868), L.R. 3 Q.B. at p. 758)—viz., that where a person transfers to a creditor on account of a debt a fund actually existing or accruing due in the hands of a third person, and notifies the transfer to the holder of the fund, and the holder of the fund promises to pay the transferee, an action for money had and received lies at the suit of the transferee against the holder of the fund—(i) it is immaterial that the transfer is to a donee, not a creditor (see p. 114, letter A, post), and (ii) in order to constitute the "fund", all that is necessary is that there must be in the hands of or accruing to the third person either a sum of money, or a monetary liability, over which the transferor has a right of disposal (see p. 114, letter H, post).

At a time when J. owed Y. a sum of 1,300 dinars temporarily on a balance of an agency account between them, Y. orally instructed J., who accepted the instructions, to pay to S. (a brother of Y.) 500 out of the 1,300 dinars. The 500 dinars were a gift to S. Y. informed S. of the gift. J. sent a cheque for £500 to S., but the cheque was incorrectly drawn. J. promised S. to send him another cheque, correctly drawn, but did not do so, having on the termination of Y.'s agency made a settlement with Y. which, so J. contended, left him no fund out of which to pay S. In an action by S. against J. for the amount of 500 dinars as money had and received, alternatively as equitable assignee of a debt of that amount and alternatively for damages for breach of contract by J. to replace the incorrect cheque.

Held: S. was entitled to recover the amount of 500 dinars as money had and received by J. to the use of S.; but (*obiter*) S. was not entitled to recover the amount as equitable assignee, nor was he entitled to damages for breach of contract as no independent obligation in contract had been intended.

[**Editorial Note.** As regards the right of action for money paid to the use of another, see 8 HALSBURY'S LAWS (3rd Edn.) 237, para. 412, and compare ibid., p. 68, para. 115 and p. 120, para. 208. The questions whether there had been an equitable assignment and whether there had been a breach of contract were considered only in general terms (see p. 115, letters F and G, post); for instances of what are or are not equitable assignments of debts, see 4 HALSBURY'S LAWS (3rd Edn.) 495, para. 1023, and pp. 496, 497, para. 1024, and as regards the necessity for notice between assignee and debtor, though not between assignor and assignee, see ibid., p. 498, paras. 1026, 1027. As to the negativing of intention to enter into legal relationships in matters of contract, see 8 HALSBURY'S LAWS (3rd Edn.) 69, para. 118, text and note (h).

For cases on the subject of the action for money had and received, see 12 DIGEST (Repl.) 614-619, *4739-4791*.]

Cases referred to:

(1) *Griffin* v. *Weatherby*, (1868), L.R. 3 Q.B. 753; 37 L.J.Q.B. 280; 18 L.T. 881; 1 Digest 676, *2871*.

(2) *Walker* v. *Rostron*, (1842), 9 M. & W. 411; 11 L.J.Ex. 173; 152 E.R. 174; 1 Digest 677, *2878*.

(3) *Hamilton* v. *Spottiswoode*, (1849), 4 Exch. 200; 18 L.J.Ex. 393; 14 L.T.O.S. 108; 154 E.R. 1182; 8 Digest (Repl.) 576, *255*.

Action. A

In 1952 the plaintiff, Rouben Ibrahim Shamia, who was a citizen of Iraq, was studying in England to be a dental surgeon. He had two elder brothers living in Iraq, Haroun and Yousuf. The defendant, Shaoul Saleh Joory, was also a citizen of Iraq but had been living in England since 1949. In 1951 the defendant had appointed Yousuf Shamia to be his representative in Iraq for the purpose of collecting rents and dealing with property in Iraq which belonged B to the defendant. Accounts were sent to the defendant, in all of which a credit balance in his favour was shown.

In 1952 the defendant visited Iraq for the purpose of selling his properties, one of which he agreed to sell for 3,500 dinars (at this time one dinar was roughly equivalent to one pound sterling). He took a deposit of 500 dinars which he left in Yousuf's hands. In November, 1952, he returned to England, after C giving a power of attorney to Yousuf to enable him to complete the contracts for the sale of the defendant's properties. He discussed with Yousuf before leaving Iraq the state of account between them and accepted that he owed Yousuf a sum of 1,300 dinars; and as Yousuf's brother, Haroun, wanted to send the plaintiff £500, Yousuf asked the defendant to give the plaintiff a sum of £500 out of this money when he returned to England. It was agreed that D Yousuf should keep a sum, which, it seems, was then put at 700 dinars, out of the sale price of the properties by way of remuneration for his services.

On Nov. 25, Nov. 29 and Dec. 7, 1952, Yousuf wrote to the plaintiff telling him in each letter that his brother Haroun had sent him a present with the defendant. In the letter of Nov. 29, he wrote: " I hope you received it and we are waiting for your acknowledgment ". On Dec. 8, 1952, the plaintiff wrote to E the defendant saying that he had heard his brother, Haroun, had sent £500 to the plaintiff through the defendant and if this information was correct would the defendant please send him the money. The defendant replied on Dec. 12, 1952, saying, " concerning the £500 I will send it to you at the end of this month ". On or about Dec. 31, 1952, the defendant wrote to the plaintiff a letter in arabic, a translation of which was as follows: " Enclosed you will find a cheque for £500 F which belongs to you*. Please acknowledge its receipt ". The cheque enclosed was incorrectly drawn but the plaintiff did not notice this; he deposited it in his bank and cabled to Yousuf that the money sent by Haroun had been safely received. On Jan. 12, 1953, he heard from his bank that the cheque was unpaid. The plaintiff immediately telephoned to the defendant, who told him to send it back to the defendant and he would correct it or send a new one. The plaintiff G returned the cheque but in spite of a promise made by the defendant some two weeks later that a cheque would be sent, no cheque was sent to the plaintiff. In fact the original cheque was stopped and no part of the £500 was ever paid.

On Jan. 16, 1953, as a result of a disagreement over the sale of the defendant's property in Iraq, Yousuf's power of attorney was cancelled and on Jan. 28, 1953, Yousuf sent a statement of account which showed an initial debit to Yousuf in H November, 1952, of 1,383 dinars, subsequent credit items and a charge of 1,400 dinars for Yousuf's services; a balance of 47 dinars was shown in favour of the defendant. The defendant accepted that account and a settlement was reached between them which was embodied in a formal deed of discharge dated Feb. 2, 1953.

The court found that at no time was a sum of 500 dinars or any other sum I handed to the defendant in cash, to give to the plaintiff, by either of the plaintiff's two brothers.

The defendant contended that he had not paid the £500 to the plaintiff in view of the dispute which had arisen over his account with Yousuf and that he would not have entered into the settlement of Feb. 2, 1953, if he had in fact paid £500 to the plaintiff on Yousuf's behalf; and that at no time was there a

---

* **For the alternative translation see p. 114, letter C, post.**

A fund in his hands out of which money could be transferred to the plaintiff, because a debt owing by a third person could not constitute such a fund, particularly when the debt consisted of a temporary debit balance in a running account. The plaintiff contended that the defendant had accepted £500 from Yousuf for the use of the plaintiff and was bound in contract to pay it to him.

B *M. Littman* for the plaintiff.
P. T. S. Boydell for the defendant.

Cur. adv. vult.

Dec. 6. **BARRY, J.**, read the following judgment: Although other alternative causes of action are relied on by the plaintiff, this, as I see it, is basically a claim for a sum of £500, being money had and received by the defendant for the use of the plaintiff. C

[HIS LORDSHIP reviewed the evidence and said that, where the evidence of the plaintiff and defendant conflicted, he preferred the evidence of the plaintiff, though this conclusion was attributable to difficulties of interpretation which had hampered the defendant and rendered his evidence unsatisfactory. HIS LORDSHIP continued:] I propose to deal with the matter on the basis of the D defendant's own account of what occurred before he left Baghdad, namely, that Yousuf had informed him that he, the defendant, then owed Yousuf 1,300 dinars on their current account, and requested the defendant to give a sum of 500 dinars to the plaintiff out of this money. The defendant apparently agreed to this request and subsequently wrote to the plaintiff and sent this incorrectly drawn but signed cheque for £500.

E Now, on these facts, counsel for the plaintiff contends that the plaintiff is entitled to recover this sum on a claim for money had and received. As an alternative, he seeks to base his claim to that sum of money on an equitable assignment; or, as a further alternative, he seeks to recover the sum of £500 as damages for breach of a contract to return the incorrectly drawn cheque to the defendant, the defendant agreeing to send back that cheque properly drawn F or replace it by another cheque properly drawn for the sum of £500. In whatever technical language the claim is garbed, its real essence is a claim for money had and received, and if this claim be unfounded, the plaintiff, in my opinion, should not be entitled to recover.

It is, I think, unnecessary for me to refer to many of the authorities which were cited to me in the course of the argument. There can be no doubt that the G law on this subject was correctly stated by BLACKBURN, J., in *Griffin* v. *Weatherby* (1) ((1868), L.R. 3 Q.B. 753 at p. 758):

> "Ever since the case of *Walker* v. *Rostron* (2) ((1842), 9 M. & W. 411) it has been considered as settled law that where a person transfers to a creditor on account of a debt, whether due or not, a fund actually existing H or accruing in the hands of a third person, and notifies the transfer to the holder of the fund, although there is no legal obligation on the holder to pay the amount of the debt to the transferee, yet the holder of the fund may, and if he does promise to pay to the transferee, then that which was merely an equitable right becomes a legal right in the transferee, founded on the promise; and the money becomes a fund received or to be received I for and payable to the transferee, and when it has been received an action for money had and received to the use of the transferee lies at his suit against the holder."

Counsel for the defendant did not seek to challenge that statement of the law. The basis of his argument was that in the present case there was not at any material time a "fund" in the hands of the defendant, and in the absence of such a "fund" he contended that no action for money had and received would lie.

Apart from this one point, to which I shall shortly refer, I am satisfied that the evidence establishes a legal right on the part of the plaintiff to recover this sum of £500 or 500 dinars. The plaintiff was not a " creditor " of his brother Yousuf, but this fact cannot be material. He was in truth the recipient of a gift from either Yousuf or Haroun and I can find nothing in the principle, or in any of the authorities cited to me, which suggests the need for consideration as between the transferee and the transferor of the fund which the transferee is seeking to recover. It is clear from the evidence that Yousuf desired to transfer this money, and did in fact transfer it, to the plaintiff, by his instructions, which were imparted to and accepted by the defendant himself. Subsequent to the receipt and acceptance of these instructions, the defendant, in my judgment, clearly promised to pay that sum of money to the plaintiff. No other construction can, I think, be placed on his letter dated Dec. 12, 1952, and his letter written on or about Dec. 31, 1952, enclosing a cheque for £500, which, as he wrote, either " belongs to you " or " is due to you " (according to which of two translations be adopted). In these circumstances, if a " fund " existed in the defendant's hands at the time when he accepted Yousuf's instructions and made this promise to pay the plaintiff, then the plaintiff acquired a legal right to recover from the defendant the money transferred to him by his brother. This right, if it existed, could not be defeated by any subsequent dealing between Yousuf and the defendant.

Counsel for the defendant submitted that no debt owing by a third person can constitute a " fund " or become subject to the principle enunciated by BLACKBURN, J., in the passage to which I have referred. A fortiori, he suggested that when the debt consists of a mere temporary debit balance in a running account, as was the debt due from the defendant to Yousuf, such debt cannot possibly be regarded as a fund within this principle. Although the argument largely turns on the word " fund ", there is, of course, no magic in it; nor is it to be regarded as though it were a word used in a statute. It was clearly chosen by BLACKBURN, J., not as a term of art, but as a word which aptly fitted the facts which were then under consideration. The problem, therefore, does not concern the meaning of this particular word, but the nature of the fundamental requirement which, other conditions being satisfied, will enable the doctrine enunciated by BLACKBURN, J., to operate in favour of the transferee.

An identifiable sum of money entrusted to a third party in order that he, the third person, should hand it over to a transferee, or indeed for any other purpose, is most certainly not required. To take two examples, the so-called " fund " in *Walker* v. *Rostron* (2) ((1842), 9 M. & W. 411) consisted of the proceeds of the sale of goods purchased by the transferor from the transferee, which were in the hands of the third person, the transferor's agents, for the purpose of re-sale. Again, in *Hamilton* v. *Spottiswoode* (3) ((1849), 4 Exch. 200) the " fund " was represented by moneys which would become owing to the transferor for goods to be supplied by him in the future to the third person who had been instructed to pay them, or part of them, to the transferee and had promised the transferee that he would do so.

In my judgment all that the law requires is that there must be in the hands of or accruing to the third person, either a sum of money, or a monetary liability, over which the transferor has a right of disposal. It matters not from what source the liability arises and I see no reason why it should not include a debt for money lent, or goods sold, or services rendered, or a debt of any other kind; nor do I think that the situation can be altered if the debt is of a temporary nature, which in the ordinary course of things would shortly be extinguished by items of contra account, provided that the debt still exists at the date of the transfer and of the debtor's promise of payment made to the transferee.

Counsel for the defendant urged on me the inconvenience and possible injustice which might be involved in treating a temporary debt of this nature as a " fund " which the transferee could recover in an action for money had and received. The short answer to this argument seems to be that the debtor is not bound to accept the transferor's instructions, nor is he bound to make any promise of payment to the transferee. If he does promise, he has only himself to blame.

Counsel for the defendant also suggested that in the present case it would be a grave hardship for the defendant if he were now compelled to pay £500 to the plaintiff. Even if this were true, it cannot, of course, affect the law, which must be administered as it is; but naturally the court will scrutinise with particular care any suggested rule of law which appears to result in an injustice. Here I am satisfied that the interpretation of the law which I adopt results in no injustice of any kind. It is said that the defendant would never have entered into the deed of settlement with Yousuf if he had been aware of his liability to the plaintiff. He was, however, fully aware of all the material facts when he made the settlement, and if he misapprehended his legal position, I am afraid he has again only himself to blame. It is suggested by the plaintiff that in the settlement Yousuf has in fact given credit to the defendant for a sum of £500, in that the defendant's real indebtedness to Yousuf in November, 1952, was 1,800 and not 1,300 dinars. There is, however, no evidence of any kind to support that suggestion; but, should it be true, it could be said with equal force that Yousuf would not have made the settlement had he known that the defendant had failed to pay the £500 to his brother. The evidence clearly establishes that by Feb. 2, 1953, that information had not been imparted to Yousuf. Incidentally, I am not concerned with subsequent transactions between the defendant and Yousuf. If there be any dispute between Yousuf and the defendant about the subsequent transactions, that dispute must, I think, be settled by Iraqi law.

It is sufficient for me to say that I find the plaintiff is entitled to recover £500 from the defendant as money had and received.

In view of this finding, I need not consider in detail the two other causes of action on which counsel for the plaintiff relied. However, in deference to the arguments addressed to me, I should perhaps state my views in very general terms. Counsel for the plaintiff failed to satisfy me that the plaintiff could recover as an equitable assignee, if only because there was no evidence that notice of the assignment had in fact been given to him. Yousuf's letters certainly give no hint that he, Yousuf, had assigned to the plaintiff any moneys owing to him by the defendant.

I also reject the alternative claim for damages for breach of contract*. I do so on the ground that the nature of the arrangement made with regard to the return and alteration of the cheque and the whole surrounding circumstances lead the court to infer that the parties did not intend to enter into any legal obligation independent of the obligation which gave rise to the sending of the cheque. It is, I think, absurd to suppose that the intention of the parties was that the defendant would be in breach of any contractual obligation if he, for example, had sent the £500 in cash instead of amending and returning the original cheque or sending another cheque to replace it. Other equally astonishing results would follow if an arrangement made in circumstances of this kind were to be given the status of an independent and legally enforceable agreement. I prefer to reject this suggested claim on this ground rather than on any lack of consideration. If the proper inference was that the parties had intended to create a legal obligation, no doubt the ingenuity of counsel for the plaintiff could discover a consideration which in law might be considered sufficient.

---

* By para. 4 of the statement of claim the plaintiff claimed in the alternative £500 damages for breaches of contract on the part of the defendant; the breaches, of which particulars had been given previously in the statement of claim, were that on Dec. 12, 1952, the defendant agreed with the plaintiff to pay to him the sum of £500 at the end of December, 1952, and that in or about Jan. 12, 1953, it was agreed between the plaintiff and the defendant that in consideration of the plaintiff returning the cheque of £500 to him, the defendant would correct the cheque and return it to the plaintiff duly altered.

I would like to conclude by addressing my thanks to both learned counsel for the assistance they have given to the court in exploring this somewhat unfamiliar branch of the law. In the result there must be judgment for the plaintiff for the sum of £500.

Judgment for the plaintiff.

Solicitors: *Teff & Teff* (for the plaintiff); *Kinch & Richardson,* agents for *Linder, Myers & Pariser,* Manchester (for the defendant).

[*Reported by* E. Cockburn Millar, *Barrister-at-Law.*]

HAZELL *v.* BRITISH TRANSPORT COMMISSION AND ANOTHER.

[Queen's Bench Division (Pearson, J.), November 27, 28, 29, 1957.]

Railways—Accommodation crossing—Duties of British Transport Commission—Duties of engine driver and driver of motor vehicle on approaching accommodation crossing in fog.

As a farm tractor was crossing a single branch railway line at a level crossing during a thick fog, a train ran into the tractor and the driver of the tractor was fatally injured. The level crossing was an accommodation crossing which was created primarily for the benefit of a farm which had land on both sides of the railway line. On an average, two or three farm vehicles used the crossing each day, and the gates were kept padlocked except when they were opened for the passage of a vehicle. There was also a footpath over the crossing, but it was very little used. Before the train approached the level crossing there was a slight down gradient, and, as the train would be stopping at a station about a mile beyond the crossing, the engine driver, following his usual practice, shut off steam and coasted down. Owing to the sound of the exhaust blast having ceased, and also because the lines were wet and the effect of the fog was to smother sound to some extent, the train was comparatively silent, but it could have been heard by anyone at the level crossing if there had been no other noise at the time, and the inference was that the driver of the tractor had failed to stop the engine of the tractor on arriving at the crossing and before proceeding to cross the line. There were several accommodation crossings over this stretch of the branch line. In an action by the personal representative of the deceased driver of the tractor against the British Transport Commission and the engine driver under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, alleging negligence on their part in failing to take proper precautions at the crossing,

Held: negligence on the part of the defendants or either of them was not established and the action failed because in the absence of special circumstances creating special danger the defendants were not under any duty to take special precautions in regard to ordinary accommodation crossings (of which the crossing in the present case was one), and, though special precautions ought to be taken in fog, it was the duty of those who were crossing the line in a motor vehicle to take them by stopping at the crossing, looking and listening.

Kemshead v. *British Transport Commission* (p. 119, post) applied.

[**Editorial Note.** The considerations governing the common law duties of an engine driver driving a train are different from those applicable to the driver of a motor vehicle on a road; the differences are clearly stated in the judgment of Morris, L.J., in *Trznadel* v. *British Transport Commission* ([1957] 3 All E.R. at p. 198).

A As to the obligations of a railway authority in relation to accommodation crossings, see 27 HALSBURY'S LAWS (2nd Edn.) 87, para. 174.]

Cases referred to:

(1) *Smith* v. *London, Midland & Scottish Ry. Co.*, 1948 S.C. 125; 2nd Digest Supp.

B (2) *Lloyds Bank, Ltd.* v. *Railway Executive*, [1952] 1 All E.R. 1248; 3rd Digest Supp.

(3) *Lloyds Bank, Ltd.* v. *British Transport Commission*, [1956] 3 All E.R. 291; 3rd Digest Supp.

(4) *Kemshead* v. *British Transport Commission*, (1956), post, p. 119.

Action.

C The plaintiff was the administrator of the estate of his son, Arthur Frederick Hazell, deceased, who was fatally injured on Oct. 11, 1955, when a farm tractor which he was driving across a railway accommodation crossing near Creeksea Place Farm, in Essex, was struck by a train. The plaintiff claimed damages against the defendants, British Transport Commission and Thomas Albert Jarrad (the engine driver of the train), under the Fatal Accidents Acts, 1846 to D 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, on the ground that the accident was due to the negligence of the defendants.

The deceased man, who was twenty-two years of age, was serving in the Royal Air Force and was at home on leave at the time of the accident. Before joining the Royal Air Force he had worked for a year or two for the owner of Creeksea Place Farm and during his leave he was helping on the farm. The accident E happened at 8.15 a.m. on a single branch line between Wickford and Burnham-on-Crouch. On a stretch of sixteen miles there were thirty-three level crossings, most of which were accommodation crossings. The one where the accident occurred was about a mile or a mile and a half from Burnham-on-Crouch and was probably created primarily for the accommodation of persons farming Creeksea Place Farm which contained land on both sides of the railway. Possibly F two or three farm vehicles, on an average, used the level crossing each day. The gates were kept padlocked except when they were opened for the passage of a vehicle. The level crossing was so wide that an ordinary vehicle, including the Fordson Major tractor which the deceased man was driving at the time of the accident, could stand between the gates and the railway line. There was also a footpath over the crossing, but it was very little used. The train G involved in the accident was running from west to east, and shortly before reaching the level crossing it ran round a left hand bend with a slow down gradient of about one in five hundred. In ordinary weather, an approaching train could be clearly seen several hundred yards away by anyone approaching the level crossing from the south (as the deceased man had done on the day of the accident), but at the time of the accident (about 8.15 a.m. on Oct. 11, 1955) H there was a bad fog, visibility varying from place to place. As the deceased man was driving the tractor over the line a train ran into it. The deceased man was thrown from the tractor and received fatal injuries.

HIS LORDSHIP (PEARSON, J.) found that the train was comparatively silent for the following reasons: (a) on reaching the downward gradient the engine driver, following his usual practice, had shut off the steam, as the train would be I stopping at Burnham-on-Crouch, and had coasted down the gradient, so that the sound of the exhaust blast had ceased; (b) the line was wet and, therefore, the wheels of the train made less noise than usual; and (c) the effect of the fog was to smother the sound to some extent. HIS LORDSHIP further found that, although the train was relatively silent, it could have been heard by anyone at the level crossing if there was no other noise, and concluded that the inference was that the major and most obvious cause of the accident was that the deceased man had failed to switch off the engine of the tractor for a short time on reaching the level crossing and before going over the line.

N. C. Lloyd-Davies for the plaintiff.
Tudor Evans for the defendants.

PEARSON, J., after reviewing the facts, stated his findings and his conclusion in regard to the main cause of the accident, viz., that the main cause was the deceased's failure to switch off the engine of his vehicle very shortly before he drove over the line, since, if he had switched the engine off, he would have heard the train coming. HIS LORDSHIP continued: The question is whether there was any negligence on the part of the engine driver or of his principals, the British Transport Commission, the owners of the railway. I want to say this as a matter of general application. In my view, when there is an accusation of negligence, it is a question of fact whether in a particular situation the defendants behaved negligently or not. The basic rule is that negligence consists in doing something which a reasonable man would not have done in that situation, or omitting to do something which a reasonable man would have done in that situation, and I approach with scepticism any suggestion that there is any other rule of law properly so called in any of these cases. One can look, however, at decisions in other cases to see how that basic rule can properly be applied to the special class of situation. This is a very well-defined class of situation, the question being: When the driver of a railway train is coming towards an accommodation crossing, what can reasonably be expected of him and what previous precautions can reasonably be expected of the British Transport Commission? It is possible to contend that a principle emerges as regards the proper method of applying the basic rule to the facts of such cases. The principle which emerges is something like this: that, in the absence of special features, the engine driver is not expected either to reduce his speed or to whistle at an ordinary accommodation crossing, and that the commission are not expected to erect a whistle-board at the approach to an ordinary accommodation crossing. I do not think that I need go into the reasons for that at great length. They are based on the special position of railway traffic. The assumption is that railway traffic has to go on reasonably. It would not be reasonable to expect an engine driver to proceed at the speed of five miles an hour or so because of fog, and it would not be reasonable to expect an engine driver to whistle at every ordinary accommodation crossing, because that might mean that he would be sounding his whistle almost all the way along, which would be a great nuisance to everybody. The method by which an engine driver has to drive his train is completely different from the method in which a ship has to be steered or a road vehicle has to be taken along the roads. The engine driver is going along a fixed track; his direction is predetermined and his main prèoccupation is with his own railway signals. He cannot reasonably be expected to look, to any great extent, at people coming up to the line from side roads, and in a fog (as is very clear from one of the cases*) it is not reasonable to expect the engine driver to go slowly. He is expected to go at his ordinary speed. If the engine driver becomes aware that there is something on the line, or that something is likely to come on to it when the train is approaching, he must take the proper steps to avoid an accident. There is no suggestion in any of the cases that the commission or an engine driver is absolved from the ordinary rule of taking reasonable steps to promote safety. My concern is how one applies the basic principle which I have mentioned to the situation of a train approaching a level crossing which is an accommodation crossing. [HIS LORDSHIP then named the cases which he had considered, namely, *Smith* v. *London, Midland & Scottish Ry. Co.* (1) (1948 S.C. 125); *Lloyds Bank, Ltd.* v. *Railway Executive* (2) ([1952] 1 All E.R. 1248); *Lloyds Bank, Ltd.* v. *British Transport Commission* (3) ([1956] 3 All E.R. 291); and *Kemshead* v. *British Transport Commission* (4) (see p. 119, post). HIS LORDSHIP continued:] From all those cases we can deduce, I think, that there is a general principle

---

* *Knight* v. *Great Western Ry. Co.* ([1942] 2 All E.R. 286). See also per LORD GODDARD, C.J., in *Kemshead* v. *British Transport Commission*, p. 121, letter C, post.

A rather to the effect that special precautions of the kind suggested cannot reasonably be expected of the commission or of their engine drivers where an ordinary accommodation crossing is concerned. By "special precautions" I mean precautions of the type of having a whistle-board erected or of making a practice of whistling on approach to a level crossing or of reducing speed to some slow speed. Such special precautions cannot be applied in the ordinary case.

B [HIS LORDSHIP then read extracts from the judgment of LORD GODDARD, C.J., in *Kemshead* v. *British Transport Commission.* These extracts are the passages reported at p. 120, letter D, and p. 120, letter F, to p. 121, letter C, post. HIS LORDSHIP also read the passage from the judgment of DENNING, L.J., reported at p. 122, letter A, post, and continued:] That being the way in which the Court of Appeal approached a somewhat similar case, can one differentiate this case? There C was a fog in that case and there is a fog here. That was an ordinary farm crossing and this is almost an ordinary farm crossing, the degree of user as a footpath being very slight, and there being a slight down gradient to this level crossing. There must, however, be a great many other accommodation crossings in the country in which there are slight down gradients or more extensive down gradients. The only point about a down gradient is that it causes, or may cause, D the train to come coasting down it. Equally, there may be other accommodation crossings which are near some station in which the train has to stop. One cannot, therefore, rely on the fact that it was usual to shut off steam on approaching this level crossing as being an important differentiating feature, and, in my view, it was not a differentiating feature. The question of fog was fully dealt with in *Kemshead* v. *British Transport Commission* (4), from which I have E recited several passages, so I am unable to say that there is any sufficient differentiating feature here. This is a most tragic and unfortunate case but, in my view, there is no liability either on the British Transport Commission or on the engine driver, and, therefore, this action fails.

Judgment for the defendants.

F Solicitors: *Alan, Edmunds & Phillips* (for the plaintiff); *M. H. B. Gilmour* (for the defendants).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

KEMSHEAD *v.* BRITISH TRANSPORT COMMISSION.

[COURT OF APPEAL (Lord Goddard, C.J., Denning and Birkett, L.JJ.), July 20, 1956.]

G *Railways—Accommodation crossing—Duties of British Transport Commission—Duties of engine driver and occupant of motor vehicle on approaching accommodation crossing in fog.*

Cases referred to:

(1) *Knight* v. *Great Western Ry. Co.*, [1942] 2 All E.R. 286; [1943] K.B. 105; 112 L.J.K.B. 321; 167 L.T. 71; 2nd Digest Supp.

(2) *Burrows* v. *Southern Ry. Co.*, (1933), unreported.

H (3) *Smith* v. *London, Midland & Scottish Ry. Co.*, 1948 S.C. 125; 2nd Digest Supp.

(4) *Lloyds Bank, Ltd.* v. *Railway Executive*, [1952] 1 All E.R. 1248; 3rd Digest Supp.

(5) *Lloyds Bank, Ltd.* v. *British Transport Commission*, [1956] 3 All E.R. 291; 3rd Digest Supp.

Appeal.

The defendants, British Transport Commission, appealed from a judgment of STABLE, J., at Northampton, dated May 10, 1956, whereby he held that the defendants were liable I to the plaintiff in damages for negligence in respect of personal injuries suffered by the plaintiff in an accident at a level crossing in Northamptonshire on Dec. 6, 1952.

The level crossing was an accommodation crossing for a road leading to a farm and some farm cottages. The plaintiff had used the crossing on at least twenty occasions and knew that there was a notice on the gates requiring people who used the crossing to shut and fasten the gates. At the time of the accident the plaintiff was a passenger in a motor car going towards the farm. The gates at the level crossing had been left open by some person unknown, and the driver of the car apparently proceeded to cross the railway line without stopping. It was a foggy morning and as the car was crossing the railway line a train ran into it. The plaintiff and the driver of the car were severely injured, and another passenger in the car was killed.

Marven Everett, Q.C., *G. R. Swanwick, Q.C.*, and *Tudor Evans* for the defendants.
Phineas Quass, Q.C., and *M. P. Solomon* for the plaintiff.

LORD GODDARD, C.J., after referring to the facts, continued: This case was complicated to some extent by the fact that at a previous assize, which was held, I think, more than a year before, a case had been brought by the widow of the passenger in the car who had been killed. That case was tried before the same learned judge and, so we are told, in that case he gave judgment for the widow and awarded damages to her. I imagine that there was more evidence for the plaintiff in that case than there was for the plaintiff in this case, but we do not know on what ground judgment was given for the widow. There was no appeal against that judgment. At the trial in the present case something was said by counsel then appearing for the British Transport Commission to the effect that he was not going to call any evidence, such apparently as he had called in the previous case, when it had not been believed and the judge had rejected it. No agreement was made, however, between the parties in the present case that the evidence which had been used in the previous case should be used here, nor was any evidence called as to what the evidence for the defendants in the previous case had been. That matter becomes very material because counsel for the plaintiff has put his case on the ground that no whistle was sounded and no indication was given of the approach of this train. There is no evidence whether the driver of the train whistled or did not whistle; both the witnesses who were called by the plaintiff had no recollection whatever of the circumstances just before the accident—all they remembered was that they were driving down the road and that the next thing that they knew was that they had been injured. They only remembered what had hit them.

Counsel for the plaintiff says that he was entitled in those circumstances to have it assumed that there was no whistle. I do not think that he was. We did, however, allow counsel to address us on the footing that the inference was that the train did not whistle. I do not think that that is an inference which can strictly be drawn, but in the view which the court take it really does not matter whether there was whistling or whether there was not. This was what is known as an accommodation crossing. There is no obligation on a railway company to put watchmen or to have signals or bells at such crossings, nor, so far as I know, to whistle, unless the circumstances are such that an ordinary prudent man would know by reason of the special nature of the crossing that people may reasonably be expected to be on it at any time. I refer to a judgment of Scrutton, L.J., which Tucker, J., read from a shorthand note in *Knight* v. *Great Western Ry. Co.* (1) ([1942] 2 All E.R. 286). I always like, if I can, to find authority from Scrutton, L.J., who was one of the greatest judges of my time. His judgment was given in *Burrows* v. *Southern Ry. Co.* (2) (1933) (unreported) and the quotation which Tucker, J., read was as follows ([1942] 2 All E.R. at p. 287):

> " The first question, therefore, in our view, and the only question we are going to decide, is this: Was there evidence upon which the jury could find that the railway company had not taken reasonable precautions to prevent danger at this crossing? Now I should be very reluctant to lay down a rule that at any private crossing the railway company is bound to use special precautions of some kind. I can quite conceive of cases where owing to a sharp turn in the railway, or the presence of large numbers of trees in a cutting obstructing the view, a jury may find: ' We think some reasonable precautions should be taken even at a private crossing '. But I ask myself, and I have considered the evidence very carefully, whether at this crossing as we see it, and on the facts we know, there was anything to distinguish it from any other private crossing where the railway company has for some reasons granted rights to particular people in the locality, but not to the whole public, because obviously there are great differences between cases where any member of the public, not having seen the crossing before, may come to a crossing and cases where the crossing is only used by people who are always using it because they are in the locality, and using it for the purposes of their business."

The cases which have been cited to us were all cases which, on an examination of the facts, were shown to be cases where the court proceeded on the ground that there were special facts or circumstances relating to the particular crossing which might, as a matter of common sense and common or reasonable precaution, require that special precautions should be taken. In the present case I cannot see any reason for holding that this accommodation crossing was any different from the hundreds of other farm accommodation crossings that exist up and down the country. No evidence was given by the plaintiff with regard to the nature of this road. We cannot assume that it was a highway because, if it was a highway, the probabilities are that precautions would have to be taken as there are special provisions in the Railways Clauses Consolidation Act, 1845, with regard to precautions which should be taken on railways where they are crossed by highways. In this case it looks as if this is a mere lane leading down to the farm; at any rate there is no evidence to the contrary. It is a farm accommodation crossing and not a public crossing, and there are gates which have to be opened and closed by persons using the crossing. I see no ground, therefore, for holding that this was any different from the many other farm accommodation crossings which one finds up and down the country.

Counsel for the plaintiff has, however, really confined his whole argument to this: that, if there is a fog, then some special precaution must be taken. I agree that special precautions ought to be taken in the case of fog. But by whom? I should say by the person crossing the line, who should stop, look and listen. One often sees such notices. I should have thought that, if in the present case the passengers in the car had stopped and listened, they must have heard the train coming. The obligation which it is sought to put on the engine driver would be intolerable on any other view. There are many crossings where the owners of the railway, recognising that precautions ought to be taken, put up whistle-boards. There is no whistle-board at this crossing, and, so far as I know, it was not put forward as a ground of negligence that a board had not been erected directing engine-drivers to whistle. How can a driver on the railway line remember all the farm gates which he may pass on his run, and how can he know exactly how far away he is from any particular crossing when there is a fog which obstructs visibility? The fact is, as we all know, that trains run in fog, not like ships, but often at their ordinary pace. Fog signals are used near the ordinary signals, and if the distant signal is at danger a fog signal detonator is set to go off in time for the driver to pull up his train by the time when it gets to the home signal, where also detonators go off. In between signals trains, naturally enough, do not go at a crawl at every place, nor can they be expected to run with the whistle going the whole time, especially in country districts such as this, which appears to be a rural part of Northamptonshire.

STABLE, J., said this:

> " In the absence of some evidence of some special precaution under fog conditions such as prevailed on the day of the accident, it seems to me to be quite plain that there was some duty on the British Transport Commission to warn whoever might be using this crossing."

With all respect to the learned judge, I do not think that there was any duty on the commission. The special conditions must be special conditions attaching to the crossing. There were no special conditions attaching to this crossing. I cannot think, therefore, that there was any duty on the commission or on the train driver to whistle at this place. There was no evidence that he did not whistle, but I am assuming that he did not. Therefore, in my opinion, the appeal succeeds, and judgment must be entered for the commission.

DENNING, L.J.: I agree. This accident took place on Dec. 6, 1952. On a foggy morning a car was crossing a level crossing and a train ran into it. One passenger was killed. The driver of the car and another passenger were so severely injured that they remember nothing about it. The representatives of the dead passenger brought an action which was heard by STABLE, J., in February, 1954, when it was held that the British Transport Commission were liable. Our decision today means that in the same accident the commission are not liable. It is very unfortunate that in regard to two different plaintiffs there should be different results in the courts of law, but I emphasise that the parties ought to have taken a different course. They ought all to have been plaintiffs in one action; or they could have agreed on one action being a test action. They did not do that. The plaintiff brings his action on his own, separately from the other, and it must be dealt with solely on the evidence in this action.

This case concerns an ordinary accommodation crossing, a farm crossing, with gates which people who use the crossing have to open and to close for themselves. It is a single line, deep in the country, which is crossed by this farm road. It is not suggested that there has been any increase of traffic since the railway was built. There is a long straight length of line on each side and a straight farm road crosses it at right angles on each side. What is the duty of the commission in regard to such a crossing? It is a duty to take reasonable care, certainly; but this is not a case where there are any special circumstances of danger. In the cases which have been before the courts in recent years such as *Smith* v. *London, Midland & Scottish Ry. Co.* (3) (1948 S.C. 125) and *Lloyds Bank, Ltd.* v. *Railway Executive* (4) ([1952] 1 All E.R. 1248) there were very special circumstances creating exceptional danger. For instance, in the latter case there was a great increase of traffic on rail and road, many accidents had taken place and several people had been killed at the crossing. It was there held by the learned judge and confirmed by this court that in such a situation the railway company ought certainly to have put up a whistle-board, so that all their drivers should whistle at that crossing. In a more recent action, however, also brought by Lloyds Bank, Ltd. [*Lloyds Bank, Ltd.* v. *British Transport Commission* (5), [1956] 3 All E.R. 291], a stronger case than the one now before the court, it was held that the circumstances were not such as to compel the railway to put up a whistle-board. If there are circumstances in which the commission ought to put up a whistle-board and they do not put it up, they will be held liable. Nothing of the kind, however, is suggested here. If this accident had happened in ordinary daylight and there had been no whistle-board and no whistle, no one suggests that the commission would have done anything wrong.

The whole point made by counsel for the plaintiff is that it was a foggy morning and on that account the driver of the train ought to have whistled. But how was the driver of the train to know where all the farm gates were along the line? It was, indeed, as the plaintiff said in his evidence, particularly the responsibility of people crossing the line in a car on a foggy morning, when they found that the gate was open (someone unfortunately having left it open), to take special care themselves and to get out and look and listen to see that all was safe before they crossed. I agree with my Lord that there are no special circumstances in this case which put on the commission the duty to put up a whistle-board and on the driver of this particular train the duty to whistle. No negligence has been proved against the commission and I agree that the appeal should be allowed accordingly.

BIRKETT, L.J.: I am entirely of the same opinion and do not desire to add anything.

Appeal allowed.

Solicitors: *M. H. B. Gilmour* (for the defendants); *Iliffe, Sweet & Co.*, agents for *Burnham, Son & Lewin*, Wellingborough (for the plaintiff).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

HORACE PLUNKETT FOUNDATION *v.* ST. PANCRAS BOROUGH COUNCIL.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Devlin and Pearson, JJ.), December 4, 1957.]

Rates—Limitation of rates chargeable—Nil amount charged prior to the coming into force of new valuation list—Occupier formerly wholly exempt from rates but now becoming chargeable—Whether entitled to limitation of rates to nil—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *&* 5 *Eliz.* 2 *c.* 9), *s.* 8 (2) (*a*).

Before Apr. 1, 1956, viz., the date when the new valuation list came into force, the appellants were wholly exempt from rates under the Scientific Societies Act, 1843. For the first year of the new list, the appellants (who, it was assumed, were no longer exempt from rates under the Act of 1843) were charged with a rate amounting to £187 15s. 6d. in respect of a hereditament that they occupied. The appellants were an organisation within s. 8 (2) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, by which the amount of rates chargeable for the first year of the new valuation list was limited to " the total amount of rates . . . which were charged " for the last year before the new list came into force. The appellants now appealed against the rate charged, contending that it exceeded the amount provided by s. 8 (2) (a), and should be reduced to a nil amount.

Held: section 8 (2) (a) was inapplicable because it contemplated that some rates were charged in the year before the new list came into force, and in the present case no rate had been charged in that year.

Appeal dismissed.

[For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, see 35 HALSBURY'S STATUTES (2nd Edn.) 394.]

Case Stated.

This was a Case Stated by the Appeals Committee of the County of London Quarter Sessions. On Dec. 10, 1956, the Horace Plunkett Foundation, the appellants, gave notice of appeal against a rate amounting to £187 15s. 6d. which was made on Mar. 31, 1956, by St. Pancras Borough Council, the respondents, in respect of a hereditament, occupied by the appellants, and described in the rate as offices, library, caretakers' rooms and premises, 10, Doughty Street, London, W.C.1; the ground of appeal was that the rate exceeded the amount chargeable under s. 8* of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The following facts were found.

---

* The relevant terms of s. 8 (2) (a) are printed at p. 123, letter F, post.

A The appellants came within s. 8 (1) (a) of the Act of 1955, being an organisation which was not established or conducted for profit and whose main objects were charitable or concerned with the advancement of education and social welfare. In the respondents' rate book for the year ending Mar. 31, 1956, the hereditament was entered as follows:—" Exempt, Scientific Societies Act, 1843. Occupied by the Horace Plunkett Foundation ", the amount of rates recoverable B being entered as " nil "; in the rate book for the year ending Mar. 31, 1957, the hereditament was entered with a rateable value of £259, the rate being 14s. 6d. in the pound and amounting to £187 15s. 6d. Before 1948 the respondents both made assessments for rating and demanded the rates, but since then, assessments were made by the Inland Revenue while the respondents merely demanded and collected the rates; no annual general rate had ever been de-C manded in respect of the hereditament prior to Apr. 1, 1956, viz., when the new valuation list came into force.

Doubt had arisen whether the appellants were still entitled to claim exemption from rates under the Scientific Societies Act, 1843, but, for the purposes of this case, it was assumed that they were now not entitled to claim that exemption. The appellants contended that, as they were an organisation to which s. 8 of the D Act of 1955 applied, the amount of rates charged exceeded the amount provided by s. 8 (2) of the Act of 1955. The respondents contended that as no rate was charged in the year preceding Apr. 1, 1956, s. 8 (2) was inapplicable and the rate was correctly charged. Quarter sessions dismissed the appeal holding that as the rate charged for the year preceding Apr. 1, 1956, was nil, s. 8 (2) did not apply to the rate appealed against. The question for the court was whether, on the E facts stated, quarter sessions came to a correct conclusion.

Harold Williams, Q.C., and *W. L. Roots* for the appellants.
C. E. Scholefield for the respondents.

LORD GODDARD, C.J., having stated the facts, continued: The question that arises is under s. 8 (2) (a) of the Rating and Valuation (Miscellaneous Pro-F visions) Act, 1955, which provides:

> " For the purposes of the making and levying of rates in a rating area, for the year beginning with the date of the coming into force of the first new valuation list for that area (in this section referred to as ' the first year of the new list '), and for any subsequent year, the amount of rates chargeable in respect of a hereditament to which this section applies shall, subject to the G following provisions of this section, be limited as follows, that is to say— (a) for the first year of the new list, the amount so chargeable shall not exceed the total amount of rates (including any special rates) which were charged in respect of the hereditament for the last year before the new list came into force . . . "

The question is a pure matter of construction and the words that we have to H construe are " the total amount of rates . . . charged ". No rates were charged in the year before the new list came into force, and therefore I do not think this provision has any application to this case. If no rates were charged, I do not see that one can consider what was " the total amount of rates . . . charged ". The rates chargeable for the first year of the new list are not to exceed the total amount of rates which were charged for the last preceding year; and if no rates were I charged there was never a total with which a comparison could be made. Section 1 of the Scientific Societies Act, 1843, provides that no society within that Act " shall be assessed . . . "; such societies, if I may so put it, are completely outside rating altogether. It may be that the appellants are not entitled to exemption under the Scientific Societies Act, 1843, though if they are, their exemption is preserved by s. 8 (6) of the Act of 1955, which provides:

> " Nothing in this section shall affect any exemption from, or privilege in respect of, rates under any enactment other than this section."

Speaking for myself, I think that where s. 8 of the Act of 1955 speaks about the total amount of rates charged it is contemplating that some rates were charged, and one has to find what is the total amount of those rates. If, however, there never was any rate charged, one cannot apply a section which deals with the total amount of rates charged.

For these reasons, I am of opinion that quarter sessions came to a correct decision, and the appeal must be dismissed.

DEVLIN, J.: I agree with the construction which my Lord has put on s. 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. I should not like to say that in every conceivable case where words of this sort are used the fact that no charge has been made or a nil amount has been charged would necessarily mean that wording of this sort was inapplicable. Phraseology of this sort must be considered, however, in relation to the section as a whole and the object which it was intended to achieve; and for that reason I have not found the authorities cited* by counsel for the appellants on the construction of similar sort of phraseology in other Acts really to be of much assistance.

The object of this section as counsel for the appellants has put it before us is clear enough. There were before 1955, and there are still, a number of premises which are occupied by bodies which have charitable or scientific objects and which accordingly have been wholly exempted from rates. The appellants claim or claimed that they were one of them, and they claimed to be exempt under s. 1 of the Scientific Societies Act, 1843. When the Rating and Valuation (Miscellaneous Provisions) Act, 1955, was passed it was not intended to disturb the position in relation to those societies which were wholly exempt, but it created three new classes of hereditaments of a semi-charitable character, if I may put it that way, and it granted to them not total exemption but a certain measure of relief. The measure of relief, put broadly, was this; the increase in rates that was otherwise contemplated by the Act of 1955 was not to affect them, but they were to remain as they were before subject only to the old rating values. That was a temporary relief, as counsel for the appellants has pointed out, merely to temper the wind to the shorn lamb because under s. 8 (3) of the Act of 1955, in due course, the local authority may bring their position into line with other premises. The temporary relief was, however, the object of s. 8. It is plainly contemplated, therefore, that s. 8 is dealing with premises which were subject to the old rates. It is also expressly contemplated that s. 8 is not to have anything to do with premises which were exempt, because s. 8 (6) to which my Lord has referred, says specifically:

> " Nothing in this section shall affect any exemption from, or privilege in respect of, rates under any enactment other than this section."

The whole difficulty that has arisen in this case is because the appellants have mistakenly been supposed to be exempt from rates and have therefore been entered in the list as exempt. I say " mistakenly supposed to be " because we have to make the assumption that there is not a good exemption and s. 8 (6) does not apply. The position is that we are dealing with an odd case, a case of a mistake which was never contemplated by the Act. So now, if one turns back to s. 8 (2), and asks oneself: Is it possible that the draftsman of the section or Parliament contemplated no charge and a nil assessment? If it seems clear from the section as a whole that this was contemplated, I should have been disposed to do my best, though I do not know whether I should have succeeded, to give to the words the meaning which could be applied to such a situation. One could, for example, say that a nil charge was a charge of nothing and that the reduction

---

* The authorities cited were *Jervis* v. *Tomkinson* (1856), 1 H. & N. 195 and *R.* v. *Gee* (1860), 1 E. & E. 1068.

A of one hundred per cent. was a proportionate reduction*; but I see no need to strain the meaning of the words to achieve that result because it is plain to me that that is not what was contemplated by sub-s. (2) at all. It contemplated a situation in which rates were to be limited and in which there was an old figure to compare with the new. Therefore, I agree with the meaning that my Lord puts on s. 8 (2) (a), which is the natural and right meaning in the contemplation B of the section; and I agree that this appeal should be dismissed.

PEARSON, J.: I agree. If one looked only at s. 8 (2) (a) and (b) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, I personally would have felt no difficulty in saying that the figure O, or nil, is an amount; for it could be said that the amount so chargeable should not exceed the total amount C of rates, which one could construe as nil, and then there would be a one hundred per cent. reduction, or one hundred per cent. proportion under s. 8 (2) (b). If, however, one considers the matter in relation to the section as a whole and in relation to the Scientific Societies Act, 1843, the more reasonable view is the one which has been already stated, namely, that where s. 8 (2) uses the expression

> " the amount of rates chargeable in respect of a hereditament . . . shall, D subject to the following provisions of this section, be limited as follows ",

that applies only to a case in which some rates have been charged, and in which some figure exceeding nil is to be in some way limited. For there was the provision for total exemption that was made by s. 1 of the Scientific Societies Act, 1843. This was that " No person or persons shall be assessed or rated, or liable to be assessed or rated, or liable to pay " any sum in respect of rates. The position E where there was that total exemption does not reasonably fall within the wording used in s. 8 (2) of the Act of 1955.

For those reasons I agree with the decision that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Barfield & Barfield* (for the appellants); *Town clerk*, St. Pancras Borough Council (for the respondents).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

---

* Paragraph (b) of s. 8 (2) of the Act of 1955 provides:—" If, by virtue of [s. 8 (2) (a)], the amount of rates chargeable in respect of the hereditament is less than it would have been apart from that paragraph, the proportion by which it is thereby required to be reduced shall apply to any subsequent year . . . and accordingly the amount of rates chargeable in respect of the hereditament for any such year shall be reduced by that proportion."

DISTRICT BANK, LTD. *v.* WEBB AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), December 4, 1957.]

Estoppel—Estoppel by deed—Effect of recital—Conveyance to purchaser reciting vendors "seised in unincumbered fee simple in possession"—Whether vendors estopped from relying on existence of lease as against mortgagee of purchaser—Whether lease an "incumbrance".

By a conveyance dated Feb. 22, 1952, land, including a dwelling-house, was conveyed to W. and Mrs. W. By a lease dated Mar. 25, 1952, W. and Mrs. W. granted a lease of the land to W. and M. (who were partners) for a term of twenty-one years from that date. The partnership between W. and M. was later dissolved and M. claimed no beneficial interest in the lease. On July 28, 1954, W. and Mrs. W. executed a memorandum of deposit of the deeds relating to the land to secure Mrs. W.'s banking account with the District Bank, Ltd., and on Oct. 14, 1954, G. E. W. (who was not then entitled to any interest in the land) executed a memorandum of deposit of the deeds relating to the land, also to secure Mrs. W.'s banking account at that bank. By a conveyance dated Nov. 8, 1954, W. and Mrs. W. conveyed the land to G. E. W. in consideration of the payment of £4,200, reciting that they (the vendors) were "seised in unincumbered fee simple in possession upon trust for sale". By a legal charge dated July 7, 1955, G. E. W. charged the fee simple in the land to the District Bank, Ltd., to secure his account with the bank. At the date of the legal charge W. and Mrs. W. were (or one of them was) living in the dwelling-house on the land. The bank as mortgagee under the legal charge claimed possession of the land against G. E. W., W. and Mrs. W. W. and Mrs. W. resisted the application in reliance on the lease of Mar. 25, 1952, and the bank contended that by reason of the recital in the conveyance of Nov. 8, 1954, they were estopped from setting up the existence of the lease.

Held: the recital was not sufficiently clear and unambiguous to raise an estoppel because the lease would not ordinarily be described as an "incumbrance" and the words "in possession" qualified "fee simple" and described an estate that was not in reversion; therefore, the lease having priority to the legal charge, the bank was not entitled to possession.

[As to estoppel by deed and the effect of recitals, see 15 HALSBURY'S LAWS (3rd Edn.) 215, para. 403; and for cases on the subject, see 21 DIGEST 249, *743-749*.]

Adjourned Summons.

The plaintiff, the District Bank, Ltd., applied to the court by originating summons for possession of premises charged to the bank by a legal charge dated July 7, 1955, made between the first defendant, George Edwin Webb, of the one part and the bank of the other part. The legal charge contained no attornment clause and was expressed to be a continuing security for moneys which the first defendant was or might become liable to pay to the bank in respect of advances made or to be made by the bank. On Sept. 1, 1955, a demand in writing was made for moneys outstanding and unpaid and the first defendant failed to make payment in accordance with the demand.

G. T. Hesketh for the plaintiff, the mortgagee.
The first defendant, the mortgagor, was not represented by counsel.
M. Nesbitt for the second and third defendants.

DANCKWERTS, J.: This originating summons relates to land at Bitchet Green, Seal, near Sevenoaks, in the county of Kent, on which stands a dwelling-house which was at one time called The Magnet House and the name of which was afterwards changed to Greensleeves. The proceedings are by the District Bank, Ltd., which claims to be entitled to possession of the land by virtue of a legal charge dated July 7, 1955. The mortgagor in respect of that charge was the first defendant, George Edwin Webb, who has not appeared, and the application for possession is opposed by Mr. George Edward Webb and his wife, Constance Lilian Janet Webb, who is a sister of the first defendant. Mr. George Edward Webb and his wife (to whom I refer as "Mr. and Mrs. Webb") acquired a piece of land, including the land which is the subject of the present dispute, by a conveyance dated Feb. 22, 1952. It is by virtue of a lease dated Mar. 25, 1952, that the defendants (other than the first defendant) claim to resist the order for possession asked for by the bank. By that lease Mr. and Mrs. Webb demised the property which is the subject of the present dispute to Mr. George Edward Webb, one of the lessors, and a man who became his partner, a Mr. Donald Martin. It was leased to those two persons for twenty-one years at a rent of £70 a year. On July 28, 1954, a memorandum of deposit was executed by Mr. and Mrs. Webb to secure Mrs. Webb's bank account. On Oct. 14, 1954, the first defendant executed a memorandum of deposit further securing Mrs. Webb's bank account, though as far as one can see he was not an owner or in any way entitled to any interest in the property at that date. On Nov. 8, 1954, the property was conveyed by Mr. and Mrs. Webb to the first defendant in consideration, according to the deed, of a payment of £4,200, and that was prior to the bank's legal charge of July 7, 1955, which purports to be on the freehold property. The conveyance to the first defendant of Nov. 8, 1954, contains a recital that the vendors are seised in unincumbered fee simple in possession on trust for the sale of the property in question.

Some doubt has been thrown on the genuineness and due execution of the lease of Mar. 25, 1952, but I have read the affidavit of Mrs. Melville, who is the sister of Mrs. Constance Webb, and her evidence makes it quite plain to me that the lease was in fact executed by Mr. and Mrs. Webb in her presence. No doubt, therefore, can be cast on the due execution of the lease, and in these proceedings for the present the existence of a valid lease dated Mar. 25, 1952, must be accepted. If the lease is effective and in being, the bank cannot get possession of the property because at the date when the legal charge was executed by the first defendant, and at the date when it was conveyed to him, it was subject to an existing lease for twenty-one years, which had at the date of conveyance to him about nineteen years to run and is still operative.

It is said, however, that by reason of their being parties to the conveyance to the first defendant, Mr. and Mrs. Webb are both estopped from setting up the existence of the lease because of the recital in the conveyance of Nov. 8, 1954, that they were "seised in unincumbered fee simple in possession upon trust for sale . . ." Estoppel depends on representation, and the cases show that, in order to be effective, a representation relied on in conveyancing as creating an estoppel must be clear and unambiguous. The question arises, therefore, whether the recital contained in the conveyance is of such a kind. The representation is said to be contained in the words, "seised in unincumbered fee simple in possession upon trust for sale". Was that a representation that no such lease existed? In my view it was not.

In the first place, I am not satisfied that a lease was an incumbrance to these parties. It is true that in certain circumstances a lease may be regarded as an incumbrance, but it seems to me that an incumbrance, normally, is something in the nature of a mortgage and not something in the nature of a lease or tenancy. We must on the authorities find an unambiguous representation if an estoppel is to be created, and it seems to me that in that respect the recital is not sufficient for the plaintiff bank's purpose. Secondly, the words "in possession" are relied on, but I do not think "in possession" means vacant possession. The meaning is "fee simple in possession" as opposed to "fee simple in reversion" and there again, it is impossible for the bank to rely on such representation in the recital so as to cause the vendors to be bound by any estoppel.

At the date of the legal charge there was in existence an incumbrance created by the memorandum of deposit and deposit of title deeds by Mr. and Mrs. Webb on July 28, 1954, and also that mysterious incumbrance, if it was an incumbrance, constituted by the first defendant by his memorandum of deposit of Oct. 14, 1954. The bank must have known of these two incumbrances. It is plain from the evidence of Mr. Leech, the bank manager, that all the defendants were on very close terms; they were always doing business together, and it seems to me extremely likely that Mr. Leech must have been aware on the date when the legal charge was executed by the first defendant that the first defendant was not in possession of the property, the subject of the charge, and that either or both Mr. and Mrs. Webb were living there and in possession. If Mr. Leech knew that the person on the title, the owner of the property, was not in possession, but that somebody else was, there was an obligation to inquire as to the terms under which the person in possession held the property. The evidence is more by inference than positive and it is not necessary to rely particularly on that ground in the present case. It seems to me that one way and another the bank is not entitled to an order for possession by reason of the existence of the lease.

Mr. Martin is undoubtedly one of the persons entitled to the lease, but the partnership came to an end between him and George Edward Webb and he does not claim any beneficial interest in the lease. In the circumstances that is perhaps not very important. None the less, the result is that I cannot make an order for possession in favour of the bank.

Application dismissed.

Solicitors: *Claude Barker & Partners* (for the plaintiff); *Gregsons* (for the defendants other than the first defendant).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

PRACTICE NOTE.

CHANCERY DIVISION.

Mortgage—Possession of mortgaged property—Persons not parties to mortgage claiming to be entitled to possession—Adjournment of originating summons into open court.

In *District Bank, Ltd.* v. *Webb* (ante, at p. 126), which was an originating summons under R.S.C., Ord. 55, r. 5A, claiming possession of mortgaged property from the mortgagor and from other persons in occupation of the property, the summons was adjourned to the judge in chambers, but was heard by Danckwerts, J., in open court.

In the course of the hearing Danckwerts, J., said that the judges of the Chancery Division had considered the procedure to be adopted in cases in which a mortgagee was attempting to enforce his security and persons not parties to the mortgage claimed to be entitled in possession to, or to remain in possession of, the mortgaged property. In such cases, if any of the parties was dissatisfied with the decision of the master, the proper practice was for him to adjourn the summons into court and to make, in appropriate cases, an order under R.S.C., Ord. 38, r. 1, for the attendance for cross-examination of deponents to the affidavits filed in the proceedings.

Dec. 4, 1957.

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

ROYAL COLLEGE OF NURSING *v.* ST. MARYLEBONE CORPORATION.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Donovan and Havers, JJ.), October 16, December 2, 13, 1957.]

Rates—Limitation of rates chargeable—Royal College of Nursing—Organisation whose main objects are charitable—Organisation to promote the " advance of nursing as a profession "—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *& 5 Eliz.* 2 *c.* 9), *s.* 8 (1) (*a*).

Charity—Benefit to community—Nursing—Promotion of the " advance of nursing as a profession "—Incidental benefits to individuals—Objects of the Royal College of Nursing—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *& 5 Eliz.* 2 *c.* 9), *s.* 8 (1) (*a*).

By article II (B) of the amended charter of incorporation of the Royal College of Nursing the main objects of the college were " to promote . . . the purposes hereinafter set out and in particular (a) to promote the science and art of nursing and the better education and training of nurses and their efficiency in the profession of nursing; (b) to promote the advance of nursing as a profession in all or any of its branches . . ." It was conceded that object (a) was charitable. The activities of the college included giving full-time education in the art and science of nursing. The college appealed to quarter sessions against a rejection of their claim for limitation of rates under s. 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955*, which the college had put forward on the ground that they were " an organisation . . . whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare " within s. 8 (1) (a). It appeared that the activities of the college were directed to raising the standard of nursing rather than to the promotion of the interests of nurses as an end in itself. On appeal from quarter sessions,

Held: the college were entitled to limitation of rates under s. 8 (1) (a), (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, because the words " advance of nursing as a profession " in art. II (B) (b) were, on the true construction of that article and in the light of the surrounding circumstances, directed to the advancement of nursing, not merely to advancing the interests of nurses, and therefore art. II (B) (b) expressed a purpose that in law was charitable.

Dictum of LORD MACNAGHTEN in *Inland Revenue Comrs.* v. *Forrest* ((1890), 15 App. Cas. at p. 354); and *Institution of Civil Engineers* v. *Inland Revenue Comrs.* ([1932] 1 K.B. 149), and *Royal College of Surgeons of England* v. *National Provincial Bank, Ltd.* ([1952] 1 All E.R. 984) applied.

General Nursing Council for England and Wales v. *St. Marylebone Corpn.* ([1957] 3 All E.R. 685) distinguished on the facts.

Appeal dismissed.

[**Editorial Note.** The test stated by LORD MACNAGHTEN in *Inland Revenue Comrs.* v. *Forrest* ((1890), 15 App. Cas. at p. 354) was also applied in relation to a claim to limitation of rates in *Chartered Insurance Institute* v. *Corporation of London* ([1957] 2 All E.R. 638).

---

* Section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, so far as material, is as follows—

" (1) This section applies to the following hereditaments, that is to say—(a) any hereditament occupied for the purposes of an organisation . . . which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare . . .

" (2) For the purposes of the making and levying of rates . . . the amount of rates chargeable in respect of a hereditament to which this section applies shall . . . be limited as follows . . ."

As to what objects are "charitable" in law, see 4 HALSBURY'S LAWS (3rd Edn.) 206, para. 486, and p. 209, para. 488; and for cases on the subject, see 8 DIGEST (Repl.) 312-331, *1-126*. A

For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, see 35 HALSBURY'S STATUTES (2nd Edn.) 394.]

Cases referred to:

(1) *Berry* v. *St. Marylebone Corpn.*, [1957] 3 All E.R. 677. B

(2) *General Nursing Council for England and Wales* v. *St. Marylebone Corpn.*, [1957] 3 All E.R. 685.

(3) *Bowman* v. *Secular Society, Ltd.*, [1917] A.C. 406; 86 L.J.Ch. 568; 117 L.T. 161; 8 Digest (Repl.) 359, *378*.

(4) *Art Union of London* v. *Savoy Overseers*, [1894] 2 Q.B. 609; 63 L.J.M.C. 253; 71 L.T. 40; 59 J.P. 20; *revsd.* H.L. sub nom. *Savoy Overseers* v. *Art Union of London*, [1896] A.C. 296; 65 L.J.M.C. 161; 74 L.T. 497; 60 J.P. 660; 38 Digest 498, *525*. C

(5) *Institution of Civil Engineers* v. *Inland Revenue Comrs.*, [1932] 1 K.B. 149; 100 L.J.K.B. 705; 145 L.T. 553; 16 Tax Cas. 158; Digest Supp.

(6) *Inland Revenue Comrs.* v. *Forrest*, (1890), 15 App. Cas. 334; 60 L.J.Q.B. 281; 63 L.T. 36; 54 J.P. 772; 3 Tax Cas. 117; 38 Digest 496, *503*. D

(7) *Royal College of Surgeons of England* v. *National Provincial Bank, Ltd.*, [1952] 1 All E.R. 984; [1952] A.C. 631; 8 Digest (Repl.) 327, *96*.

(8) *Inland Revenue Comrs.* v. *Yorkshire Agricultural Society*, [1928] 1 K.B. 611; 97 L.J.K.B. 100; 138 L.T. 192; 13 Tax Cas. 58; Digest Supp.

(9) *Geologists' Association* v. *Inland Revenue Comrs.*, (1928), 14 Tax Cas. 271; Digest Supp. E

Case Stated.

This was a Case Stated by Quarter Sessions for the County of London, at the instance of the rating authority for the metropolitan borough of St. Marylebone, the St. Marylebone Corporation in respect of the decision of quarter sessions, dated Apr. 12, 1957, allowing the appeal of the Royal College of Nursing, who were rated in respect of certain premises occupied by them in the borough, against the rejection by the rating authority of a claim by the ratepayers that they were entitled to rating relief under s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The facts appear in the judgment. The case first came before the Divisional Court on Oct. 16, 1957, but was then remitted to quarter sessions for further facts to be found (see p. 131, letters E and F, post). F G

J. P. Widgery for the rating authority.

Michael Rowe, Q.C., and *E. H. Blain* for the ratepayers.

Cur. adv. vult.

Dec. 13. **DONOVAN, J.**, read the judgment of the court: The appellants in this case are the St. Marylebone Corporation who are the rating authority for the borough. The respondent ratepayers are the Royal College of Nursing, a non-profit-seeking organisation. In January last the rating authority rejected a claim by the ratepayers for rating relief under s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The ratepayers appealed against that refusal to London Quarter Sessions, who allowed the appeal. From that decision the rating authority now appeal to this court by way of Case Stated. H I

Section 8 provides a measure of rating relief in the case of

> ". . . any hereditament occupied for the purposes of an organisation . . . not . . . conducted for profit . . . whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare . . ."

The ratepayers were incorporated by royal charter in 1928, and they occupy for the purposes specified in that charter the hereditament for which they seek rating relief, namely, 1 and 1A, Henrietta Place, London, W. The ratepayers' charter recites that a petition for incorporation by royal charter had been presented to the Sovereign by " The College of Nursing, Ltd." and art. I of the charter incorporates the ratepayers under the title* of " The College of Nursing ". Article II then provides as follows:

> " The purposes for which the college is established and incorporated are as follows:—A. To acquire and take over all the assets property possessions effects and liabilities of the said company†. B. To promote, by means of such assets and otherwise, the purposes hereinafter set out and in particular (a) to promote the science and art of nursing and the better education and training of nurses and their efficiency in the profession of nursing; (b) to promote the advance of nursing as a profession in all or any of its branches . . ."

It is not necessary for the purposes of this case, which is concerned only with the " main objects " of the ratepayers to set out any of the other " purposes " specified in art. II (B) of the charter, several of which are, in any event, not purposes at all, but simply powers to effect purposes already specified earlier in the article.

The original decision of quarter sessions was in these terms:

> "We were of opinion that the main objects of the ratepayers were such as to attract the application of s. 8 of the Act."

On the Case coming before us we took the view that the findings should be more specific, and the Case was returned to quarter sessions for them to state (1) What is or are the main object or objects of the college, (2) In the case of such object or objects is it (a) charitable, (b) if not, is it otherwise concerned with the advancement of education, (c) is it otherwise concerned with the advancement of social welfare ?

Quarter sessions have now answered these questions as follows:

> " (1) We found that the main objects of the college were those set out in art. II (B) (a) and (b) of its charter. (2) The objects in art. II (B) (a) were admitted to be charitable. We were further of opinion that the object in art. II (B) (b) was either ' charitable ' or ' otherwise concerned with the advancement of social welfare ' for we were satisfied on the evidence written and oral that the objects in art. II (B) (a) and (b) were mutually complementary in that both were directed to a single end, namely, the raising of the standard of nursing for the benefit of the community rather than the promotion of the professional interests of nurses as an end in itself."

Between the time when the Case was sent back to quarter sessions, and the further arguments that we have now heard on the amplified findings, two cases on s. 8 were heard by the Court of Appeal and certain pronouncements made which it will be convenient here to summarise:—

(1) To qualify for relief under s. 8 all the main objects of an organisation must be of the kind specified in the section. If one of such main objects is of a different kind, relief is not due (*Berry* v. *St. Marylebone Corpn.* (1), [1957] 3 All E.R. 677).

(2) Where an organisation has a written constitution the court should normally resort to that alone to ascertain its objects, though its activities are relevant to an inquiry as to what its main objects are, and this may involve oral evidence of such activities. But once the main objects of an organisation are ascertained, extrinsic evidence is not admissible to limit the proper meaning of the language by which such main objects are described in the written constitution.

(3) Once the main objects of an organisation have been ascertained, and one of them is not of the kind specified in s. 8, rating relief under the section cannot

---

* The title was changed to " The Royal College of Nursing " by an amendment of the royal charter on Sept. 4, 1940.

† I.e., the College of Nursing, Ltd.

be secured by regarding such main object as ancillary to another main object which is of the kind so specified. Ancillary or not, the one object will still be a main object, and if it is outside the scope of the section relief will not be due:—

> " . . . it may not be useful or even possible to try to give a primacy to the one purpose rather than to the other; and all the more, perhaps, should the attempt be abandoned in the present case, where the statute speaks of ' main objects ' in the plural."

(per Lord Evershed, M.R., in *General Nursing Council for England and Wales* v. *St. Marylebone Corpn.* (2), [1957] 3 All E.R. 685 at p. 689). On the question of treating one object as paramount and the rest subsidiary and subordinate we might perhaps ourselves add, without quoting, a reference to what Lord Parker of Waddington said on this point in *Bowman* v. *Secular Society, Ltd.* (3) ([1917] A.C. 406 at p. 443).

The rival contentions may now be stated. The rating authority say that the object specified in art. II (B) (b), that is, the advance of nursing as a profession is now found to be one of the ratepayers' main objects. The language in which this object is expressed is wide enough to cover the advancement of the professional interests of nurses. The ratepayers in practice do so construe the language, for the exhibits in the Case Stated establish that they actively concern themselves with the advancement of such interests. Accordingly, the ratepayers do not qualify for relief under s. 8, for the promotion of the professional interests of nurses is neither a charitable object nor an object otherwise concerned with the advancement of social welfare, albeit that one result of pursuing such an object may be the improvement of the standard of nursing generally (*General Nursing Council for England and Wales* v. *St. Marylebone Corpn.* (2)). The ratepayers, it is said, cannot overcome the difficulty by treating this object as ancillary to some other object, for quarter sessions have found it to be one of the main objects.

The ratepayers contend that read as a whole the finding of quarter sessions really means that there are not two main objects but only one, namely, the raising of the standard of nursing for the benefit of the community. Alternatively, that if there are two main objects, the second is the advancement of nursing as opposed to nurses, and the interests of nurses are looked after simply as a means of attaining this object, not as an end in itself. Whichever view be taken, therefore, of the finding of quarter sessions, the ratepayers are entitled to the relief that they seek.

There is no ambiguity about the language of para. 1 of the further findings of quarter sessions. It says expressly that the college has two main objects. In para. 2, however, they seem to suggest that the college has really one object (it is called " a single end "), namely, the raising of the standard of nursing for the benefit of the community; so that the two main " objects " are means to that one end. It is this language which raises a doubt as to the sense in which quarter sessions use the term " objects " in para. 1 of their further findings. Curiously enough, however, their language is very similar to that used by A. L. Smith, L.J., in *Art Union of London* v. *Savoy Overseers* (4) ([1894] 2 Q.B. 609 at pp. 627, 628):

> ". . . if the other object be only a means to the one end . . . then the society has a sole and exclusive object, and not another object subsidiary thereto."

(It should be said that this was a dissenting judgment but on a quite different point, namely, whether subscriptions to the Art Union were voluntary contributions. A. L. Smith, L.J., thought not, and the House of Lords afterwards unanimously upheld him: [1896] A.C. 296). In the face, however, of the clear finding that the college has two main objects we do not feel able to read the second paragraph of the further finding in such a way as to contradict the first.

We think that we should consider the case on the footing that the ratepayers have the two main objects found by quarter sessions. The question then becomes this: is the second main object, as expressed in the charter, charitable or otherwise concerned with the advancement of social welfare ?

We have already stated the rating authority's contention on this point. It is reinforced by their counsel in this way. He says that it is not right to treat this object as being simply the advance of nursing by means of improving the lot of nurses so as to make them more efficient, for that is already covered by the terms of the first object; and if that were all that was contemplated the second object would be unnecessary. This argument is cogent, but not, by itself, conclusive. For in documents setting out the objects or purposes of an organisation tautology is unfortunately the rule rather than the exception. Things are constantly being expressed as " purposes " or " objects " when they are really no more than powers, or means to effect a purpose or object already expressed. There are several " purposes " in art. II which are really no more than powers. Article II (B) (j)* is perhaps the clearest example. Furthermore, the opening words of art. II are apparently intended to be read together with paras. (B) (a) and (b); and so read, the result is this:

> " The purposes for which the college is established and incorporated are . . . to promote . . . the purpose [of promoting] the science and art of nursing . . . [and] to promote [the promotion of] the advance of nursing as a profession . . .",

which is hardly the best example of the draftsman's art, and affords no inducement to construe art. II as though it were a work of precision with no overlapping at all between its various sub-paragraphs. Finally, on this point, the language of art. II (B) (b) enables the college to take appropriate steps to increase the numbers of those taking up the vocation of nursing, a very necessary thing, but which, on a strict construction, might be thought to be outside the scope of the language of art. II (B) (a). We are not able, therefore, to treat the rating authority's argument on this point as decisive.

Counsel for the rating authority also contended that art. II (B) (b) is not only wide enough to cover the advancement of the professional interests of nurses, but is so construed by the ratepayers in practice. He referred to exhibit C to the Case, a publication entitled " Royal College of Nursing. Observations and Objectives ". It states under the heading:

> " Conditions of service: The Royal College of Nursing, the largest and most representative professional organisation for nurses, takes a leading part in obtaining for them good economic and social conditions. It does so in the spirit of its royal charter: ' to promote the advance of nursing as a profession in all or any of its branches.' . . . The college takes a leading part in obtaining good and equitable working conditions for the profession, both in the interests of nurses themselves and their service to the community."

This work is, however, bound to be done whichever of the rival constructions of art. II (B) (b) is correct. If the objective is the advancement of the professional interests of members then obviously these activities are the working out of that purpose. If, on the other hand, the objective is the advance of nursing as an art, the same work still has to be done because the art of nursing cannot be advanced by an insufficient force of drudges. At any rate that is a reasonable view. Accordingly, one cannot draw a safe conclusion in this case merely by considering these particular activities, for they are consistent with the contentions of both sides.

---

* Article II (B) (j) was "to do all such other lawful things as may from time to time be conducive to the attainment and furtherance of the above objects or any of them."

We return, therefore, to the actual language of the article. If it simply read " to promote the advance of nursing in all or any of its branches ", then the object would be clearly and admittedly charitable. It would be a purpose beneficial to the community and entirely analogous to the charitable objects specified in the preamble to the Statute of Elizabeth*. It is the addition of the words " as a profession " which cause the difficulty in the present case and give rise to the dispute.

There have been similar controversies before. The charter of the Institute of Civil Engineers, for example, stated its object to be (see *Institution of Civil Engineers* v. *Inland Revenue Comrs.* (5), [1932] 1 K.B. 149):

> ". . . the general advancement of mechanical science, and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer . . ."

The institute held examinations, awarded prizes, maintained a library of great advantage to consulting engineers, laid down rules of professional conduct, and gave members the exclusive right to use distinguishing letters after their name. The institute appealed to the Special Commissioners of Income Tax against the refusal of the Commissioners of Inland Revenue to afford it exemption from income tax as a body of persons established for charitable purposes only. Before the Special Commissioners there was evidence that the expectation of professional advantage probably prompted engineers to join the institute. The report of the council of the institute for 1926-27 also contained this passage (see the report in 16 Tax Cas. at p. 165):

> " The protection of the interests of members of the institute is engaging the council's earnest attention . . . the council wish to assure the members of their intention to resist to the utmost any impairment of the liberty of professional practice now enjoyed by members."

The Special Commissioners, and on appeal ROWLATT, J., decided that one object of the institute was to benefit its members, and accordingly it was not established for charitable purposes only. The Court of Appeal reversed this decision (*Institution of Civil Engineers* v. *Inland Revenue Comrs.* (5), [1932] 1 K.B. 149). Reference was made to an earlier case, *Inland Revenue Comrs.* v. *Forrest* (6) ((1890), 15 App. Cas. 334) where the House of Lords had held that the institute was relieved from duty on annual value under the Customs and Inland Revenue Act, 1885, as being a body corporate whose property was appropriated and applied for the promotion of science, and not for the benefit of civil engineers. There, too, it had been contended unsuccessfully against the institute that its main purpose was to promote the interests of civil engineers. Dealing with this LORD MACNAGHTEN had said in *Forrest's* case (6) (ibid., at p. 354):

> ". . . the question at issue may be stated shortly. Is the property of the Institution of Civil Engineers legally appropriated and applied for the promotion of the science of civil engineering, or is it legally appropriated and applied for the benefit of civil engineers in order to enable them to practise their profession to greater advantage ? "

The majority of the House had answered the first of these questions in the affirmative, and the second in the negative. The Court of Appeal in *Institution of Civil Engineers* v. *Inland Revenue Comrs.* (5) ([1932] 1 K.B. 149) held that the position was still the same. LORD HANWORTH, M.R., and LAWRENCE and ROMER, L.JJ., applied the same test as that laid down by LORD MACNAGHTEN and held that the purpose of the institute was the promotion of the science of civil engineering and not the interests of civil engineers. It was true that civil engineers benefited professionally from their membership but that was simply a consequence of the way in which the institute pursued its charitable purpose.

---

* The Charitable Uses Act, 1601 (43 Eliz. 1 c. 4) the preamble to which is expressly preserved and set out in the Mortmain and Charitable Uses Act, 1888, s. 13 (2); 2 HALSBURY'S STATUTES (2nd Edn.) 916.

In 1952 the House of Lords had to decide whether the Royal College of Surgeons of England was a charity (*Royal College of Surgeons of England* v. *National Provincial Bank, Ltd.* (7), [1952] 1 All E.R. 984). The objects of the college were not set out separately in its charter; they had to be extracted from a recital in it. The relevant words were these:

> " the due promotion and encouragement of the study and practice of the said art and science ",

that is, of surgery. The House of Lords, reversing the decision of the Court of Appeal, held that the words did not include the promotion of the professional interests of surgeons. If those interests were benefited, that was simply a consequence of the work done by the college which was the promotion of the art and science of surgery by education both practical and theoretical. It is right to say that LORD COHEN took a different view, namely, that the disciplinary and " defence " activities of the college were themselves " objects " of the college, not ancillary to the main charitable object, and that the appeal of the college ought therefore to fail. For present purposes the decision is material in that the House of Lords tacitly approved the decision of the Court of Appeal in *Institution of Civil Engineers* v. *Inland Revenue Comrs.* (5), and that LORD MORTON OF HENRYTON regarded it as important that nowhere in the charter of the College of Surgeons could one find a statement that one of the objects of the college was the promotion of the interests of individuals carrying on the profession of surgeons.

Inland Revenue Comrs. v. *Yorkshire Agricultural Society* (8) ([1928] 1 K.B. 611) was also cited to us but need not be dealt with at length. The Crown's allegation in that case, that one of the society's objects was to benefit its members, rested not on the language in which its objects were set forth. but on the rules of the society and the privileges provided for members pursuant to them. A passage from the judgment of ATKIN, L.J., is, however, of importance. He says (ibid., at p. 631):

> " There can be no doubt that a society formed for the purpose merely of benefiting its own members, though it may be to the public advantage that its members should be benefited by being educated or having their aesthetic tastes improved or whatever the object may be, would not be for a charitable purpose, and if it were a substantial part of the object that it should benefit its members I should think that it would not be established for a charitable purpose only. But, on the other hand, if the benefit given to its members is only given to them with a view of giving encouragement and carrying out the main purpose which is a charitable purpose, then I think the mere fact that the members are benefited in the course of promoting the charitable purpose would not prevent the society being established for charitable purposes only. That I imagine to be this case."

This was followed in 1928 by *Geologists' Association* v. *Inland Revenue Comrs.* (9) ((1928), 14 Tax Cas. 271). The actual decision, namely, that it was an association for the benefit of its members which advanced the science of geology only incidentally, is not of importance for present purposes. But in the course of his judgment in the Court of Appeal GREER, L.J., said (ibid., at p. 283):

> " It was interesting to note how those who argued the case for the appellants* found it necessary to contend that there can in law be only two kinds of society, one a society whose object was the cultivation of the interests of its members, and another a society whose sole object is a public or charitable object. It seems to me that there may be associations in between these two, associations with two objects, one being the promotion of an object which is charitable, and the other being the promotion of the

---

* I.e., the taxpayers.

> interests of the individual members of the association. Then it becomes a question which is one of some degree. There may be a question of fact, or it may be a question of law upon the evidence given, as to whether the benefits conferred upon the members of the society are only incidental to the public objects of the society, or whether, on the other hand, they are largely intended, or mainly intended, for the benefit of the members. If you come to the conclusion, as you may in many cases, that one of the ways in which the public objects of an association can be served is by giving special advantages to the members of the association, then the association does not cease to be an association with a charitable object because incidentally and in order to carry out the charitable object it is both necessary and desirable to confer special benefits upon the members. That is the view expressed by ATKIN, L.J., in the case of *Inland Revenue Comrs.* v. *Yorkshire Agricultural Society* (8), and it is a view with which I entirely agree."

Here GREER, L.J., is contemplating two objects, one of which is to give benefit to members of the organisation, and he appears to say that if that is done simply as a necessary and desirable way of carrying out the charitable object, then the organisation would not cease to be an association with a charitable object. In this context of income tax that would mean " a charitable purpose only ".

Bearing all these matters in mind, the question which we have to answer is this: Is the second object of the ratepayers as expressed in art. II (B) (b) of its charter the advancement of nursing or the advancement of the interests of nurses ? This is purely a question of construction of the language used. In favour of the ratepayers' construction this may be said, namely, that the actual words are " the advance of nursing "; but they are followed by the words " as a profession ", and the problem really narrows down to the effect of these words.

What is meant by the advance of some particular calling as a profession ? If, for example, one says that in the last fifty years there has been a striking advance in the profession of accountancy, what idea is conveyed ? Presumably this, that the profession has greatly increased in stature, importance, membership and general esteem, not simply that the fees have gone up, although that might be assumed as a consequence. How then is a profession to be " advanced " in this sense ? The answer is, by service. Demands for more pay and better conditions for those engaged, however loud and persistent, and even successful, will not " advance " the profession in the sense that we have defined; but improvement in the quality and range of services rendered, and the spectacle of constant endeavour to do better, will certainly have that effect. If, then, one finds an organisation one of whose objects is to advance nursing as a profession, there is no great difficulty in interpreting this as meaning to improve the quality and range of the services which nurses give and so to enhance the stature and importance of the nursing profession and the esteem in which it is held. It may well be, of course, that in order to improve nursing services more entrants must be attracted into the profession, and that this in time will mean improvements in pay and conditions; but such improvements will be means, not ends.

One may look at the matter, perhaps, from another angle also. Suppose that the draftsman had submitted art. II (B) (b) to the ratepayers in a form which read " To promote the advance of nursing in all its branches ", and no more, he might reasonably have been asked: Is this language enough to enable us to look after the conditions under which nurses work, for to improve their conditions is one of the most important ways in which nursing can be advanced ? And to that he might reasonably have answered: Well, I will add the words " as a profession ", which will be wide enough to cover the point. In such circumstances the object would still be the advance of nursing.

On the other hand, if the ratepayers' object were to advance the professional interests of nurses they might well say: Why do we wish to speak about the

A advance of nursing? Let us simply say "To promote the interests of all those in the nursing profession ". There is no avowal here in such clear terms of such an object, as there was not in the *Royal College of Surgeons of England* v. *National Provincial Bank, Ltd.* (7) ([1952] 1 All E.R. 984), a fact to which LORD MORTON drew attention (ibid., at p. 995).

If the article now in question is to be regarded as ambiguous so that surrounding
B circumstances may be looked at to help to resolve the ambiguity then two matters would seem to be important: (i) that the ratepayers are a college giving full-time education in the art and science of nursing, and are not an organisation called into being simply to protect and improve the pay and working conditions of nurses; and (ii) that quarter sessions seem to have found that under the article in question the activities of the ratepayers are directed to the raising
C of the standard of nursing, rather than to the promotion of the interests of nurses as an end in itself.

The problem here presented is one where, no doubt, there is room for two views, and in most of the cases we have referred to there was a divergence of judicial opinion. The present case, however, is a somewhat special one, and in the end we have come to the conclusion that on its true construction art.
D II (B) (b) is directed to the advance of nursing, and not to the advance of the professional interests of nurses. That means that this second main object of the ratepayers is charitable.

If that be right, there is no conflict between this decision and the recent decision of the Court of Appeal in *General Nursing Council for England and Wales* v. *St. Marylebone Corpn.* (2). On different facts it was there held that
E the professional benefit of nurses was a main object of the council. For the reasons we have given we do not think it is so in the case of the ratepayers.

Having arrived at this conclusion, we may mention, although the fact is not referred to in the Case, that both sides informed us that ever since 1936 the ratepayers have been regarded by the Commissioners of Inland Revenue as a body of persons established for charitable purposes only, and so exempt from
F income tax. In 1936 the same point as has now come before us was argued* out before the Special Commissioners, who took a similar view to that which we have now taken about art. II (B) (b), and the Crown acquiesced in this decision and have done so ever since. We have not been influenced by this in coming to our own view, but we cannot help thinking that the ratepayers would have been well advised, after the challenge in 1936, suitably to amend the article in question
G so as to make its meaning clear. Perhaps their failure to do so is another piece of evidence showing that the ratepayers do not have as one of their main objects the promotion of the interests of their members as an end in itself. We dismiss the appeal.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.* (for the rating authority); *Charles Russell & Co.* (for the ratepayers).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

---

* The point was argued by Mr. Terence Donovan as counsel for the college.

GRACE RYMER INVESTMENTS, LTD. *v.* WAITE AND OTHERS.

[Chancery Division (Danckwerts, J.), December 12, 16, 1957.]

Mortgage—Possession of mortgaged property—Mortgagor not in occupation—Registered land—Oral tenancy agreed and completed by tenant's entry before mortgagor has completed purchase of property—Purchase completed and mortgage granted on same day—Whether mortgagee entitled to possession as against tenant—Land Registration Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 21), *s.* 19 (1), *s.* 20 (1), *s.* 27 (3), *s.* 70 (1) (*g*).

Rent Restriction—Premium—Rent paid for three years in advance—Whether payment constituted a premium—Whether tenancy rendered invalid by payment of premium—Landlord and Tenant (Rent Control) Act, 1949 (12 *&* 13 *Geo.* 6 *c.* 40), *s.* 2.

Land Registration—Charge—Date of vesting of legal estate—Land Registration Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 21), *s.* 20 (1), *s.* 27 (3).

W. agreed to let to N. at a weekly rent of £2 13s. 6d. a flat in property of which W. intended to acquire the freehold. N. paid to W. £401 15s. and received a receipt, dated Oct. 11, 1955, for that sum " as advance rent ", the receipt stating that it was payable to W. as " stakeholder ", that moneys were deemed to be returnable in the event of non-acceptance of the tenancy by either party, and that at the end of the advance term rent was to be paid weekly or by mutual arrangement. By a contract dated Nov. 28, 1955, W. agreed to purchase the freehold from G.S. for £2,300, of which £1,700 was to be left on mortgage. N. entered into occupation of the flat on Dec. 17, 1955, and subsequently obtained from W. a rent book containing receipts for weekly rent for nearly three years. There was no evidence that the weekly rent exceeded the amount recoverable as rent under the Rent Restrictions Acts. On Dec. 30, 1955, W.'s purchase of the freehold property, the title to which was registered, was completed by execution of a transfer, and on the same day the property was mortgaged by W. by registered charge in favour of the plaintiff. On Jan. 9, 1956, the transfer and the charge were registered under the Land Registration Act, 1925, s. 19 and s. 26. The registered charge did not exclude or limit a mortgagor's power of leasing. In July, 1956, instalments under the charge being in arrear, the plaintiff took proceedings against W. and N. for possession.

Held: the plaintiff was not entitled to possession for the following reasons—

(i) there had been an oral letting by W. to N. which had been completed by N.'s entry before the transfer of the legal fee simple estate to W. which was subject, therefore, to N.'s rights as overriding interests within s. 70 (1) (g) of the Land Registration Act, 1925.

(ii) the plaintiff's title as mortgagee was also subject, by virtue of s. 20 (1) of the Land Registration Act, 1925, to N.'s overriding interests; moreover s. 27 (3) of the Act of 1925 did not have the effect of conferring on the plaintiff a legal estate until, on registration of W.'s transfer and the plaintiff's legal charge, the plaintiff acquired a legal estate by virtue of s. 20 (1) and s. 19 (1) of the Act of 1925.

(iii) although the payment of rent in advance was, in the circumstances, a premium unlawfully demanded by W., contrary to the Landlord and Tenant (Rent Control) Act, 1949, s. 2, that did not render N.'s tenancy invalid.

Hughes v. *Waite* ([1957] 1 All E.R. 603) and *Woods* v. *Wise* ([1955] 1 All E.R. 767) applied.

City Permanent Building Society v. *Miller* ([1952] 2 All E.R. 621) considered.

A [For the Land Registration Act, 1925, s. 20, s. 27 and s. 70 (1) (g), see 20 HALSBURY'S STATUTES (2nd Edn.) 962, 970, 1002.

For the Landlord and Tenant (Rent Control) Act, 1949, s. 2, see 13 HALSBURY'S STATUTES (2nd Edn.) 1097.]

Cases referred to:

B (1) *Woolwich Equitable Building Society* v. *Marshall*, [1951] 2 All E.R. 769; [1952] Ch. 1; 3rd Digest Supp.

(2) *Church of England Building Society* v. *Piskor*, [1954] 2 All E.R. 85; [1954] Ch. 553; 3rd Digest Supp.

(3) *City Permanent Building Society* v. *Miller*, [1952] 2 All E.R. 621; [1952] Ch. 840; 3rd Digest Supp.

C (4) *Woods* v. *Wise*, [1955] 1 All E.R. 767; [1955] 2 Q.B. 29; 119 J.P. 254; 3rd Digest Supp.

(5) *Hughes* v. *Waite*, [1957] 1 All E.R. 603.

(6) *Hitchcock* v. *Waite*, (1957, May 29), The Times, May 30.

(7) *Rush* v. *Matthews*, [1926] 1 K.B. 492; 95 L.J.K.B. 409; 134 L.T. 571; 31 Digest (Repl.) 688, *7796*.

D (8) *Samrose Properties* v. *Gibbard*, (1957, May 3), unreported.

(9) *Gray* v. *Southouse*, [1949] 2 All E.R. 1019; 31 Digest (Repl.) 689, *7804*.

Adjourned Summons.

The plaintiff, Grace Rymer Investments, Ltd., the mortgagee of a dwelling-house, issued an originating summons under R.S.C., Ord. 55, r. 5A, against the mortgagors and those in occupation of the house claiming possession. The occupants claimed to be tenants of the mortgagors. E

P. R. Oliver for the plaintiff, the mortgagee.

The first three defendants, the mortgagors, did not appear.

N. F. Stogdon for the last four defendants, the occupants.

Cur. adv. vult.

F Dec. 16. **DANCKWERTS, J.,** read the following judgment: This is a summons by a mortgagee, asking for an order for possession of certain property known as 8, Church Rise, Lewisham, in the county of London. I am afraid that it is another case of the kind of fraud perpetrated by the Waites (a father and two sons), who have been responsible for other litigation of a similar type. They are the mortgagors, but they have not appeared at the hearing before me. G The pattern of these cases is that the Waites arrange to purchase properties with the aid of a mortgage, and then let off the properties in flats, obtaining some three years' rent in advance from the prospective tenants. When the Waites fall into arrears with their mortgage payments and the mortgagees seek to enforce their security and obtain possession of the mortgaged property, they find themselves faced with the claims of tenants to retain occupation of the H property for which they have paid three years' rent in advance. The situation, therefore, is that either the mortgagees are deprived of the full benefit of their security or the unfortunate tenants will lose the benefit of the considerable sums which they have paid, representing a loss which they cannot easily replace.

In the present case, by a contract dated Nov. 28, 1955, the Waites agreed to purchase the freehold property, 8, Church Rise, Lewisham, from Colonel George I Sinclair (who is the manager of the plaintiff company) for the price of £2,300. By the terms of the contract the vendor agreed to leave on mortgage £1,700 repayable over a period of twelve years at six per cent. interest by monthly instalments of principal and interest of £16 18s., and the mortgage deed was to be in the form already agreed. The National Conditions of Sale were incorporated in the contract, and condition No. 7 provides that if the purchaser is let into occupation of the property before the actual completion of the purchase, then, as from the date of his going into occupation and until actual completion the purchaser shall be the licensee and not the tenant of the vendor.

Completion was to be on or before Dec. 19, 1955, but in fact completion took place on Dec. 30, 1955. The property was registered with absolute title under the Land Registration Act, 1925. On Dec. 30, 1955, a transfer in accordance with the requirements of the Act was executed by Colonel George Sinclair in favour of the Waites, and on the same day a registered charge was executed by the Waites in favour of the plaintiff to secure the principal sum of £1,700 with interest at six per cent. per annum repayable by monthly instalments of £16 18s. over a period of twelve years. There was the usual provision making the whole balance secured immediately payable in case of default in payment of two consecutive instalments. The statutory powers of leasing were not excluded or limited by the charge. Both these transactions were completed by registration in accordance with s. 19 and s. 26 of the Land Registration Act, 1925, on Jan. 9, 1956. In regard to all these matters the same solicitors acted for Colonel George Sinclair and the plaintiff.

On July 12, 1956, instalments being in arrear, the plaintiff started proceedings against the Waites, and on Oct. 10, 1956, obtained judgment against them for £1,655 10s. 10d. and costs. On July 26, 1956, the plaintiff appointed a receiver. As a result of the receiver's attempts to collect rents, the claims of the last four defendants, Mr. and Mrs. Neill, Mr. Frederick Spurling, and Mrs. Alexandrina Hitchen came to the notice of the plaintiff. Mrs. Neill does not claim to be a tenant.

There are three flats in the property. Mr. and Mrs. Neill are in occupation of the ground floor flat. As a result of seeing an advertisement of unfurnished flats, Mrs. Neill went to the Waites' office and was taken to see a flat at 183, Devonshire Road, Forest Hill. She was told that the rent was £2 11s. 6d. a week (inclusive of rates) and was asked for three years' rent in advance. Accordingly she paid by cheque to the Waites the sum of £401 15s., and received from them a receipt dated Oct. 11, 1955, for that sum " as advance rent ". The receipt stated that this was payable to the Waites as " stakeholders " and that moneys were deemed to be returnable in the event of non-acceptance of tenancy by either party. It was also stated that at the end of the advance term, rent was to be paid weekly or by mutual arrangement, and that the £10 10s. letting fee was not payable until the tenant was accepted and received the key. Some time later, however, Mrs. Neill was told by the Waites that she could not have the flat, and was offered the flat at 8, Church Rise. After considerable trouble with the Waites over the preparation of the flat for occupation, during which period Mrs. Neill had a baby, the Neills managed to get into occupation on Dec. 17, 1955. The Neills were told that the rent of this flat would be 2s. a week more than the one previously seen, making a weekly rent of £2 13s. 6d. Mr. Neill wanted some record of their tenancy and after a good deal of trouble he obtained from the Waites on Jan. 30, 1956, a rent book containing receipts for weekly rents of £2 13s. 6d. for three years, but the last six entries were cancelled, as Mr. Neill refused to pay any more money down in respect of the increased amount of the rent due to the extra 2s. a week.

As a result also of an advertisement Mr. Spurling called on the Waites on Aug. 22, 1955, and was shown a flat at 6, Sydenham Park which was said to be available at a rent of 36s. per week. Mr. Spurling paid a deposit of £25 and on Aug. 26, 1955, he paid a further sum of £290 18s., making a total of £315 18s. All this was paid in cash, and Mr. Spurling was given a receipt in similar terms to that given to the Neills. Mr. Spurling's wife, however, did not like the flat, and subsequently Mr. and Mrs. Spurling were shown a number of other flats. Eventually they were shown a flat on the first floor of 8, Church Rise, Lewisham, for which they were told the rent would be a bit more. Mr. Spurling did not object to that but said that he could not pay any more in advance and so the Waites agreed to reduce the period for which the rent was paid in advance. After completion of decorations Mr. and Mrs. Spurling managed to get into occupation on Dec. 16, 1955. Subsequently they were given a rent book showing that Mr. Spurling had paid £315 18s. for rent in advance at the rate of 49s. 6d. per week inclusive of rates from Dec. 16, 1955.

Mrs. Alexandrina Hitchen, as the result of the Waites' advertisement, telephoned and was given the Waites' address. Accordingly her sister, Mrs. Taylor, went there and was taken by one of the Waites to 8, Church Rise and was shown a flat, the rent of which was to be £2 0s. 6d. per week inclusive, three years' rent being asked in advance. Mrs. Taylor paid £100 to the Waites as a "holding deposit" on behalf of her sister. Mrs. Hitchen called next day, Oct. 19, 1955, and was shown the flat (which was on the top floor) and was told that she could occupy it when it was completed—in a month or six weeks. Accordingly she gave the Waites a cheque for £215 18s., and was told there would be a letting fee of £10 10s. when she received the key. She received the key about a month later by post, but she had considerable trouble in getting the Waites to complete the decorations. Finally, with the assent of the Waites as a result of an ultimatum from Mrs. Hitchen, it appears, Mrs. Hitchen moved her furniture into the flat on Dec. 27, 1955, and on Dec. 28 she went in and spent a night there. She then fell ill, however, and went to her sister to be looked after. When, later, she received a rent book, it contained receipts for a weekly rent of £2 0s. 6d., starting on Dec. 31, 1955, and ending with an entry for Dec. 24, 1958.

The question arises, therefore, whether these defendants have tenancies of their respective flats, which are effective against the claim of the plaintiff to an order for possession of the property.

It is to be observed, first of all, that this is not a case where the question depends on the exercise by the mortgagors of the statutory powers of leasing conferred on mortgagors in possession by the Law of Property Act, 1925, s. 99. In my view, it is clear that, in the case of each of the three tenants, there was an oral letting completed by entry on the part of the tenant before the date of the mortgage to the plaintiff. This means, of course, that the letting was before the Waites' title was completed by the conveyance of the legal fee simple to them by Colonel George Sinclair on Dec. 30, 1955, which was the date also of the mortgage. But, as the tenants were in possession before that date, there was a completion of their title, when the landlords received the legal estate, which preceded the mortgage to the plaintiff: see *Woolwich Equitable Building Society* v. *Marshall* (1) ([1951] 2 All E.R. 769); *Church of England Building Society* v. *Piskor* (2) ([1954] 2 All E.R. 85). I am satisfied that the tenancies were, in each case, completed by entry before Dec. 30, 1955. The facts that Mrs. Hitchen left the day after her entry because of her illness, and was charged no rent for the few days before Dec. 31, 1955, seem to me to be immaterial. Unless, therefore, the payment of the rent in advance created some objection, it seems to me that the tenancies were overriding interests prevailing over the plaintiff's title under the Land Registration Act, 1925, as provided by s. 20 (1) of the Land Registration Act, 1925.

A point, however, has been taken on behalf of the plaintiff on the terms of s. 27 of the Land Registration Act, 1925. Section 19 (1) of the Act provides that the transfer of the registered estate in the land or part thereof shall be completed by the registrar entering on the register the transferee as the proprietor of the estate transferred, but until such entry the transferor shall be deemed to remain proprietor of the registered estate. Section 25 provides for the proprietor of any registered land creating a charge over the land by deed. Section 26 (1) provides that the charge shall be completed by the registrar entering on the register the person in whose favour the charge is made as the proprietor of such charge. Section 27 (1) provides that a registered charge shall, unless made or taking effect by demise or sub-demise, take effect as a charge by way of legal mortgage. Sub-section (3) of this section provides that any such demise or sub-demise or charge by way of legal mortgage shall take effect from the date of the delivery of the deed containing the same, but subject to the estate or interest of any person (other than the proprietor of the land) whose estate or interest (whenever created) is registered or noted on the register before the date of registration of the charge. The argument is, as I understand it, that the result produced by s. 27 (3) is that until registration the Waites had not got the legal estate, but the plaintiff, as mortgagee, had got a legal charge from the date of execution of the mortgage. This argument has not been put forward in any previous case, so far as I know, and it does not seem to me to be sound. I do not think that the subsection is dealing with the matter of legal estates or interests, but with the form of a registered charge, and is simply designed to secure that the demise or subdemise (or the equivalent rights in the case of a charge by way of legal mortgage) begin from the date when the charge is executed. In any case, the tenancies of the defendants in possession began prior to the date of the execution of the charge and so would, if not invalid, be effective against the plaintiff under s. 20 (1) of the Act.

To complete the references to the Land Registration Act, 1925, the enumeration of overriding interests in s. 70 should be mentioned. This includes (s. 70 (1) (g)):

> " The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where inquiry is made of such person and the rights are not disclosed."

There is also a reference in s. 70 (1) (k) to " leases for any term or interest not exceeding twenty-one years, granted at a rent without taking a fine ". " Lease " includes a tenancy*, but I think that this provision must be aimed at terms created by a document, as an oral letting completed by possession appears to be covered more appropriately by the previous provision, para. (g), which I have mentioned.

The principal argument on behalf of the plaintiff was that the payment of the large sums, supposed to represent rent in advance, were, in fact, premiums and were rendered illegal by the provisions of the Rent Restrictions Acts. Therefore, it is said that the tenancies of the defendants were unlawful and cannot prevail as the defendants who are in occupation are parties to the illegality. There are two propositions therefore: (i) the payments were premiums, and (ii) being unlawful exactions by the landlords (the Waites) the tenants have no lawful tenancies. It should be observed that there is no evidence that the weekly rents of £2 13s. 6d., £2 9s. 6d., and £2 0s. 6d., were in excess of the amounts recoverable as rent in view of the restrictions of the Rent Restrictions Acts. In this case, at any rate, therefore, it would appear that the Waites were not attempting to recover excessive rents. They were, presumably, desirous of anticipating the rents payable over a period, with the object of producing lump sums, either in order to finance their purchase operations, or with the object of making a quick fortune and a departure with their gains.

It is necessary now to examine the authorities, some of which involve other operations of the Waites. In *City Permanent Building Society* v. *Miller* (3) ([1952] 2 All E.R. 621), the Court of Appeal had to consider a case where a landlord (who purchased and mortgaged registered land) exacted three years' rent in advance from a prospective tenant. The circumstances, however, were not similar in certain important respects to those of the present case. By a document of Oct. 16, 1950, the landlord acknowledged the receipt of £228, being three years' rent at 30s. per week in advance and also agreed to grant to the tenant an unfurnished tenancy of the premises

> " for three years from Oct. 16, 1950, and thereafter on a weekly basis, at a rental of 30s. per week."

The tenant, however, did not go into occupation of the premises until Jan. 15, 1951. By that time the landlord had completed his purchase of the premises, and a mortgage of them to the society. The mortgage was dated Jan. 4, 1951, and the landlord was registered as proprietor of the premises and the society were registered as owner of a charge on Jan. 11, 1951. In order to claim the benefit of an "overriding interest", it is plain that the tenant was compelled to rely on s. 70 (1) (k) as a lessee at a rent without a fine. The decision of the Court of Appeal was against the tenant on the ground that at best the tenant had merely an executory agreement for a lease and not anything effective to create a term. It was unnecessary to decide whether the sum of £228 was a premium. Sir Raymond Evershed, M.R., and Jenkins, L.J., therefore, expressed no opinion on the point. Sir Raymond Evershed, M.R., said (after referring to certain statutory definitions) (ibid., at p. 624):

---

* See the Land Registration Act, 1925, s. 3 (x); 20 HALSBURY'S STATUTES (2nd Edn.) 946.

> " . . . when regard is also had to the ordinary sense of the words, there is much to be said for the view that the sum of £228, expressed to be an advance payment of 30s. a week rent over three years, is neither a 'fine' nor a 'premium'. On the other hand, it was obviously a device, expressed in a particular way, on [the mortgagor's] part to get a lump sum, and to substitute a lump sum for a recurring weekly payment during the period from Oct. 16, 1950, to Oct. 16, 1953, and I certainly do not wish to lend any encouragement to the consequences which might flow from a decision of this court that a lump sum, paid like this so as to cover the financial obligations of the tenant for three years, was not capable of being regarded as a fine or premium, and thereby to encourage persons of [the mortgagor's] calibre to enter into transactions of this sort. I prefer, therefore, to express no view one way or the other on the particular point which commended itself to the learned judge, since I do not think it is necessary that I should."

Jenkins, L.J., also reserved his opinion on the point. Hodson, L.J. (ibid., at p. 629) expressed an opinion more favourable to the view that the payment was a premium or fine, and added that the tenant then could never have an "overriding interest" consisting of an equitable right to specific performance, because the exaction of a premium by the mortgagor would itself be a criminal offence, and the tenant would be a party to the crime (see the Landlord and Tenant (Rent Control) Act, 1949, s. 2). The question whether the tenant was affected by the illegality was not argued, it would seem, and I infer that the learned lord justice assumed that the illegality would affect the tenant as well as the landlord, without having considered the matter more fully. I have had, however, the advantage of the careful argument on this point of counsel for the persons in occupation.

Woods v. *Wise* (4) ([1955] 1 All E.R. 767) is a decision of the Court of Appeal, on a different kind of case, but it incidentally brings in the question of what is a premium. The standard rent of a flat was £263 10s. a year. The tenant did not want to pay so high an annual sum and preferred to pay an annual rent of £190 and a sum of £850 (described as "commuted rent") which represented the balance of the standard rent, discounted for payment in advance, and was granted a lease for fourteen years. The tenant then attempted to recover the £850 as a premium paid contrary to the provisions of the Landlord and Tenant (Rent Control) Act, 1949, s. 2 (1). The action failed because the tenant failed to show that the landlord had "required" payment of the sum as a "condition" of the granting of the lease. Romer, L.J. (ibid., at pp. 782, 783), made some observations indicating his view that while in certain circumstances and to a limited extent the demand of some prepayment of rent might be lawfully made by a landlord, the requirement of payment of substantially the whole of the standard rent in advance as a condition of granting a fourteen or twenty-one years' lease or some other term of years would be within the scope and object of s. 2 of the Act of 1949 and unlawful.

Hughes v. *Waite* (5) ([1957] 1 All E.R. 603), was a case before Harman, J., concerning the operations of the same Waites, two of whom were stated to have fled the country and the third to be ill. The circumstances of this case differed from those of the present case, in that (i) the bargains were made before the Waites acquired any interest in the property and there was no evidence of any contract by the Waites to purchase before the date of completion which was Oct. 26, 1955, when a registered land charge was also executed; and (ii) though the agreements with the alleged tenants were made before the date of the charge, they were not let into occupation until Oct. 31, 1955, which was after the date of the charge, though before its registration on Nov. 14, 1955. The rights of the parties, therefore, depended on the provisions of s. 99 (6) of the Law of Property Act, 1925, which authorises a mortgagor in possession to make leases at " the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken ". HARMAN, J., held that the alleged tenants were mere occupiers on sufferance, and also that they had no valid tenancies at a rent as required by s. 99 (6) of the Law of Property Act, 1925, since, although the amounts were calculated by reference to so many weeks' or years' rent, no periodical payment of rent was prescribed; and the payments were foregifts or fines.

Hitchcock v. *Waite* (6) ((1957), The Times, May 30), before VAISEY, J., was another example of the methods of these Waites. Unfortunately the case appears only to have been reported (and, of course, in an abbreviated form) in " The Times " newspaper of May 30, 1957. It is difficult to discover the exact facts and the precise reasons which led to the conclusion reached by the learned judge. It appears that in November, 1955, the plaintiffs agreed to sell to the Waites the property for £2,000, of which £1,330 was to be left on mortgage. The transaction was completed in February, 1956. Meanwhile the Waites agreed to let the three flats in the property to three persons who paid sums equivalent to three years' rent in advance. Apparently, unlike the situation in the present case, the rents must have been calculated at rates above the standard or recoverable rents, as one of the three occupiers obtained a judgment in the county court for the recovery of a portion of the sum paid by him, though this judgment was never satisfied. VAISEY, J., held that the rent paid in advance was plainly a premium and so unlawful under the provisions of the Rent Restrictions Acts. VAISEY, J., is reported as saying that its exaction, moreover, was a criminal offence by the Waites to which each of the so-called tenants would be a party, although he added that he could not fairly attach any moral blame to them. In this I infer that the learned judge was merely following the assumption made by HODSON, L.J., in *City Permanent Building Society* v. *Miller* (3), and I think it is probable that no argument was addressed to him on this point.

These are the most relevant cases, but I should add that the Court of Appeal seem to have been loth to lay down any firm principles in cases of this character, and have indicated that each case may well depend on the particular facts: see, for instance, *Rush* v. *Matthews* (7) ([1926] 1 K.B. 492); *Samrose Properties* v. *Gibbard* (8) (1957, May 3, unreported).

I now turn to consideration of the two questions which I have mentioned, in regard to the facts of this case. The first is, were the sums paid premiums? I think that it cannot in every case be requiring a premium or unlawful to require payment of rent in advance. After all, it is well known that rents are often required to be paid in advance where the circumstances suggest that the tenant is not a very stable character. It may well be, however, that the demand of several years' rent in advance cannot be justified on any such ground. At what point is the line to be drawn ? I apprehend that one test may be that if the demand is obviously a device to get over some provision of the law, and not merely a bona fide attempt to prevent the landlord being deprived of the ability to recover his rent, the transaction may be scrutinised and be shown to be something other than what it is called. In the circumstances of the present case I am prepared to come to the conclusion that the payments were, as ROMER, L.J., said in *Woods* v. *Wise* (4), within the scope and object of the Landlord and Tenant (Rent Control) Act, 1949, s. 2, and were premiums unlawfully demanded by the landlords. If that

A is so, then it is plain that the landlords have committed an offence under the Act of 1949; but does it follow that the tenancies of the tenants are thereby rendered invalid, so that they can be turned out and be deprived of the property which they had expected to enjoy ? In my view, a consideration of the terms of the Rent Restrictions Acts leads to a different conclusion. First of all, I should state what I find to be the true effect of the dealings between the Waites and the tenants in B the present case. In my view, the effect was that the Waites were saying: "We have unfurnished flats to offer at weekly rents, inclusive of rates, but you will have to pay three years' rents in advance". The prospective tenants, desperate to obtain accommodation, accepted this demand and handed over lump sums of money to the Waites. Eventually they were let into occupation of flats, but not until then, or just before, were the weekly rent, the date of commencement C of the tenancy and the other terms of the tenancies settled. By that time the Waites had an interest in the property under their contract to purchase. Mr. Neill and Mr. Spurling actually paid down their sums of money in regard to other flats, and only Mrs. Hitchen had the same flat in view all along, but I do not think that there is any materiality in this difference.

Secondly, I would observe that the Rent Restrictions Acts are indubitably D Acts passed for the protection of tenants and to restrain the demands of landlords. The material provisions of the Acts appear to be these. The Landlord and Tenant (Rent Control) Act, 1949, s. 2 (1) (which replaced the repealed provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 8 (1)), provides:

> "A person shall not, as a condition of the grant, renewal or continuance of a tenancy to which this section applies, require the payment of any premium E in addition to the rent",

and sub-s. (6) provides:

> "A person requiring any premium in contravention of this section shall be liable on summary conviction to a fine not exceeding £100, and the court by which he is convicted may order the amount of the premium, or so much thereof as cannot lawfully be required under this section, to be repaid F to the person by whom it was paid."

It is clear that it is the act of the landlord which is forbidden and is an offence under these provisions. But the Acts treat the tenant as a victim, as s. 2 (6) of the Act of 1949, as well as the following provisions, show. Section 2 (5) of the Act of 1949 gives the tenant the right to recover the amount of a premium which could G not lawfully have been required. Section 14 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, makes sums unlawfully obtained by a landlord recoverable from the landlord, and provides that any such sum may, without prejudice to any other method of recovery, be deducted by the tenant from any rent payable by him to the landlord. It has been held that a tenant may recover a premium payment which he has made to a landlord, although he H was aware that the payment of a premium was unlawful: see *Gray* v. *Southouse* (9) ([1949] 2 All E.R. 1019), in which DEVLIN, J., considered the matter very fully. It is clear that these Acts do not treat the tenant as tainted by the offence committed by the landlord, and regard him as a person to be protected.

In the result, in my view, if the tenants in the present case were compelled unlawfully to pay a premium to the Waites, this does not affect the validity of I their tenancies, and they are entitled to deduct from their rents the amounts which they have paid, unless they elect to attempt to recover from the Waites the proportion referable to the future (which presumably is unlikely).

Accordingly, I am unable to make an order for possession in favour of the plaintiff.

Summons dismissed.

Solicitors: *A. Kramer & Co.* (for the plaintiff); *Humphrey Razzall & Co.* (for the last four defendants).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

GORULNICK *v.* GORULNICK.

[COURT OF APPEAL (Hodson and Morris, L.JJ.), November 29, 1957.]

Injunction—Husband and wife—Wife's petition for divorce—Matrimonial home belonging to wife—Whether entitled to exclude husband—Married Women's Property Act, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 12, *amended by Law Reform* (*Married Women and Tortfeasors*) *Act,* 1935 (25 *&* 26 *Geo.* 5 *c.* 30), *s.* 5 *and Sch.* 1.

A married woman who had presented a petition for divorce on the ground of her husband's cruelty applied for an injunction to restrain her husband from living or remaining in the matrimonial home, which belonged to the wife, and in which they were both still living. She claimed that she was afraid of her husband and that there was a dispute as to when intercourse last took place between them. The husband denied the wife's allegations of cruelty; and it was not a case in which it was possible, before the hearing, to form a view on the issue of cruelty. The judge in his discretion refused the application. On appeal,

Held: the judge's discretion had been properly exercised and the case was not one in which an injunction should be granted, since, (i) the husband had not left the matrimonial home nor was it shown that he desired to remain in it in order to bring pressure to bear on the wife to leave it, (ii) he denied the allegations against him and the issue could not now be resolved, (iii) s. 12 of the Married Women's Property Act, 1882, did not enable the wife to exclude the husband on the ground that the home was hers, for regard must be had not merely to the wife's proprietary rights but also to the fact that the husband had not lost the matrimonial right of consortium.

Appeal dismissed.

[As to injunctions against a spouse in matrimonial proceedings, see 12 HALSBURY'S LAWS (3rd Edn.) 477, para. 1067; and for cases on the subject, see 27 DIGEST (Repl.) 258-260, *2087-2101*.

For the Married Women's Property Act, 1882, s. 12, as amended, see 11 HALSBURY'S STATUTES (2nd Edn.) 802.]

Cases referred to:

(1) *Symonds* v. *Hallett,* (1883), 24 Ch.D. 346; 53 L.J.Ch. 60; 49 L.T. 380; 27 Digest (Repl.) 258, *2090.*

(2) *Shipman* v. *Shipman,* [1924] 2 Ch. 140; 93 L.J.Ch. 382; 131 L.T. 394; 27 Digest (Repl.) 258, *2091.*

(3) *Silverstone* v. *Silverstone,* [1953] 1 All E.R. 556; [1953] P. 174; 3rd Digest Supp.

(4) *Teakle* v. *Teakle,* [1950] W.N. 452; 27 Digest (Repl.) 259, *2101.*

Appeal.

The wife appealed against an order of WALLINGTON, J., made on Oct. 9, 1957, refusing an application by the wife for an injunction restraining her husband from living or remaining in the matrimonial home at 7, Wren Avenue, London. The wife had presented a petition for divorce on the ground of cruelty.

Gerald Gardiner, Q.C., and *Eric Myers* for the wife.

K. B. Campbell for the husband.

HODSON, L.J.: This is an appeal from an order of WALLINGTON, J., dated Oct. 9, 1957. The application was by the wife, who had presented a petition for divorce on the ground of cruelty, for an injunction restraining her husband from living in or remaining with her in the house, 7, Wren Avenue, which belonged to the wife. The petition is dated Sept. 4, 1957, and an answer has been put in by the husband denying that he has been cruel to his wife. Affidavits have been sworn both by the wife and by the husband and also by a doctor who has sworn that what the wife says in her affidavit and in her petition

A is consistent with the condition of health which she, the doctor, found and might fairly be attributed to the husband's conduct. But the issue of cruelty has yet to be decided, and it is not contended that, on this interlocutory application, this court can arrive at any conclusion as to the merits of the case. Counsel for the wife has not shrunk from contending that, as a matter of law, the house being the wife's house and not the husband's, she is entitled to come to the court and B ask for an order restraining the husband from entering it.

The first case to which we were referred is a decision of the Court of Appeal—*Symonds* v. *Hallett* (1) ((1883), 24 Ch.D. 346). In that case the husband and wife had been physically apart for some time. Having had proceedings instituted against him for divorce or judicial separation, the husband claimed the right to use the wife's house when and as he thought fit, not for the purpose of consorting C with his wife, but for his own purposes; and an interim injunction having been granted by CHITTY, J., there was an appeal to the Court of Appeal by the husband. By his judgment, COTTON, L.J., showed that he regarded the problem as a troublesome one and that he was reluctant to be taken as saying that in circumstances such as those the husband was in the position of a stranger and as such would be excluded from the wife's house. He said (ibid., at p. 351):

D

> "Expressions have been used that she is entitled to be there in all respects as a feme sole and to be protected against her husband's acts as if he were a stranger. That is very true as regards the property. But is the husband to be considered a stranger because the property is vested in her for her separate use? That is a point which those who assert that the husband is to be considered a stranger must prove."

E

On the facts of that case he was of the opinion that the husband could not be considered as desiring to use or to enter the house as a husband to enjoy the society of his wife or to consort with his wife, and therefore he held that an injunction could stand. BOWEN, L.J., who was of the same opinion, said that in those particular circumstances he thought the injunction could stand (ibid., F at p. 353):

> "For this reason: the husband is not really asking for the benefit of the wife's society. He has no wish for that . . . The true effect of the affidavit . . . is this, that he complains of not being allowed the proprietary use of the house."

Therefore, the lord justice thought it was more convenient in those circumstances, G the wife being clearly entitled to the house, that the injunction should stand.

A later decision of the Court of Appeal which is often referred to in this class of case was *Shipman* v. *Shipman* (2) ([1924] 2 Ch. 140). In that case no petition for divorce or judicial separation was pending. The wife owned the house and was anxious to make a living out of it by taking in lodgers and she said that she had been ill treated by her husband. She succeeded before RUSSELL, J., in H obtaining an interim injunction restraining her husband from entering the house or interfering with her possession. There, again, the same problem arose. Section 12 of the Married Women's Property Act, 1882, which had been passed before that case, provides that:

I

> "Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort."

The case of *Symonds* v. *Hallett* (1) was referred to and, without reading the judgments, it is clear to my mind that the members of the court were of opinion that, on the true construction of s. 12, notwithstanding the wide language of the

Act, the husband could not be properly treated as if he had been a stranger, A having regard to the special relationship which exists between husband and wife in that they have a duty to live together. Nevertheless, all the members of the court were agreed that the injunction should stand. ATKIN, L.J., and also SIR ERNEST POLLOCK, M.R., referred to the fact that substantial acts of cruelty were established even though only by affidavit against the husband because of the admissions that he had made, and, therefore, they were not disposed to B accept the argument which is always addressed to the court in these cases that to accede to such an application is tantamount to pronouncing a decree of separation between the parties for the time being. On the facts of the case it was held that the learned judge had exercised his discretion rightly. SARGANT, L.J., pointed out that the remedy was a special remedy, a discretionary remedy ([1924] 2 Ch. at p. 147): C

> "The husband's conduct has been such that he has apparently lost the right to the matrimonial consortium, and therefore he is in no better position than a stranger, and it follows that the injunction was rightly granted."

ATKIN, L.J., referred to the strength of the case against the husband from the D point of view of admitted violence and did not emphasise the need for protection of the wife's business, a business which she proposed to carry on of taking in lodgers and had carried on previously for some years in the house which she owned.

I am satisfied that nothing in that section enables the wife as of right to exclude her husband from her property; nor is the position different when she has E presented a petition. As the petition had not been heard but was pending, I think that, for the purpose of this appeal, it must be regarded as a bona fide petition in which the wife is claiming the relief of the court on the ground which she states. The court has also to take into account the fact that the petition is being disputed by the husband, who is denying the allegations, and that there is a conflict of evidence which cannot now be resolved. The fact is that now and F at all material times the parties have been living together under the same roof, the roof being the wife's roof, and the husband has refused to go. In such a situation it cannot be doubted that the court has a discretion to intervene, and has often done so in the past, notwithstanding the fact that it cannot arrive at any conclusion on the issue of cruelty. Many instances can be given where the court would naturally intervene; if, for instance, there was difficulty in the way G of the sale of the house; and illustrations can be found in the reported cases which counsel for the wife referred to, in which a successful application has been made by one spouse to exclude the other spouse from the matrimonial home, where the court has thought that the status quo should be maintained, e.g., cases where the husband has left the matrimonial home belonging to the wife before the proceedings were instituted and has come back to it perhaps as a tactical H move with a view to defeating the wife's claim or to place himself, as he thought, in a more advantageous position as opposed to her. But that is not this case. Here the parties have continued to live under the same roof. On the facts as established there has been no absence by the husband from the house for any substantial length of time; no question of the husband having gone away and lived somewhere else and having attempted to return in order to put himself in a I position in which he is or may be thought to be wrongly disturbing the status quo. These circumstances were considered by the learned judge, who in the exercise of his discretion decided that it was not a case in which he ought to intervene by injunction. It is not contended here that he took into account matters which he ought not to have taken into account in exercising his discretion or left out of account matters which he ought to have taken into account, e.g., such as the prospect of reconciliation or the likelihood that there would never be a reconciliation. On the one hand, the wife has contended throughout that she is in

A all circumstances determined never to live with her husband again. The husband takes the contrary view. The argument has been put forward for the wife that, unless her application is granted, the effect will be to force her to live in the house while her petition is pending or to leave; and it is said that, if she is not to obtain relief by way of injunction, she will have to leave, and that, by resisting the application or requesting to live in the house, the husband is putting pressure
B on her to leave it. I do not myself think it right to arrive at that conclusion.

There have been reported cases (two of them decisions of Pearce, J., *Silverstone* v. *Silverstone* (3) ([1953] 1 All E.R. 556) and *Teakle* v. *Teakle* (4) ([1950] W.N. 452), in which the husband had been away from home in circumstances which are not altogether clear from the statement of facts and had returned home at or about the time when proceedings were instituted, and the learned
C judge took the view on the facts that in effect pressure was exercised by the husband on the wife to leave the matrimonial home. *Silverstone* v. *Silverstone* (3) was an extreme case, because the home was actually the flat of the husband and the wife had no proprietary interest in the property at all. But, without in any way seeking to cut down the discretion of the court to make an appropriate order in the right case which may involve one spouse ceasing to live under the
D same roof as the other, I do not see any circumstances in this case which would warrant this court in interfering with the exercise of the discretion by the learned judge who refused to make such an order. I think that the appeal fails and should be dismissed.

MORRIS, L.J.: I agree. Counsel for the wife does not put her case as being based entirely on her ownership of the house. He says that the wife is
E desirous of having an injunction for two reasons: first, because she is afraid of her husband, and, secondly, to protect her from the risk of its being said in the proceedings that there had been condonation. Counsel points to a conflict of fact shown by the two affidavits. The husband says that intercourse took place at the end of August, 1957; the wife says that intercourse last took place in August, 1956. So it is submitted that the wife would be gravely embarrassed for those
F two reasons if she were under the same roof as her husband. It seems to me, therefore, that this case is not based on the wife's proprietary rights. A wife's proprietary rights must clearly in some cases be protected. In *Symonds* v. *Hallett* (1) ((1883), 24 Ch.D. 346) a leasehold house was settled on the usual trusts for the wife for life and for her separate use, and certain articles such as furniture and plate were also held on trust for her. The husband and wife lived
G in the house together for some time. They then ceased to cohabit. The wife began proceedings for divorce. Then the wife commenced an action in the Chancery Division claiming administration of the trusts of the settlement, and she claimed an injunction. An interim injunction was granted by Chitty, J., on the motion of the wife to restrain her husband from entering on or taking or continuing in possession of the leasehold house and from removing articles of
H furniture or plate from it. The wife deposed that the husband had for about twelve months ceased to reside at the house, but went there usually on Thursdays and Fridays and slept one night a week; and she said that he had already taken away some of the settled plate, furniture, chattels and effects. When Cotton, L.J., agreed in dismissing the husband's appeal against the interim injunction he said (ibid., at p. 351):
I

> "I concur in the view that this injunction ought not to be discharged, on this ground, that, looking at the circumstances of the case and at the facts which we have before us, and the affidavit of the husband, he cannot be considered as desiring to use or to enter this house as a husband, to enjoy the society of his wife, or to consort with her as his wife. Therefore, although I must not, by concurring in the view that this injunction shall stand, be considered as in any way favouring the view of it which has been urged in the arguments, yet I think that under the circumstances the best

> course till the hearing of the case, when the matter can be decided, is not to discharge the injunction which has been granted."

It seems to me that there was a clear separation there between the wife's proprietary rights and the matrimonial position: it was said the husband had for some time voluntarily abandoned his privilege of consorting with his wife.

Approaching the matter on the basis on which counsel for the wife has made his submissions, it seems to me this case does not therefore depend on the fact that the wife is the owner of the house. I agree entirely that, pending the hearing of a petition, the court has wide powers to make orders that seem right, sometimes to preserve the interim position and sometimes having the effect of restraining the right of one spouse to live under the same roof as the other. In the present case, however, it does not seem to me that the learned judge would have been warranted in granting an injunction. It would be sufficient to dispose of this appeal to say that it is not shown that the learned judge in any way erred in the exercise of his discretion. Here, however, is a case in which the husband has not in fact left the matrimonial home (which was a feature in so many of the cases to which we have been referred), in which he denies the allegations against him and in which it is not possible, I think, for the court to form any view until the matters in dispute can be heard and determined. It does not seem to me that this is a case in which the court would have been warranted in granting an injunction which would force the husband to leave what has been the matrimonial home.

Appeal dismissed.

Solicitors: *Howard, Kennedy & Co.* (for the wife); *Franks, Charlesly & Leighton* (for the husband).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

TATE *v.* SWAN HUNTER & WIGHAM RICHARDSON, LTD.

[COURT OF APPEAL (Lord Denning, Hodson and Morris, L.JJ.), December 12, 1957.]

Factory—" Floor "—Opening—Planking covering part of one level of a gantry—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 25 (3).

A gantry carrying cranes in a shipyard had planks laid across the steelwork at various levels, so that workmen could walk on them to get about the gantry. The planks had gaps in them where steelwork, ladders, stanchions, etc., passed through their level, and did not cover the whole of any one level. A workman, standing on one of these planks, fell through a space between the edge of the planking and a girder to the ground eighty feet below and was killed. The space was not fenced and normally there was a ladder in it but on this day the ladder had been removed. On a claim by a dependant of the workman for damages in respect of his death, it was contended that the planks constituted a " floor " and that the space through which he had fallen was, therefore, an opening in a floor which, by s. 25 (3) of the Factories Act, 1937, was required to " be securely fenced ".

Held: the workman's employers were not in breach of s. 25 (3) because the word " floor ", construed in its ordinary and natural meaning, means something within walls, indoors, on which people walk or stand, and the planking through which the workman fell was not, therefore, a " floor ".

Quaere, whether in any event a space at the edge of a " floor " could be an " opening in " that floor (see p. 153, letters C and I, post).

Appeal allowed.

[As to the obligation to fence openings in floors, see 17 HALSBURY'S LAWS (3rd Edn.) 85, para. 142, text and note (p).

For the Factories Act, 1937, s. 25 (3), see 9 HALSBURY'S LAWS (2nd Edn. 1018.]

Cases referred to:

(1) *Harrison* v. *Metropolitan-Vickers Electrical Co., Ltd.*, [1954] 1 All E.R. 404; 3rd Digest Supp.

(2) *Bath* v. *British Transport Commission*, [1954] 2 All E.R. 542 ; 3rd Digest Supp.

Appeal.

The defendants, the employers of a deceased workman, appealed from the decision of DONOVAN, J., dated May 21, 1957, awarding the plaintiff, the dependant mother and administratrix of the deceased, £1,250 damages in respect of his death and £47 12s. 6d. funeral expenses under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934. The facts appear in the judgment of LORD DENNING.

R. H. Forrest, Q.C., and *Norman Harper* for the employers, the defendants.

G. S. Waller, Q.C., and *R. P. Smith* for the mother, the plaintiff.

LORD DENNING: On Aug. 4, 1953, the deceased workman, an electrician aged twenty-three, was employed in a shipyard in connexion with the maintenance work during the holiday period. He was engaged on a huge steel structure which carried cantilever cranes and also some overhead cranes. At a great height above the ground there were some longitudinal gantries and transverse gantries. Along those gantries there were placed planks by means of which men could get from one part of the structure to the other for their work. These planks were not continuous in straight lines; they had to go round various parts of the steelwork at places where there were ladders, stanchions and so forth.

On this particular day the deceased had done some electrical work on a cantilever crane and had come down to the middle of three levels, from which he watched the working of the cantilever crane. He was standing on some planks which were on the middle level on the transverse gantry, and he gave a signal to the crane driver apparently indicating that the crane was working properly. Nobody knows exactly what happened then, but it appears that he must have stepped back and fallen through a space where there was no planking. The space enclosed some stanchions: and it also enclosed a wooden ladder which had been temporarily removed for the maintenance work. If conditions had been as usual, he would have fallen on to the lower level gantry, where ordinarily there would be other planks, but on this particular day one of those planks had been taken away because the painters had to do their work. Unfortunately, therefore, he fell not three or four feet to the gantry below but eighty or more feet to the ground below and was killed. He was not married but his mother depended on him to some extent, and so she has brought this action claiming damages for his death.

It is not suggested that the employers were guilty of any negligence at common law at all. They conducted this yard in the way that other shipyards are conducted, quite efficiently and carefully. The only ground of claim that is made against them is under the Factories Act, 1937. Originally the case was put on the footing that the deceased had been knocked off by the movement of the crane, but that is no longer pursued. The only ground pursued is that this planking along the gantry was a floor and that the space through which he fell was an opening in the floor. It is said that it ought to have been fenced, because s. 25 (3) of the Factories Act, 1937, says:

> " All openings in floors shall be securely fenced, except in so far as the nature of the work renders such fencing impracticable."

It would have been quite practicable to have put an iron rail up around this place, and, therefore, if it was an opening in a floor it ought to have been securely fenced. The learned judge has held that it was a floor. There is an appeal to this court by the employers, who say that this plank-run on the gantry, was not a " floor " within the meaning of the Act.

Section 25 (1) provides that

> " All floors, steps, stairs, passages and gangways shall be of sound construction and properly maintained",

and sub-s. (3) is concerned with openings in floors only. There have been two cases in this court where this section has been considered: one is *Harrison* v. *Metropolitan-Vickers Electrical Co., Ltd.* (1) ([1954] 1 All E.R. 404) and the other is *Bath* v. *British Transport Commission* (2) ([1954] 2 All E.R. 542). I do not think that either of those cases throws much light on the present problem. The question is: what is a floor ? There is no definition in the Act to help the court. The ordinary and natural meaning of a floor is something within walls, indoors, on which people walk or stand. A plank-run such as this on a gantry—or on a staging or on a scaffolding—does not seem to me to be within the ordinary meaning of a " floor ". There would be great difficulty in applying the word " floor " to this plank-run. If it is a floor, what is the edge of the floor, as distinct from an opening in it ? Does the floor go round the stanchions or is there a gap in it, and so forth ? That all goes to show that this is not properly described as a floor at all. It can be described as a plank-run or a gangway or a platform, but it is not a floor.

The learned judge seems himself to have thought that it was not a floor in the ordinary sense, but that the Act ought to extend to cover it. I am afraid that we cannot go so far as this. As this is not a floor it means that the deceased's mother cannot bring the case within the Factories Act, 1937. It is one of those unfortunate accidents for which the remedy is in the system of national insurance, now in force, and not in claims against the employer in this manner.

I would therefore allow the appeal and give judgment for the employers.

HODSON, L.J.: I agree. There is no question but that the employers' shipyard is a factory within the meaning of the Factories Act, 1937; the only question before the court is whether there has been a breach of s. 25 of that Act. Section 25 (1) provides:

> " All floors, steps, stairs, passages and gangways shall be of sound construction and properly maintained."

There is no contention that there has been any breach of sub-s. (1) in respect of the runway or plankway on which the deceased was standing when he unfortunately fell. Sub-section (3) reads:

> " All openings in floors shall be securely fenced, except in so far as the nature of the work renders such fencing impracticable."

Fencing was practicable, and the only question is whether this place is a floor, and whether the agreed place through which the deceased fell was an opening in the floor.

It is very difficult, by words, to describe exactly what it is that the deceased was standing on. We have been shown photographs of the gantry which show us that along it were placed planks, alongside one another and, so far as one can see, not fixed. The learned judge found that they could easily be taken up when desired, and it also appears from photographs that this gantry, made of open steelwork, was not, on the bottom part of it, covered wholly by these planks. The planks do not go to the whole area of the bottom of the structure; they are irregular in the sense that they leave a space on the right which might be described as the edge of the planking or as a hole between the edge of the planking and the ironwork of the girder on the right of the photograph.

I agree with the learned judge in the view which he took that the word " floor " is not one's first choice of a word to describe this planking, although he found a difficulty in putting forward any satisfactory ground for saying that it was not a floor. He referred, in his judgment, to some of the ordinary purposes of a floor for which these planks were used: persons passed and repassed over them, and

A they were used to stand on. But, of course, it is not every place on which workmen stand, on which they pass and repass, which could be called a "floor". For example, one would not, in the ordinary way at any rate—although there might be an exception to this—regard the flat roof of a factory as a floor; and in reading sub-s. (3) one has to bear in mind that primarily what is in contemplation is, no doubt, floors in factories which are there for work to be done on B them, because "the nature of the work" is referred to in sub-s. (3).

This being a passageway or plankway of an irregular kind, where it is difficult to define the extent of the floor, I find it even more difficult to say that the word "floor" is appropriate. As the learned judge said in the course of the case, by way of an interlocutory observation, one can understand that an opening in a floor is one thing because that postulates a floor which is not continuous; on the C other hand, you may have a floor which simply does not cover the whole of the place, and clearly a floor which does not cover the whole of the place is not aptly described as a floor with a hole in it. To my mind that description fairly fits the situation in this case, and with some diffidence—because I appreciate that the learned judge applied his mind with very great care to this problem, and I respect the conclusion to which he came—I am nevertheless of the opinion that D that conclusion is not right, and, therefore, that this appeal should be allowed.

MORRIS, L.J.: I am of the same opinion. The only question before us is whether the deceased, at the moment before he fell to his death, was standing on what could properly be described as a "floor" within the meaning of s. 25 (3) of the Factories Act, 1937.

There is no doubt that he was within a factory; it is to be remembered that in E the definition of "factory" in s. 151 of the Act it is provided, by sub-s. (7), that

> "Premises shall not be excluded from the definition of a factory by reason only that they are open air premises."

I think that there must be a certain measure of overlap in the words, used in s. 25 (1), "All floors, steps, stairs, passages and gangways". There may be some F passages and some gangways which may be floors, or which at least may have floors on them.

I find myself, in approaching this case, feeling very much as SOMERVELL, L.J., did when he expressed himself in his judgment in *Bath* v. *British Transport Commission* (2) ([1954] 2 All E.R. 542). In that case it was held that it was impossible to regard an excavation which constitutes a dry dock as an "opening" G within the meaning of s. 25 (3), and SOMERVELL, L.J., in this court, said (ibid., at p. 543):

> "I do not know that I can say much more about that point. Where words are, as the words of s. 25 (3) are, perfectly familiar, all one can do is to say whether or not one regards them as apt to cover or describe the circumstances in question in any particular case."

H

The Act itself does not give a definition of the word "floor". It seems to me, therefore, that, while having in mind all the evidence and the assistance afforded by the plans and the photographs, the question must be posed whether one can fairly and reasonably describe the place on which the deceased was standing as being a floor. Approaching the matter in this way, although recognising that I the learned judge has come to a different conclusion, I would not describe the place as being a floor.

There might have been a further question whether the place vacated by reason of the absence of the ladder could properly be described as an "opening" in the floor, because it might have been said that the only floor laid down, if there had been a floor at all, was that which went to the right of the iron ladder. However, it is unnecessary to say anything in regard to that matter because, in my judgment, the planking on which the deceased was standing was not properly to be regarded as a floor.

I agree, therefore, that the appeal succeeds.

Appeal allowed.

Solicitors: *T. D. Jones & Co.*, agents for *Linsley & Mortimer*, Newcastle-on-Tyne (for the employers); *Rowley, Ashworth & Co.* (for the mother).

[*Reported by* Henry Summerfield, Esq., *Barrister-at-Law.*]

KRUHLAK *v.* KRUHLAK.

[Queen's Bench Division (Lord Goddard, C.J., Devlin and Pearson, JJ.), December 11, 19, 1957.]

Bastardy—" Single woman "—Child born before marriage of mother and putative father—Separation of mother and father under separation order made some years after their marriage—Whether mother a " single woman " quoad her husband—Bastardy Laws Amendment Act, 1872 (35 *&* 36 *Vict. c.* 65), *s.* 3, *as amended.*

In 1953 a child was born to a married woman, who had been living apart from her husband since 1940. Shortly afterwards, a decree nisi for her divorce having been made absolute, she married the putative father of the child. In March, 1957, a separation order, containing a non-cohabitation clause, was made in her favour against her husband. When living apart from her husband under the separation order, she applied, as a " single woman " within s. 3 of the Bastardy Laws Amendment Act, 1872*, for a summons to be served on her husband in respect of the child.

Held: the mother of the child was entitled to make application under the Bastardy Laws Amendment Act, 1872, as a single woman quoad her husband, because she was then living apart from him under the separation order.

Mooney v. *Mooney* ([1952] 2 All E.R. 812) distinguished.

Appeal allowed.

[**Editorial Note.** Section 3 of the Bastardy Laws Amendment Act, 1872, is prospectively repealed by the Affiliation Proceedings Act, 1957, which will come into force on Apr. 1, 1958, and s. 3 will be replaced, so far as is relevant, by s. 1 of the Act of 1957.

As to applications by the mother of an illegitimate child in affiliation proceedings, see 3 Halsbury's Laws (3rd Edn.) 110, para. 172; and for cases on the subject, see 3 Digest 387, 388, *259-269*.

For the Bastardy Laws Amendment Act, 1872, s. 3, see 2 Halsbury's Statutes (2nd Edn.) 478; and for the Legitimacy Act, 1926, s. 1, see ibid., 493.]

Cases referred to:

(1) *Mooney* v. *Mooney*, [1952] 2 All E.R. 812; [1953] 1 Q.B. 38; 116 J.P. 608; 3rd Digest Supp.

(2) *R.* v. *Flintan*, (1830), 1 B. & Ad. 227; 9 L.J.O.S.M.C. 33; 109 E.R. 771; 37 Digest 233, *255*.

Case Stated.

This was a Case Stated by the justices for the County of the West Riding of York acting in and for the Petty Sessional Division of Osgoldcross in respect of their adjudication as a magistrates' court sitting at Castleford. On Apr. 5, 1957, a complaint was preferred by the appellant, Hilda Mary Kruhlak, against the respondent, Hilko Kruhlak, alleging that the respondent was the father of her bastard child born on Dec. 2, 1953. The complaint, which was made under s. 3 of the Bastardy Laws Amendment Act, 1872, as amended, was heard on May 22, 1957, and the following facts were found.

---

* Section 3 of the Bastardy Laws Amendment Act, 1872, provides, so far as relevant —" Any single woman . . . who may be delivered of a bastard child may . . . make application to any one justice of the peace . . . for a summons to be served on the man alleged by her to be the father of the child . . ." The remainder of s. 3, subsequent to the words last quoted, was repealed by the Magistrates' Courts Act, 1952, s. 132 and Sch. 6.

The appellant gave birth to a girl on Dec. 2, 1953, at 7.30 a.m., of which child she alleged the respondent to be the father. On the same day, Dec. 2, 1953, at 10 a.m. a decree nisi was made absolute in favour of the appellant's former husband from whom she had been living separate and apart since 1940. The appellant and the respondent, who had been on intimate terms since September, 1952, were married on Dec. 19, 1953. On Mar. 26, 1957, a separation order, containing a non-cohabitation clause, was made in favour of the appellant against the respondent on the grounds of persistent cruelty. It was contended by the appellant that she was a single woman quoad the respondent in relation to the child who was the subject of the complaint; and by the respondent that she could not so establish herself quoad the respondent, he being her husband.

The justices were of opinion that there was a distinction from the facts in *Mooney* v. *Mooney* (1) ([1952] 2 All E.R. 812) in that the appellant had obtained an order against the respondent on the grounds of persistent cruelty; but that in view of the judgment in that case it was not open to them to hold that a married woman who summons her husband can be heard to say she is a single woman; and accordingly they dismissed the complaint.

R. D. Ranking for the appellant, Hilda Mary Kruhlak.
J. B. Deby for the respondent, Hilko Kruhlak.

Cur. adv. vult.

Dec. 19. The following judgments were read.

DEVLIN, J.: The question in this case is whether the appellant can be said to be a single woman within the meaning of the Bastardy Laws Amendment Act, 1872, notwithstanding the fact that she is married to the respondent, by whom she had previously had an illegitimate child.

It has been settled by a series of cases that in construing the expression " single woman " the courts will have regard to the de facto position of the woman rather than to her status in the eyes of the law. Thus, a woman who has been legally separated from her husband or one who lives apart from him and has by her conduct forfeited the right to maintenance has been held to be a single woman. The importance of this last factor is that until 1948 a man who married a woman with an illegitimate child was bound to support the illegitimate child as well as any children of his own by the marriage. So if a wife could have obtained maintenance for the child both from the husband and from the putative father there would have been a double liability; and this indeed was the reason why the relief under the Act of 1872 was given only to a single woman. The National Assistance Act, 1948*, now provides that a husband is bound to support only his own children.

Until *Mooney* v. *Mooney* (1) ([1952] 2 All E.R. 812), all the cases which the courts had considered were cases in which the woman, having had an illegitimate child by one man, had later gone off and married someone else. *Mooney* v. *Mooney* (1) was a case, as is the present one, in which the woman married the putative father; and it was also a case, as is this one, in which the subsequent marriage did not legitimate the child. Such a case would have raised no problem before the Act of 1948, since before then the man would have been obliged either as husband or putative father to support the child anyway. But after the Act of 1948, the only way in which the woman could get maintenance for the child was by means of a bastardy order. The artificiality of the construction that the courts have given to the expression " single woman " is brought into high relief when a wife asserts against her own husband that she is a single woman. Nevertheless, once the point is reached when the fact of singleness is determined by looking at the actual state to which the woman has been reduced and not at her status in the eyes of the law, it seems to me that a woman whose husband has deserted her or cast her off can say to him, with as much force as she can say it to anyone else, that he reduced her to living as a single woman. If she cannot say that, it would mean that he escapes the obligations of putative fatherhood first by marrying her and then by committing a matrimonial offence.

---

* See s. 42 of the National Assistance Act, 1948; 16 HALSBURY'S STATUTES (2nd Edn.) 968.

In *Mooney* v. *Mooney* (1) the husband and putative father supported the illegitimate child from the time of the marriage until his wife left him. She left him in circumstances which precluded her from obtaining a maintenance order on the ground of desertion; he was willing to have her back and support her and her child but she refused to return to him. This raised the question whether a woman can choose to reduce herself to the condition of a single woman within the meaning of the Bastardy Laws Amendment Act, 1872, by deserting her husband. In some cases the courts have permitted that to be done. The court in *Mooney* v. *Mooney* (1) were dealing with a case in which the husband was willing to give his wife all the benefits of marriage and to treat his illegitimate child just as though it had been born in wedlock. In such circumstances the court held that a wife could not be heard to say as against her husband that she was to be treated as if she were a single woman.

Now the facts in the present case are entirely different. It is not the appellant who has broken off the marriage; on Mar. 26, 1957, she obtained a separation order, including a non-cohabitation clause, against the respondent on the ground of persistent cruelty.

Counsel for the respondent, who has argued this case extremely well, has contended that *Mooney* v. *Mooney* (1) must be taken to lay down as an invariable rule that, whatever the circumstances, a wife can never claim as against her husband that she is a single woman. There are expressions in the judgment which, taken by themselves, might bear that interpretation, particularly the one to which I have already referred, namely, that when a married woman summons her husband she cannot be heard to say that she is a single woman—but the phrase " cannot be heard " is not being used as if to indicate that the question is one of estoppel. No such principle can apply to the construction of a statute. If the facts of a case make a woman a single woman within the meaning of the statute, then she is so for all the purposes of the statute; and different constructions cannot be given to the statute according to the different status of the persons who may be parties to proceedings that are brought under it. The expression " cannot be heard " means, I think, that in all the circumstances of that case it was an impossible contention for the appellant to make. In the circumstances of this case I can see nothing to prevent the appellant from relying on the separation order in the same way as has been done in the past to justify her claim that she is a single woman.

The justices considered this case to raise a difficult problem, as indeed it does. They thought that it was not for them to find ways of distinguishing *Mooney* v. *Mooney* (1) and that such a matter had better be left for the High Court; they invited the parties to apply for this Case to be stated. In my judgment, the appeal should be allowed, the question stated should be answered in the affirmative and in favour of the appellant and the justices should now proceed to the hearing of the appellant's complaint.

I desire to add this, that in the course of the argument counsel for the respondent raised the point whether the child had been legitimated. The position was that on Dec. 19, 1953, the appellant was married to the respondent. Seventeen days before that, on Dec. 2, 1953, the appellant had given birth to an illegitimate child, a girl, whose father she alleged the respondent to be. If that allegation is right the subsequent marriage would under the Legitimacy Act, 1926, but subject to s. 1 (2) of the Act, have legitimated the girl. Section 1 (2) provides, however, that nothing in the Act shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born. In fact the appellant had been married to another man, from whom she had been separated since 1940 and from whom she was divorced before she married the respondent. The decree absolute dissolving this earlier marriage was pronounced at 10 a.m. on Dec. 2, 1953, the girl having been born 2½ hours earlier at 7.30 a.m. on the same day. Since the birth of the child and the dissolution of the marriage occurred on the same day, there may be room for argument about the effect of s. 1 (2) If it does not apply and assuming of course the paternity of the respondent, he would be liable on any view to maintain the girl; but this possibility did not occur to anyone until it was perceived by counsel for the respondent. All that the justices were asked to deal with was a summons by the appellant under the Bastardy Laws Amendment Act, 1872, and the illegitimacy of the child was not put in issue. The only question stated in the Case is whether the appellant can be held to be a " single woman " within the meaning of that Act. That is the only point with which I have dealt in this judgment, and the other point as to legitimacy remains open for what it is worth.

LORD GODDARD, C.J.: I agree in the result with the judgment that has just been delivered but as I was a party to the decision in *Mooney* v. *Mooney* (1) ([1952] 2 All E.R. 812) I desire to give my reasons, which I can do quite shortly. It is firmly established that for the purposes of the bastardy laws a married woman living apart from her husband may be regarded, if the circumstances permit, as a single woman and so entitled to take proceedings in bastardy. I say " if the circumstances permit " because unless non-access can be proved or inferred the child would be regarded as legitimate if born in wedlock. If a woman is in fact living apart from her husband and by her adultery has lost her title to maintenance in his home she returns, as was said by LITTLEDALE, J., in *R.* v. *Flintan* (2) ((1830), 1 B. & Ad. 227), to the same status as if she were not married. If she is separated either by deed or by the order of the court the presumption of access and the legitimacy of the child is rebutted, provided the parties are actually living apart under the deed or in consequence of the order. As the parties in this case are living apart under an order of the court which contains a non-cohabitation clause, there can be no doubt that had this woman borne a child conceived since the date of the order she could have taken proceedings as a single woman against the putative father. The difficulty that arises here is because the mother of the child married the alleged father after the birth of the child. A married woman who was living with her husband at the time when the application was made has never been treated as a single woman; but as in this case she was living apart from him under this order I do not see why she should not take proceedings against him, as the child was born before marriage, just as she could against any other man. *Mooney* v. *Mooney* (1) was different. That again was a case where a woman sought an order against her husband and it was not disputed apparently that the husband was the father of the child, as he had cohabited with the mother before marriage, She had, however, left her husband against his will and, although he was ready to receive her back, she would not return. There seemed accordingly no ground on which she could be regarded as a single woman. I agree that this appeal should be allowed. The case raised a difficult point for the justices and I think it was quite reasonable for them to say as they did that if it was to be distinguished from *Mooney* v. *Mooney* (1) the distinction should be drawn by this court.

PEARSON, J.: I agree. It is clear from the many cases decided under the Bastardy Laws Amendment Act, 1872, that the expression " single woman " cannot be interpreted literally but has an extended meaning including some married women. In my view, the principle to be deduced from the previously decided cases is simply that a married woman who is for the time being effectively separated from her husband may be regarded as a single woman for the purposes of the Act of 1872, and the material time is the time of the application. Here we have a married woman who was living apart from her husband under a separation order. There could be no more effective separation than that. I have referred to the cases, and I have not found anything which would conflict with the apparently obvious proposition that a woman in that state can be treated as a single woman, having regard of course to the other decisions under which it becomes plain that the simple literal meaning cannot be given to that expression. I therefore agree with the order proposed.

Case remitted to the justices.

Solicitors: *Long & Gardiner*, agents for *A. Maurice Smith*, Castleford (for the appellant); *Collyer-Bristow & Co.*, agents for *Alf. Masser & Co.*, Castleford (for the respondent).

[*Reported by* E. Cockburn Millar, *Barrister-at-Law.*]

Re PHOENIX OIL AND TRANSPORT CO., LTD. (No. 2).

[Chancery Division (Wynn-Parry, J.), December 16, 20, 1957.]

Company—Winding-up—Compulsory winding-up—Distribution of surplus assets—Necessity for order of court before distribution—Companies Act, 1948 (11 & 12 *Geo.* 6 *c.* 38), *s.* 245 (2) (*h*), *s.* 265—*Companies* (*Winding-up*) *Rules,* 1949 (*S.I.* 1949 *No.* 330), *r.* 120.

By an order dated Feb. 27, 1950, a company, on its own petition, was ordered to be wound up by the court. At that date the company's issued capital consisted of £1,438,268 stock and there were 9,100 stockholders on the register of members. The liquidator now had sufficient surplus assets in hand to make a return of 10s. 2d. on each £1 of stock held. On July 31, 1957, on an application to the court by the liquidator, an order was made dispensing with the settlement of a list of contributories. The question now arose whether (contrary to the normal practice of applying for leave to distribute among persons whose names appeared in a list verified by affidavit) the liquidator was entitled to distribute the surplus assets among the contributories without further order: or whether leave would be granted for him to make the proposed distribution without any further order of the court. The register of members of the company was about seven years out of date at the time of the application and some inquiry by the liquidator would be necessary before distribution could be made.

Held: (i) the liquidator was not entitled to distribute the surplus assets among the contributories without an order of the court because by s. 265* of the Companies Act, 1948, which was the operative enactment rather than s. 245 (2) (h), the court was to make the distribution.

(ii) the liquidator would not be authorised under r. 120† of the Companies (Winding-up) Rules, 1949, in advance of an inquiry who were the persons entitled to share in the distribution, to make distribution to those who should be found to be entitled, but the liquidator should, following the normal practice, apply for leave to distribute to persons found to be entitled.

[For the Companies Act, 1948, s. 245 (2) (h) and s. 265, see 3 Halsbury's Statutes (2nd Edn.) 656, 668.

For the Companies (Winding-up) Rules, 1949, r. 120, see 4 Halsbury's Statutory Instruments 159.]

Case referred to:

(1) *Re Phoenix Oil & Transport Co., Ltd.*, [1957] 3 All E.R. 218.

Adjourned Summons.

By a summons dated Nov. 22, 1957, the liquidator in the compulsory winding-up of Phoenix Oil and Transport Co., Ltd., applied for the following relief: (i) that he might be at liberty to admit without proof the claims of contributories

---

* The terms of the section are printed at p. 161, letter D, post.

† The terms of the rule are printed at p. 162, letter C, post.

A for certain unpaid dividends and stock fractions; (ii) that it might be determined
whether on the true construction of the Companies Act, 1948, and in the events
which had happened, the liquidator was entitled to distribute the surplus assets
of the company among the contributories in accordance with their respective
rights thereto as such contributories without further order; and, alternatively,
(iii) that the liquidator might be at liberty to make a return of capital, at the
B rate of 10s. 2d. on each £1 of stock held, to the contributories.

The company was incorporated on June 24, 1920, under the Companies Acts,
1908 to 1917, with a nominal capital of £1,050,000 divided into a million shares
of £1 each and a million shares of 1s. each. The capital was increased from
time to time and at the beginning of 1939 it was £4,500,000, divided into
4,450,000 shares of £1 each and a million shares of 1s. each, of which 3,737,588
C of the £1 shares and all the 1s. shares were issued and credited as fully paid up.

As the result of a scheme of arrangement made between the company and
its members on Feb. 22, 1939, and an order of the court dated July 3, 1939,
the capital of the company was reduced to £2,150,680 by cancelling 13s. 4d. of
the capital paid up on 3,523,980 of the issued shares of £1 each and reducing
the nominal amount of each such share to 6s. 8d. The issued shares (namely,
D 213,608 shares of £1 each, 3,523,980 shares of 6s. 8d. each, and the million
shares of 1s. each) were sub-divided and consolidated, and converted into
£1,438,268 stock, in accordance with the terms of the scheme of arrangement.
By a minute of the company, approved by the court, the capital was then
increased to its former amount of £4,500,000, being divided into £1,438,268
stock and 3,061,732 shares of £1 each, none of which shares had been issued.
E The capital remained unaltered at the date of the commencement of the
winding-up.

The scheme of arrangement involved the sale by the directors of all stock
representing fractions of £1 to which members were entitled as a result of the
reorganisation and the payment of the net proceeds of sale, in due proportions,
to the members entitled to such fractions. By an order dated Feb. 27, 1950,
F and made on the company's own petition, the company was ordered to be wound
up by the court. At the date of the liquidation there were 1,220 members or
former members entitled between them to the sum of £174 0s. 2d., being the
proceeds of sale of the stock fractions which these members or former members
had failed to claim. There were also sums totalling £1,255 3s. 11d. due to 639
members or former members in respect of unclaimed dividends. Except for
G these sums of £174 0s. 2d. and £1,255 3s. 11d., and two debts (of £35 and £250,
respectively), to creditors who had not responded to notices sent to them
requiring them to prove their respective debts, all the liabilities of the company
had been settled in full and the liquidator had in hand a surplus of approximately
£640,000 available for distribution among the holders of the company's stock.
There were approximately 9,100 members entitled to rank pari passu in the
H distribution of the surplus assets of the company, and the liquidator estimated
that he would be able to make a return of 10s. on each £1 of stock held. On July
31, 1957, on a summons taken out by the liquidator, Roxburgh, J., made an
order dispensing with the settlement of a list of contributories: see *Re Phoenix
Oil & Transport Co., Ltd.* (1). Owing to additional sums received by the
liquidator, he was now in a position to make a return of 10s. 2d. on each £1
I of stock held.

R. O. Wilberforce, Q.C., and *Arthur Bagnall* for the applicant, the liquidator.
Denys B. Buckley as amicus curiae.

Cur. adv. vult.

Dec. 20. **WYNN-PARRY, J.**, read the following judgment in which, after saying that he had given the leave asked for in para. 1 of the summons, he stated the terms of the question in para. 2*, and continued: As counsel for the liquidator said in opening the summons, the point raised by question 2 is a new one and is entirely uncovered by authority. It is, however, a short point. The company was, on its own petition, ordered to be wound up by the court by an order dated Feb. 27, 1950. At that time it was thought to be insolvent, but, in the events which have happened, the liquidator has a large surplus in his hands available for distribution amongst the contributories. There is issued £1,438,268 of stock held, so far as the register of members is concerned, by 9,100 stockholders; and there is sufficient money available to make a payment at the rate of 10s. 2d. in the pound to those who may now be entitled. The difficulty which arises is that the register is at least seven years or more out of date, and it is clear that no distribution can be made on the basis of the register as it now stands.

---

* See head (ii) at letter A, supra.

On July 31, 1957, Roxburgh, J., made an order, on a summons taken out by the liquidator in the liquidation, dispensing with the settlement of a list of contributories. His decision is reported: *Re Phoenix Oil & Transport Co., Ltd.* (1) ([1957] 3 All E.R. 218). The basis of his decision was that the distribution of surplus assets does not of itself involve an adjustment of the rights of contributories, and that in the circumstances of the case the court should and would dispense with the settlement of a list.

At the present time, and for a very long time past, it has been the practice of the court in the case of a compulsory winding-up to control the making and distribution of surplus assets among those entitled thereto by requiring the liquidator to bring in at the appropriate time, when he asks for an order for distribution, a list of those who, he says, are entitled, verified by affidavit. The Board of Trade have insisted on this practice, because, as Mr. Buckley, who appeared as amicus curiae said, the order of the court which is involved affords proper protection to the Board of Trade, who, on the making of the order, then ask the Bank of England to draw the necessary cheques. On this summons, however, counsel for the liquidator has challenged the necessity for this practice, and has contended that in a compulsory winding-up the liquidator is free to make a distribution (that is, to require the Bank of England to make the necessary payments) without the necessity of obtaining any order from this court.

A study of the relevant sections of the Companies Act, 1948, dealing with winding-up shows clearly that, as regards voluntary winding-up, the legislature has followed (in pursuance of the policy of previous Companies Acts) a different policy from that laid down in the case of compulsory winding-up. The reason is not far to seek. In the case of voluntary winding-up, the jurisdiction of the court is not invoked in order to place a company in liquidation. In the case of a creditors' liquidation the creditors, through their committee of inspection, are in control as against the contributories; while in the case of a members' voluntary winding-up it is the members who are in control. In both cases the court is given a certain degree of jurisdiction; but I think that it can be accurately, though shortly, said that in both forms of voluntary winding-up the court is in the background, to be referred to if the necessity should arise. In the case of a winding-up by the court, however, different considerations arise. In this case the court is conducting an administration, and so, as in the case of an ordinary administration action in the Chancery Division, it retains, under the express provisions of the statute, a much greater degree of control. It is against this background, in my view, that the relevant sections of the Companies Act, 1948, should be considered. In a voluntary winding-up it is the liquidator, who, without any reference to the court, is charged with the duty of distributing the assets among the members (s. 302) and also has the duty of adjusting the rights of the contributories among themselves (s. 303 (2)). In the case of compulsory liquidation the relevant sections appear to me to be s. 245 (2) (h) and s. 265. Section 245 (2) reads:

> " The liquidator in a winding-up by the court shall have power . . . (h) to do all such other things as may be necessary for winding-up the affairs of the company and distributing its assets."

Counsel for the liquidator submitted that, if that were the only provision in the Act relating to distribution of assets, the necessary conclusion would follow that the liquidator in a compulsory winding-up has power to distribute the surplus assets among those entitled without the necessity of obtaining any order of the court or the committee of inspection: see the opening words of s. 245 (1):

> " The liquidator in a winding-up by the court shall have power, with the sanction either of the court or of the committee of inspection . . ."

I should feel constrained to agree with this submission if s. 245 (2) (h) were the only provision in the Act relating to distribution of assets, but solely because it was the only provision. Taken by itself, it does not appear to me to be couched in very appropriate language for the purpose for which counsel for the liquidator seeks to use it. To my mind, it is properly to be regarded as a mopping-up provision at the end of a list of functions which the liquidator is enabled to perform in connexion with the administration of the particular company's affairs and no more. Paragraph (h) of s. 245 (2) is in very general terms and does not indicate among whom the assets are to be distributed or how they are to be ascertained. The other relevant section, s. 265, reads as follows:

> " The court shall adjust the rights of the contributories among themselves and distribute any surplus among the persons entitled thereto."

Prima facie this section directs the court to do two things: first, to adjust the rights of contributories among themselves, and then to distribute any surplus among the persons entitled. It is argued, however, by counsel for the liquidator, that the direction to the court to distribute any surplus only comes into operation if an adjustment among the contributories has first to be made. I am unable to accept this construction. The section is mandatory, and I read it as meaning that the court is to make an adjustment among the contributories, if that be necessary, and after having done that, if it be required, it is then to proceed to make the distribution contemplated. I can see no good sense in the limited construction contended for. It would have this odd result that if no adjustment among the contributories were required, then the distribution would be made by the liquidator under s. 245 (2) (h) without any reference to the court; but if adjustment were required, an act which only in exceptional circumstances could be expected to involve difficulty, then the distribution would have to be made by the court. In my view s. 265 is the only operative section as regards actual distribution, and it applies whether or not an adjustment among the contributories is required. I therefore answer question 2 in the negative.

Question 3* is raised on the basis that the answer to question 2 is, as I have decided, in the negative. It is then sought to invoke certain words in r. 120 of the Companies (Winding-Up) Rules, 1949, which, it is said, in effect confer a discretion on the court, the exercise of which in favour of the liquidator would enable him to make the proposed distribution of 10s. 2d. without any further order of the court. Now it is quite clear that, having regard to the lapse of time since the order for winding-up was made in 1950, no distribution could be made on the basis of the register as it stands. Something in the nature of an inquiry who are the persons entitled to the surplus assets must be made by the liquidator at some stage. The sole remaining question, therefore, is whether in advance of that inquiry the liquidator should be authorised by an order under question 3 of the summons to distribute to those persons whom he finds entitled on making the inquiry, or whether he should first make the inquiry, and then, following the normal practice, apply for leave to distribute to the persons found entitled, whose names will appear in a list exhibited to a short A affidavit in support of his application.

---

* See p. 159, letter B, ante, head (iii).

I confess that I cannot help approaching a consideration of r. 120 without having in mind what I have said in considering question 2 of the summons, and that, therefore, I should want a very clear indication in r. 120 that the legislature had in the Companies (Winding-up) Rules, 1949, reversed or varied a policy which, so far as I am concerned, I find clearly stated in the body of the B Act. Rule 120 reads:

> "Every order by which the liquidator in a winding-up by the court is authorised to make a return to contributories of the company shall, unless the court shall otherwise direct, contain or have appended thereto a schedule or list (which the liquidator shall prepare) setting out in a tabular form the C full names and addresses of the persons to whom the return is to be paid, and the amount of money payable to each person, and particulars of the transfers of shares (if any) which have been made or the variations in the list of contributories which have arisen since the date of the settlement of the list of contributories and such other information as may be requisite to enable the return to be made. The schedule or list shall be in the form D 70 in the Appendix with such variations as circumstances shall require, and the liquidator shall send a notice of return to each contributory."

That rule begins by presupposing that an order of the court is required in the case of a distribution in a winding-up by the court. The rule then proceeds to require that the order shall contain, or have appended to it, a schedule or list containing the particulars set out in the rule. That is the normal case. There E is, however, a proviso "unless the court shall otherwise direct". I can conceive that in a simple case the court might be persuaded to dispense with some of the particulars mentioned in the rule, but I can see no justification for doing so in a case like the present, where, ex concessis, not only has there not been a settled list of contributories, but the liquidator is faced with, as I have put it, something in the nature of an inquiry before he can say among whom the surplus F should be distributed. I am unable to see that what I am asked to do would achieve anything more than putting the cart before the horse, an activity in which I am unwilling to indulge; and I am unable to agree that by refusing to do what I am asked to do under question 3 I am taking a course which will increase the costs of the liquidation, except to the extent of the costs involved in applying to the court for an order giving leave to distribute on the basis G of the list, which must at some time be compiled. As I said in argument, the difficulty in which the liquidator finds himself, if it be a difficulty, may well be due to his success in obtaining the order dispensing with a list of contributories. I make no order on question 3 of the summons.

Solicitors: *Herbert Smith & Co.* (for the applicant); *Solicitor, Board of Trade.*

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

Re TACON (*deceased*).
PUBLIC TRUSTEE *v.* TACON AND OTHERS.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Ormerod, L.JJ.), November 20, 21, December 19, 1957.]

Charity—Practicability of object—Financial practicability—Vested gift in remainder subject to defeasance—Whether reversionary value of gift is the test of financial practicability—Assumption that gift will not be defeated.

A testator, who died in 1922, bequeathed a one-sixth share of his residuary estate on trusts creating a vested remainder for a charitable purpose (the establishing of a convalescent home) to take effect at a distant future time and liable to be defeated only on the happening of a contingency that might not occur, viz., his daughter, who was unmarried, having issue who should attain a vested interest. The testator's daughter was thirty-nine years old at his death; she died unmarried in October, 1952. The value of the one-sixth of the residuary estate at the testator's death was about £16,500 and the value of the reversionary interest bequeathed for the charitable purpose was, at that date, £2,400. A sum of £16,500 was sufficient at that time for effecting the charitable purpose. The value of the one-sixth of the residuary estate at the daughter's death, after allowing for death duties payable thereon, was of an amount* that would be insufficient to establish a convalescent home. An inquiry was directed in a form following *Re White's Will Trusts* ([1954] 2 All E.R. 620) including, as the second branch of the inquiry, the question whether at the testator's death there was any reasonable prospect that it would be practicable to carry into effect the charitable bequest at some future time.

Held: at the testator's death there was reasonable prospect that it would be practicable to carry into effect the charitable bequest, which accordingly did not fail, because—

(i) regard must be had to the prospective worth of the property bequeathed at the time of the death of the testator's daughter and not merely to the value at the testator's death of the reversionary interest comprised in the charitable bequest, and

(ii) there was no reason at the testator's death to expect the increase in death duty and the fall in the value of money that occurred subsequently.

PER CURIAM: where a future gift to charity is vested but defeasible, an inquiry as to its practicability should be approached on the footing that the gift will not be defeated, but will take effect at some future time in possession (see p. 167, letter E, p. 168, letter I, and p. 169, letter F, post).

Appeal allowed.

[As to the failure of a particular charitable purpose which has initially been established, see 4 HALSBURY'S LAWS (3rd Edn.) 319, 320, para. 658; and for cases on the subject, see 8 DIGEST (Repl.) 464, 465, *1645-1654*.]

Cases referred to:

(1) *Re Slevin, Slevin* v. *Hepburn*, [1891] 2 Ch. 236; 60 L.J.Ch. 439; 64 L.T. 311; 8 Digest (Repl.) 463, *1633*.

(2) *Re Moon's Will Trusts, Foale* v. *Gillians*, [1948] 1 All E.R. 300; [1948] L.J.R. 778; 8 Digest (Repl.) 389, *832*.

(3) *Re Wright, Blizard* v. *Lockhart*, [1954] 2 All E.R. 98; [1954] Ch. 347; 3rd Digest Supp.

(4) *Re White's Will Trusts, Barrow* v. *Gillard*, [1954] 2 All E.R. 620; [1955] Ch. 188; 3rd Digest Supp.

---

* The effect of the evidence regarding the value of the one-sixth share of residue at the death of the testator's daughter is summarised in the footnote at p. 165, post.

Appeal.

This was an appeal by the Attorney-General from an order of HARMAN, J., dated July 31, 1957, who in answer to an inquiry ordered by him on Oct. 26, 1954, declared that it was not practicable to carry out a charitable bequest at the date of the death of the testator, Sir Thomas Henry Tacon, deceased, and that there was then no reasonable prospect that it would be practicable to do so at some future time and that, therefore, the gift failed.

Denys B. Buckley for the eighth defendant, the Attorney-General.

Harold Lightman, Q.C., and *Charles Sparrow* for the seventh defendant (interested on an intestacy).

P. S. A. Rossdale for the plaintiff, the Public Trustee.

Cur. adv. vult.

Dec. 19. The following judgments were read.

LORD EVERSHED, M.R.: It is well established that in the case of a gift to a charity (i.e., to some body of persons or organisation admittedly charitable) where no general charitable intention is present, then (i) if the charity had ceased to exist before the will comes into operation, the gift lapses; but (ii) if the charity is still in existence at the date mentioned, the gift is effective as a gift to the extent that the interests of the next-of-kin (or of whoever else take in default of the charitable interest taking effect) are for ever excluded notwithstanding the later dissolution or disappearance of the charity: see *Re Slevin, Slevin* v. *Hepburn* (1) ([1891] 2 Ch. 236). In these respects the " charity " is assimilated to an ordinary individual legatee. The same principles apply to a gift, not to a named charity, but for some (admittedly) charitable purpose where (again) there is no general charitable intention. Such a gift will wholly fail if the purpose is either so vague or uncertain or so impracticable that the court cannot execute it. The test of vagueness or uncertainty or impracticability is to be applied at the date of the testator's death; if at that date the disposition is shown to be impracticable (confining myself henceforth to that case)—that is, incapable for any reason of being practically initiated or administered—then the gift fails altogether and the next-of-kin (or whoever else are entitled in default) take. Per contra, if the charitable gift is not then shown to be " impracticable ", the next-of-kin or other interests are for ever excluded even though later supervening events defeat the precise purpose contemplated by the testator. In such case the gift will be administered cy-près; and, in my opinion, the onus will (prima facie, at any rate) be on those seeking to invalidate the charitable gift. In the case of a charitable gift expressed to take effect immediately on the testator's death, no great difficulty arises. The difficulty has arisen in the present case because the gift for the purpose of establishing the particular convalescent home envisaged by the testator, is, on any view, expressed to take effect on the happening of a future, and, indeed, a relatively distant, event.

The will is that of Sir Thomas Henry Tacon, and it is dated Jan. 27, 1919. His residue was devised and bequeathed (subject to the usual trusts for conversion and investment) so that the trustees should stand possessed of the residuary trust fund on trust during the life of his daughter to pay the income thereof to her for her separate use without power of anticipation during coverture—and there follows then a power to appoint to her husband, which never arose—and from and after her decease on trust for such of her issue as she should appoint, and in default of appointment

> " In trust for all or any of the children or child of my said daughter who being sons attain the age of twenty-one or being daughters attain that age or marry and if more than one in equal shares."

There was then a provision as follows:

> ". . . and if there shall be no child or other issue of my said daughter

> living at her death I empower her to appoint by will such sum or sums (not exceeding in the aggregate £20,000) out of the trust fund "

as she should think proper. I pause to observe that that power was in fact exercised. The will continued:

> " And in the event of the failure or determination of all the trusts hereinbefore declared and contained as to the whole or any part of the trust fund then the following provisions shall take effect (namely) [there were then certain specific legacies for charitable and other purposes, and finally] And my trustees shall stand possessed of the residue of the trust fund the trusts whereof have so failed or determined or of so much thereof as shall not become absolutely vested ",

in trust for nephews as therein stated. That last-mentioned trust, however, was revoked by the third codicil of the testator, which is dated Jan. 16, 1920, and recites and provides thus:

> " Whereas under my said will my trustees are to stand possessed of the residue of the trust fund the trusts whereof have failed or determined as therein mentioned or of so much thereof as shall not have become absolutely vested or be applied or disposed of under the trusts or powers therein contained or by law vested in my trustees In trust for my nephews the sons of my brother in equal shares as therein mentioned Now I hereby revoke such last mentioned provisions and declare that my trustees shall stand possessed of such residue or of so much thereof as shall not become vested . . . As to five equal sixth parts thereof [for nephews as therein mentioned] And as to the remaining one equal sixth part [and this is the relevant disposition] In trust to apply the same in purchasing adapting and furnishing and equipping suitable premises at Ipswich Felixstowe or Lowestoft or any or either of those places as a convalescent hospital for nurses or patients or both preference being given to persons from Eye or adjoining parishes or members or staff of the East Suffolk County Council and the hospital to be managed and carried on by the board of management of the East Suffolk and Ipswich Hospital if they are willing to undertake it such hospital to be called ' Sir Thomas Henry Tacon's Hospital '."

The testator died on Feb. 19, 1922, and he left his daughter, the daughter referred to in the will and codicil—Maude, who was then aged thirty-nine years and a spinster. She died, never having married, on Oct. 22, 1952. At the date of the testator's death, one-sixth part of residue, after allowing for the £20,000 appointed by the daughter, was stated to be worth or to be equivalent to a sum of approximately £16,500*.

The principles which I have stated at the beginning of my judgment (apart from the matter of onus) were not contested by counsel for those interested on intestacy, who also conceded that the gift for the charitable purpose with which we are concerned is in form an absolute or " vested " remainder liable to be defeated on the happening of a specific event, viz., the coming into existence of issue to Maude capable of taking. What follows is limited to such a form of gift. Different considerations may, to some extent at any rate, be applicable to the case of a strictly contingent gift. A

---

* The approximate value of this one-sixth share was estimated on behalf of the Public Trustee to be about £10,840 in 1955; but according to evidence filed on behalf of the Attorney-General, the capital sum available from the charitable bequest for its purposes was estimated at £16,567. There was evidence that the cost of purchasing a house of the type that might be suitable would in 1922 and 1923 have been between £3,500 and £5,000. The value of the residue of the testator's estate at the time when the estate was handed over by the executors to the trustees, of whom the Public Trustee was one, was, according to evidence filed on behalf of the Public Trustee, £156,606.

The evidence filed concerning what sum would be required to furnish and equip a convalescent hospital according to the testator's bequest was not wholly consistent; according to evidence filed by the Treasury Solicitor the capital sum required at the present time was £20,000 and the cost of maintaining and staffing such a convalescent hospital would amount to anything from £5,000 per annum upwards; but according to evidence filed on behalf of the Attorney-General a convalescent hospital, not involving skilled nursing or medical attention, could probably be provided for £16,000, and in 1922 could have been provided for less than that amount.

In the present case, on the principles already stated, the effect of the disposition will be to exclude the next-of-kin unless "impracticability" is shown at the death of the testator. But since the charitable gift was not an immediate gift, the question is not merely whether at the testator's death it was immediately practicable, but also whether it could at that date be said that it would at any relevant date be practicable: see *Re Moon's Will Trusts, Foale* v. *Gillians* (2) ([1948] 1 All E.R. 300) and *Re Wright, Blizard* v. *Lockhart* (3) ([1954] 2 All E.R. 98). In the latter case the form of inquiry thought to be appropriate was as follows (ibid., at p. 100): "An inquiry whether it is now or will at any future time be possible to carry into execution the trusts declared by the will . . ." That inquiry (perhaps for obvious reasons) the master had thought unanswerable. To meet the difficulty caused by such form of inquiry, UPJOHN, J., had, in *Re White's Will Trusts, Barrow* v. *Gillard* (4) ([1954] 2 All E.R. 620) suggested a variation in form which has been used in the present case, where the inquiry directed is B C D

> "An inquiry whether at the date of the death of the testator it was practicable to carry into execution the trust for the purchase and equipment and management of suitable premises in Ipswich Felixstowe or Lowestoft or any of those places as a convalescent hospital for nurses or patients or both or whether at the said date there was any reasonable prospect that it would be practicable to do so at some future time." E

If by the first half of the inquiry the question intended is whether it was, on the testator's death and as things then were, practicable to give effect to the relevant disposition, no doubt the answer is "No": because at that date the testator's daughter, Maude, was alive and aged thirty-nine, her expectation of life was over thirty years, and the value of the remainder at that time was about £2,400, a sum admittedly and obviously inadequate for the purpose; but the contest before us has been on the effect of the second half of the inquiry. Counsel for those interested on intestacy has argued that, for the purpose of answering this part of the inquiry, financial considerations are no longer relevant. He has said (and, having regard to the concessions which he has made, it has been, if I have correctly understood him, his main if not his sole point) that the only relevant figure remains £2,400; that account cannot be taken of the actual sum that would be, or would be expected to be, received in the event of the gift taking effect. In other words (according to the argument) one is, so far as financial considerations are concerned, limited to or by the figure of £2,400, being the actual value of the interest at the testator's death—increased, at best, by such interest as it might have earned during the expected duration of Maude's life. I have been unable to agree. I think the words of the inquiry mean what they say: viz., whether, at the date of the testator's death, there was any reasonable prospect (according to the ordinary beliefs and knowledge of mankind in 1922) that at some future date this scheme would be "practicable". F G H

In my judgment, since the relevant proportion of the estate was then worth £16,500 or upwards, an amount at the testator's death admittedly sufficient and amply sufficient for the intended gift, and since there was then no reason (again admittedly) to anticipate the subsequent increase in duty and fall in the value of money, the answer is clearly "Yes". Counsel, indeed, so concedes, if (contrary to his view) one can take these financial considerations into account. I

The question also arose in argument whether on this form of inquiry one should also take into account the chances of the disposition taking effect at all—since if it did not, then nothing at all would be available. The answer to the question depends on whether the word "practicable" ought to be treated as meaning "capable, for financial or other reasons, of being carried out", but confined to that meaning: in other words, whether practicability is to be judged on the assumption that the disposition does at some time take effect, or whether, on the other hand, remoteness is to be taken into account as affecting practicability: so that in the case, for example, of a gift taking effect only on an extremely remote and improbable event, it would be said that the chances of it being effective were so small that in common sense its "practicability" should be rejected.

Counsel for the Attorney-General was disposed to concede that the form of inquiry in the present case did bring remoteness into the estimate of practicability. In my judgment, on the facts of this case it does not in the end matter one way or the other whether that view is right or wrong. For if it is legitimate or necessary to take into account the possibilities of the disposition taking effect at all, the result is not affected. Maude at the relevant date was thirty-nine years old and was still unmarried. According to the evidence she was attractive, and it was regarded by those who knew her as surprising that she had not married. A photograph, taken in the pattern of her age, was exhibited. At this we did not look, but counsel for the Attorney-General told us that had we done so we might have been disappointed. This evidence, to my mind, cuts both ways. At least there was obviously a reasonable prospect that she would die childless. Since the matter has been debated it may be desirable for me to say that, as a matter of principle, I accept the view advanced by counsel for the Attorney-General, i.e., that the test, for the purposes of the validity of a charitable gift, of "practicability" is that of workability as the word was used in the argument, that is, whether the disposition is one which the court can, as a matter of practice, for financial or other reasons, administer: and to that test the question of remoteness is irrelevant. That is to say, the question of "practicability" is to be answered on the footing that the gift does at some date take effect: though the answer must be given as at the testator's death. In other words, the court must, as it were, put on for all purposes 1922 spectacles, must put itself into the position of one forming a judgment of future prospects (of practicability) at the date of the testator's death. I add this so that it may if necessary be considered, for the purpose of removing doubts or difficulties, in the framing of similar inquiries in the future.

For the reasons which I have given, I think that this appeal should be allowed.

ROMER, L.J.: I agree. In his argument on behalf of the respondent William Harold Scarfe (a representative of the testator's next-of-kin), counsel very rightly and properly, if I may say so, made certain admissions and thus narrowed the issues between the parties. He conceded: (i) that such matters as the change in the value of money, the increased cost of house property, increases in taxation, and the like, which occurred after the death of the testator in 1922 are irrelevant to the inquiry whether the gift which is in question in this case failed for impracticability; (ii) that once property has become vested in a charity, or in furtherance of a charitable purpose, it will not become divested in favour of persons entitled in default by reason of the subsequent dissolution of the charity or the subsequent impracticability of the purpose, as the case may be; (iii) that as a matter of construction of the testator's will and codicil the gift for the purchase and equipment and management of suitable premises in Ipswich, Felixstowe or Lowestoft for the purpose prescribed by the testator was not contingent, but was vested, though defeasible; (iv) that the only point of time at which the question as to the practicability of the gift fell to be put and answered was the date of the testator's death—in accordance with, or by analogy to, *Re Moon's Will Trusts, Foale* v. *Gillians* (2) ([1948] 1 All E.R. 300), *Re Wright, Blizard* v. *Lockhart* (3) ([1954] 2 All E.R. 98), and *Re White's Will Trusts, Barrow* v. *Gillard* (4) ([1954] 2 All E.R. 620); (v) that the value of one-sixth of the testator's residuary estate at his death (£16,500) was sufficient at that time, had it then been available for the purpose, to carry the charitable trust into effect; and (vi) that, if it was relevant under the second limb of the inquiry directed by the order of Oct. 26, 1954, to take into account the possibility of the testator's daughter Maude having issue capable of taking, such a possibility would not in itself justify a negative answer to the inquiry.

Accepting as he did these various points, counsel's contention on behalf of those interested on intestacy was that the second limb of the inquiry was directed solely to the practicability of the testator's charitable project as a project—as to the feasibility, from a mechanical or administrative view only, of carrying the proposed scheme into effect. His submission was that although the question of finance was relevant to the first limb of the inquiry, the prospect or possibility of future financial sufficiency had nothing to do with the second. The only material matter to be taken into consideration from a financial point of view was that the reversionary value of the one-sixth of residue which was the subject of the charitable bequest was, at the testator's death, £2,400. That, said counsel, was the " property " of the charity and as it was wholly insufficient to carry out the bequest it followed, of necessity, that the gift failed for impracticability at the outset. Counsel admitted that if he was wrong in that submission the appeal must succeed.

In my judgment, it cannot rightly be said that a hypothetical reasonable person, looking forward in 1922 to the future, and assessing the prospect of it becoming practicable at some time to carry the charitable trust into execution would be precluded from taking into account (inter alia) what money might one day be available for the purpose; for one of the most obvious reasons why a charitable bequest for a particular purpose may be deemed impracticable is that there is, or will be, insufficient money to enable it to be carried out. True it is that in 1922 a purchaser of the charity's reversionary interest would have paid no more than £2,400 for it—which is why the first limb of the inquiry obviously had to be answered in the negative. By the very terms of the bequest, however, it was not intended by the testator to come into operation until a distant, possibly a far distant, date, viz., the death of his daughter without having issue who should attain a vested interest. It is to the future, then, that the reasonable man in 1922 would have directed his mind in considering the practicability of the gift; and if (as was quite possible) the one-sixth share of residue when it fell into possession should be worth more or less the same as it was in 1922 there would be sufficient money to give effect to the testator's charitable purpose. If that view of the matter be right, as in my opinion it is, it disposes of the appeal in the Attorney-General's favour; for apart from the financial aspect of the matter it has not been suggested that in 1922 there was any ground of impracticability—save for the possibility of Maude having children, on which, as I have said, counsel did not found himself.

I agree with the observations which have fallen from Lord Evershed, M.R., as to the form of inquiry which was directed in this case. In view of the concession with regard to the possible issue of Maude, it is unnecessary to decide whether, in 1922, the chance of such issue being born thereafter and attaining vested interests was a relevant consideration under the second limb of the inquiry. There is much to be said for the view that it was, for if it was permissible (as in my opinion it clearly was) to take into account the possibility of there being insufficient money to enable the scheme to be carried into effect, it is difficult to see why the possibility of there being no money at all should be excluded. However that may be, I agree that in most, if not all, cases the inquiry as to practicability should proceed, where the gift to charity, although future, is vested, but defeasible, on the footing that the gift will not be defeated but will, at some time in the future, take effect in possession; and that the inquiry should be so framed, in a proper case, as to make that plain. For the above reasons, and those stated by Lord Evershed, M.R., I agree that this appeal must be allowed.

ORMEROD, L.J.: I agree. Counsel for those persons interested on intestacy has conceded that the gift in question is a vested remainder liable to be defeated only if the testator's daughter Maude had issue. He has also agreed that the date at which the practicability or otherwise of the gift has to be considered is the date of the death of the testator. He argues, however, that as at that time the value of the remainder was only £2,400, which admittedly was insufficient to carry out the testator's intention, the answer to the questions in the inquiry must be in the negative in spite of the fact that in 1922, when the testator died, the estimated value of one-sixth of the residue was £16,500. I find it difficult to understand the argument that the value of the remainder at the time of the testator's death is the sum to be taken into consideration when considering the question of practicability. It was certainly not the intention of the testator that the value of the remainder should be realised and a convalescent home built out of the proceeds. On the contrary, his intention was that a home should be built if and when his daughter died childless. At the time of the testator's death his daughter was thirty-nine years of age and was unmarried. She did not in fact marry, although there is evidence that her friends expected that she would. Her expectation of life was put at about thirty years, and in fact she lived for about that length of time. In considering the question whether in February, 1922, there was a reasonable prospect that the gift would be a practicable proposition, I think the first question which would have to be considered would be: Assuming that the gift is not defeated, is the share of the residue sufficient to carry out the testator's intention? If that is the right question to be asked, there can be little doubt that it would be answered in the affirmative. It is true that in the light of subsequent events the money available is not now sufficient for the purpose, but no reasonable person would have been likely in 1922 to expect that the fall in the value of money and increase in death duties would have taken place, at least to the extent to which they have done so.

The further question which has been considered is whether the gift was impracticable in view of the prospect of it being defeated by the testator's daughter marrying and having children. For my part, I doubt whether this should be a relevant consideration, although it would appear to be so having regard to the form of the inquiry directed in this case. I would have thought that the proper approach to the question would be on the basis of the gift not being defeated. However, on the facts of this case, there was at least a reasonable chance that Maude would die without having any children, and that in consequence the gift would not be defeated. It is unnecessary, therefore, in this case, to consider the question of the remoteness of the possibility of the gift taking effect. I agree that this appeal should be allowed.

Appeal allowed. Declaration in answer to inquiry that at the death of the testator there was a reasonable prospect that it would be practicable at some future time to carry into execution the trust in question and that the said trust was a valid and effective charitable trust. Leave to appeal to the House of Lords refused.

Solicitors: *Treasury Solicitor; Wrinch & Fisher*, agents for *Block & Cullingham*, Ipswich (for all other parties).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

CROSS *v.* EDEY AND ANOTHER.

[Court of Appeal (Romer and Ormerod, L.JJ.), December 17, 1957.]

County Court—Payment out of court—Fatal accident—Damages recovered by widow invested at low rate of interest—Money recovered in High Court transferred to county court—Discretion—County Courts Act, 1934 (24 *&* 25 *Geo.* 5 *c.* 53), *s.* 164 (2), (3).

Practice—Payment out of court—Fatal accident—Damages recovered by widow paid into court—Transfer to county court—Whether widow entitled to payment out—County Courts Act, 1934 (24 *&* 25 *Geo.* 5 *c.* 53), *s.* 164 (2), (3).

In 1943 the applicant recovered in the High Court £898 damages under the Fatal Accidents Acts, 1846 to 1908, in respect of the death of her husband. The money was transferred to the county court under s. 164 (1)* of the County Courts Act, 1934, and was invested. The applicant was now aged forty-six years, her daughter was now aged nineteen years and in employment, and the sum invested was now earning interest at the rate of 3¼ per cent. per annum. The applicant applied for the total sum in court with interest to be paid out to her to enable her to buy a house as an investment on allegedly profitable terms. Such full information as the county court required concerning the proposed purchase was not brought before the court, and it was contended that the funds in court should in the circumstances be paid out to the applicant, she being competent in affairs and uninfluenced by any other person, to be invested by her to better advantage. On appeal from a refusal to order payment out,

Held: the Court of Appeal would not interfere with the exercise of the discretion of the county court judge under s. 164 (2) of the County Courts Act, 1934, because—

(i) the intention of s. 164 was that money subject to it should be administered for the benefit of a widow rather than paid to her, and, though the county court judge had a discretion to direct such money to be paid out, yet to hold that he ought to do so merely because the widow was a free and competent person would be to negative the discretion that s. 164 (2) conferred, and

(ii) although the Court of Appeal, if it were exercising this jurisdiction originally, might not have come to the same conclusion as the county court judge, yet the court could not interfere with his exercise of his discretion in this case, since he had not had sufficient information about the property proposed to be purchased and there was not sufficient material to justify interference by an appellate court.

Dictum of Upjohn, J., in *Smith* v. *Boulton & Paul, Ltd.* (Oct. 25, 1957), The Times, distinguished.

Per Romer, L.J.: in such a case as the present, prima facie it would be right to allow the applicant to have the damages which she has recovered, and normally that would be the wise and sensible course to adopt, where no special circumstances are established which render such a course undesirable, e.g., the influence of some third person or the existence of infant children (see p. 174, letter H, post).

Appeal dismissed.

[**Editorial Note.** In *Taylor* (*formerly Ryan*) v. *Cheltenham & Hereford Breweries, Ltd.* ([1952] 1 All E.R. 1135) Somervell, L.J., considered a similar problem when dealing with a case of payment out to a widow under R.S.C., Ord. 22, r. 14 (9).

As to power to refuse payment out to a widow, see 9 Halsbury's Laws (3rd Edn.) 236, para. 538, notes (b), (c); and for a case on the subject, see 36 Digest (Repl.) 227, *1208*.

---

* The relevant terms of s. 164 (1), (2), (3) are printed at p. 172, letters G to I, post.

For the County Courts Act, 1934, s. 164, see 5 HALSBURY'S STATUTES (2nd Edn.) 118.

For the Administration of Justice Act, 1956, s. 57 (2), Sch. 2, see 36 HALSBURY'S STATUTES (2nd Edn.) 209, 210.]

Case referred to:

(1) *Smith* v. *Boulton & Paul, Ltd.*, (Oct. 25, 1957), The Times.

Appeal.

The applicant, Mrs. Cross, appealed against an order of His Honour JUDGE PATON sitting at Bridgwater County Court on Nov. 14, 1957.

In 1943 the applicant recovered in the High Court the sum of £898 as damages under the Fatal Accidents Acts, 1846 to 1908, in an action brought by her as widow against the defendants, one Edey and G. Hooper & Co., Ltd., arising out of the death of her husband. In the same action the applicant's infant daughter was awarded £249. In accordance with the trial judge's order both sums were on June 28, 1943, transferred to the Bridgwater County Court.

On Sept. 17, 1943, an order was made in the county court that the applicant's sum of £898 should be invested and that interest thereon (viz., at 3 per cent.) should be paid to her half-yearly until further order and that the infant's sum of £249 should also be invested and the income accumulated. On Oct. 21, 1954, the county court registrar ordered payment of £30 to be made out of her fund to the infant, and ordered payment of £150 to be made out of her fund to the applicant to enable her to buy a car. On Sept. 27, 1956, the registrar ordered a further payment out to the infant of £160 for the purchase of a motor scooter to enable her to travel to work (the infant then being about eighteen years of age). On June 18, 1957, the applicant applied to the registrar for payment out to her of the whole of her fund (then earning interest at the rate of 3¼ per cent. per annum) in order that she might purchase a freehold house (No. 39, Kellerton Road, Lewisham) as an investment.

The registrar adjourned the application so that the applicant might be legally represented, and told her that he would need full information from her solicitor as to the property—the terms of the existing tenancy and the terms of the proposed contract of purchase. On July 11, 1957, the application came again before the registrar when apparently none of the information required was available, but it was suggested on behalf of the applicant that the application should be treated on the footing that the fund should be paid to her to be invested by her to better advantage than 3¼ per cent. per annum. The registrar was not prepared to make an order and referred the application to the county court judge. The application came before the judge on Oct. 3, 1957, and was adjourned to give the applicant an opportunity to supply further information relating to the property, and on Nov. 14, 1957, the application was dismissed. The applicant appealed.

Roger Gray for the applicant.

ROMER, L.J., stated the facts and continued: We have before us an affidavit by the applicant's solicitor, who states what happened when the matter came before the judge. The solicitor says that he repeated before the learned judge the arguments which he had placed before the registrar. He informed the judge that the applicant was a woman aged approximately forty-six, that she assisted her mother and did the greater part of the work in the conduct of a licensed house, that what moneys she had earned she had invested in land and in the local building society, and that she was in every way a business woman, fully capable of looking after her own interests to the best advantage. The solicitor then pointed out to the learned judge that the purchase of this particular house would, in the circumstances, be a highly profitable transaction*. The reason for that was this. The property was let to a Mr. Slade, who was an old friend of the applicant and who was a gentleman aged some sixty-three years. He and his wife were the sole occupants of the property. Mr. Slade had said that he had every intention of leaving the house and moving down to the West Country in two years' time, when he reached retiring age. It was put by the solicitor to the judge that when that happened (as there was every reason to suppose it would) this house would then be worth some £2,000, because it could be sold, on Mr. Slade's vacating it, with vacant possession. Having been told that, the learned judge (according to his note) wanted to know more about the house, and the application was adjourned till Nov. 14, 1957, to give opportunity to the applicant and her solicitor to supply some further information. On the adjourned hearing (according to the learned judge's note), the solicitor was unable to furnish any further information about the premises proposed to be purchased; but it appeared that he had misinformed the judge about the rateable value, and that in fact the premises would not be de-controlled under the Act of 1957.

---

* The information before the county court judge on Oct. 3, 1957, was that the proposed purchase price was £950 subject to a tenancy of Mr. Slade at 30s. weekly.

The judge having taken the view that he was not proposing to authorise this particular transaction, the solicitor then asked him if he would make an order for the moneys to be invested in gilt-edged stock dated for redemption in a few years' time, and that the applicant would if necessary undertake that it would not be dealt with for five years; and he said that the five per cent. stock would be a great deal more to the applicant's advantage than the 3½ per cent. The solicitor in his affidavit said that the judge was not inclined to make an order, and that he, the solicitor, asked him if he would adjourn the matter so that he could obtain a special valuation of the house. That was not obtained by the time of the adjourned hearing, when the learned judge refused either to make a particular order for the release of this money in order to pay for the house or the rather more general order releasing the fund to the applicant so that it might be invested at a more profitable rate of interest. It is from that refusal that this appeal has been brought. The appellant through her counsel desires to have the control of the fund either for the purpose of buying the house or for the purpose of re-investment at a more favourable rate of interest.

The money which was originally awarded in the action was transferred to the county court in pursuance of the provisions of the County Courts Act, 1934, s. 164, which (as amended by the Administration of Justice Act, 1957, s. 57 (2) and Sch. 2) reads:

> "(1) Where in any cause or matter in the High Court, money is in any manner recovered by or on behalf of, or adjudged or ordered to be paid to or for the benefit of, a person who is an infant or of unsound mind, the High Court or a judge thereof may order the money or any part thereof to be paid into or transferred to the county court of the district in which that person resides or such other county court as the High Court or judge may order.
>
> "(2) On the making of any such order, the money . . . shall be . . . transferred . . . and shall, subject to any special order or direction of the High Court or a judge thereof . . . be invested, applied or otherwise dealt with for the benefit of the person to whom the order relates in such manner as the county court in its discretion thinks fit.
>
> "(3) The provisions of this section shall apply to money which in proceedings under the Fatal Accidents Acts, 1846 to 1908, is recovered by or adjudged or ordered to be paid to the widow of the person killed as they apply to money recovered by or adjudged or ordered to be paid to an infant."

Accordingly, since this money was transferred to the county court, it had to be "applied or otherwise dealt with for the benefit of" the applicant "in such manner as the county court in its discretion thinks fit".

Counsel for the applicant put his case before us in two ways. First of all, he says that, on the particular facts of this case, it was a highly profitable transaction which the judge was asked to authorise, and that the judge went wrong in refusing to approve the purchase which the applicant desired to effect. The second way in which he puts it is this: When an applicant is a middle-aged lady who has some business experience and whose only child has almost attained her majority, and who is free, so far as can be known, from the domination of any other person, then such an applicant should be entitled, in the absence of special circumstances, to be paid out the money which stands to her credit or which has been paid, for her benefit, into the county court.

So far as the first way of putting the matter is concerned, I think that there is no possible ground for interfering with the way in which the learned county court judge exercised his discretion. He was not satisfied that he had sufficient information about this property, about the lessor's and lessee's covenants under the tenancy agreement and other material matters to enable him to say whether this would be or would be likely to be a sound investment or merely a hopeful speculation. In those circumstances, and especially having regard to the statement which I read from the learned judge's note, that, on the adjourned hearing, the applicant's solicitor was unable to furnish any further information about the premises proposed to be purchased, it seems to me impossible for this court to say that he erred in refusing to sanction the payment out of this money for the purpose of purchasing this house, bearing in mind, as he did bear in mind, that for relevant purposes he was administering this fund in the same way as he would administer it for the benefit of an infant; and that no court would direct an investment of an infant's money in the purchase of a house property without knowing a great deal more about the tenancy to which the property was subject than the learned county court judge knew in the present case. I, therefore, can see no ground for interfering in any way with the judge's refusal so far as the property is concerned. It is true, as counsel says, that even if Mr. Slade, the tenant, does not go out, as it is hoped that he will, the money invested in the house will still be there as an investment. I cannot believe that the learned county court judge overlooked that. I think that he regarded this as something of a speculation in a property which he did not know enough about.

With regard to the more general way of putting the case, counsel for the applicant in effect asked us to say that, where a lady of this kind is not shown to be illiterate or unbalanced or under the dominion of some evilly disposed person, she ought to be allowed at any time to have unqualified possession and dominion over money which has been paid into court for her benefit, the object (as he says) of the provisions as to administering such funds contained in s. 164 (2) and (3) of the Act of 1934 being not to protect a widow against herself, but to protect her from the influence of other people. He says that the learned county court judge in the present case overlooked, or disregarded, the facts that the fund at present is only bringing in $3\frac{1}{4}$ per cent.; that the daughter is nineteen years old and in a job; and that the lady is now forty-six, is competent to manage her own affairs, and possesses business experience. He says, accordingly, that in those circumstances the judge went wrong in refusing to exercise his discretion by directing the payment out of this fund to her.

I am prepared to assume that there is a right of appeal from the exercise by a county court judge of the discretion vested in him by s. 164; but it seems to me that it would need a very strong case to justify this court in interfering. Certainly I am by no means disposed to lay down any such general proposition as that for which counsel contended. It seems to me that such a proposition would be quite inconsistent with the terms in which s. 164 (which originated in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 205) is expressed, because sub-s. (3) applies the section to widows generally, and not only to widows with infant children. It was obviously the intention of the legislature that money recovered by a widow which was ordered to be paid into court should be administered by the county court for her benefit as distinct from being paid to her for her own use and benefit. If we were to say that a lady who is free from outside interference and who has either no children or no infant children, or only children who have practically attained their majority, ought to be entitled as of right to have her money paid out to her, it seems to me that that in effect would be completely abrogating the discretion which Parliament has vested in the county court judge and would be going much further than this court has any right to go.

It seems to me that each case must depend on its own particular facts. In the present case, the learned registrar saw the applicant. I do not know whether the county court judge saw her; she was presumably in court at the hearing before him. Both the registrar and the learned county court judge came to the conclusion that no proper case had been established to their satisfaction for releasing this fund to her for her own use and benefit. It appears to me that we have no material before us on which we can say that they exercised their discretion wrongly, although it may well be (I do not know) that had the matter come before us in the first instance we would have taken a different view on the matter. With regard to that, counsel drew our attention, as, indeed, the applicant's solicitor drew the attention of the learned county court judge, to what UPJOHN, J., had said in *Smith* v. *Boulton & Paul, Ltd.* (1) ((Oct. 25, 1957), The Times), when he was sitting as an additional judge of the Queen's Bench Division. Sitting in that court, he awarded £4,826 damages to a Mrs. Smith, aged forty-five, under the Fatal Accidents Acts, 1846 to 1908, in an action which she brought in respect of the death of her husband. Her counsel asked the learned judge to order payment of some of the damages to her forthwith. UPJOHN, J., took, and expressed, the view that

> " A person is perfectly entitled to take their damages out and regrettably they are entitled, if they so desire, to fritter it away . . . Having seen Mrs. Smith, I think she would be the last person in the world to do this."

He then directed that the money should be paid out to Mrs. Smith, less £600 for the two children and certain other deductions. He was exercising a discretion (very comparable to that which the learned county court judge was exercising in this case) conferred by R.S.C., Ord. 22, r. 14 (9), which I do not take up time by reading. Other judges have taken a similar view to that expressed by UPJOHN, J., but it appears to me that that does not assist in the present case. We are not exercising an original discretion, as UPJOHN, J., was. We are being asked to interfere with the exercise of the original discretion which is vested in the county court judge, and very different considerations arise. I for my part would only say this. I respectfully agree with what UPJOHN, J., said. In a case such as the present, prima facie, it would be right to allow the applicant to have the damages which she has recovered, and normally that would be the wise and sensible course to adopt, where no special circumstances are established which render such a course undesirable, e.g., the influence of some third person or the existence of infant children or the like. What I think, however, is really irrelevant for present purposes, because all we are asked to do is to interfere with and overrule the exercise of the county court judge's discretion in the circumstances of this case as he saw them. In my opinion there is not sufficient material for us so to do; and I would accordingly dismiss the appeal.

ORMEROD, L.J.: I agree, although I have considerable sympathy with the applicant in this appeal. The appeal is one from a learned county court judge who has made an order in the exercise of his discretion under s. 164 (2) of the County Courts Act, 1934. It appears to be clear that in the case of an exercise of a discretion by a county court judge in those circumstances there may be an appeal, but only in exceptional circumstances, where the decision has resulted in an injustice being done. Although I personally might feel disposed to come to a different conclusion on the facts, it is clear that it is a matter for the exercise of the discretion of the county court judge vested in him by statute; and, unless there is some circumstance which would enable this court to say that an injustice has been done because there has clearly been a wrongful exercise by the judge of his discretion, it does not appear to me that this court has any right to interfere.

Counsel for the applicant put his case in two ways. In the first place, he referred to the scheme itself for the purchase of this house and submitted that on any showing this was a scheme which was for the benefit of the applicant —that whatever happened to the house in the future, whether or not there was vacant possession in two years, the house would still have its value and the money would not be lost—and that in those circumstances the proper exercise by the county court judge of his discretion would have been to allow this money to be spent on this house. That is one way of looking at it. On the other hand, of course, it means that if the judge had allowed this money to be paid out for this specific purpose the court would then have lost control of the money completely. The house would be in the possession and ownership of the applicant. She would be entitled to realise it at any moment and, of course, would have complete control of the proceeds of sale. It may or may not be that that is a matter which was in the mind of the county court judge at the time he came to his conclusion. Be that as it may, I think it is impossible to say here that it was an improper exercise of the discretion of the county court judge for him to decide that this was not, in the circumstances, a suitable way of expending this money on behalf of the widow. On the other ground which counsel has put forward, he would have this court find that the discretion vested in the county court judge could really only be exercised in one way in a case of this kind, where the applicant is a widow who has reached the age of forty-six years and where the infant is now almost of age, and that really only in the event of an exceptional circumstance, such as the domination of an evilly disposed person, should such an application be refused. For my part, I am unable to accept that view, and would be a long way from laying it down as a rule that the discretion of the county court judge should be exercised in that way. Apart from anything else, it would be taking away his discretion entirely in a matter of this kind. It may very well be that the modern idea is that a widow should have possession of money to deal with as she thinks best, that in these days women are more experienced than they were in the past in handling their own affairs, and it may be that with increasing frequency a judge in the High Court will order moneys to be paid direct to widows in these circumstances rather than order that they should be transferred to the county court and invested under s. 164. That is, however, entirely a matter for the High Court judge in each particular case and it is not a matter in which this court can interfere, so far as I am able to see. Although, as I say, if I had been considering these circumstances myself I might have come to a different conclusion, I find it impossible to say that there has been such a wrongful exercise by the county court judge of his discretion that this court should interfere. I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Barrington & Sons*, Bridgwater (for the applicant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re WHITWORTH ART GALLERY TRUSTS. MANCHESTER WHITWORTH INSTITUTE *v.* VICTORIA UNIVERSITY OF MANCHESTER.

[CHANCERY DIVISION (Vaisey, J.), December 11, 20, 1957.]

Charity—Cy-près doctrine—Charter—Charity founded by royal charter—Jurisdiction of court to order scheme.

Although a charity founded by royal charter cannot be re-founded or re-established by the court, it can be regulated and controlled by the court in financial matters and in doing so the court is entitled to have regard to altered circumstances (see p. 179, letter G, post). Where, therefore, the income of a charitable corporation founded by royal charter was inadequate for its sole purpose, viz., the management and conduct of a museum and art gallery, the court had jurisdiction to approve a cy-près scheme under which the museum and art gallery, its contents and the endowments of the charity were to be transferred to a university as sole trustee, and under which the university was to have special facilities for its own purposes subject to an obligation at other times to keep the museum and art gallery open to the public.

A.-G. v. *Clarendon* (*Earl*) ((1810), 17 Ves. 491) applied.

A.-G. v. *Christ's Hospital* (*Governors*) ([1896] 1 Ch. 879) and *A.-G.* v. *Foundling Hospital* ((1793), 2 Ves. 42) considered.

[As to charities of royal foundation, see 4 HALSBURY'S LAWS (3rd Edn.) 416, para. 867; and for cases on the subject, see 8 DIGEST (Repl.) 510, *2348-2351*.]

Cases referred to:

(1) *A.-G.* v. *Christ's Hospital* (*Governors*), [1896] 1 Ch. 879; 65 L.J.Ch. 646; 74 L.T. 96; 60 J.P. 246; 8 Digest (Repl.) 456, *1549*.

(2) *A.-G.* v. *Clarendon* (*Earl*), (1810), 17 Ves. 491; 34 E.R. 190; 8 Digest (Repl.) 453, *1507*.

(3) *Berkhampstead School Case*, (1865), L.R. 1 Eq. 102; 8 Digest (Repl.) 457, *1569*.

(4) *Re Berkhampsted Grammar School*, [1908] 2 Ch. 25; 77 L.J.Ch. 571; 99 L.T. 147; 72 J.P. 273; 19 Digest 589, *194*.

(5) *A.-G.* v. *Foundling Hospital*, (1793), 4 Bro. C.C. 165 (29 E.R. 833); 2 Ves. 42 (30 E.R. 514); 8 Digest (Repl.) 505, *2261*.

(6) *A.-G.* v. *Smart*, (1748), 1 Ves. Sen. 72; 27 E.R. 898; 8 Digest (Repl.) 510, *2348*.

(7) *A.-G.* v. *Middleton*, (1751), 2 Ves. Sen. 327; 28 E.R. 210; 8 Digest (Repl.) 510, *2349*.

Adjourned Summons.

The applicant, the Manchester Whitworth Institute (in which were vested the freehold property and contents and investments and money of the Whitworth Art Gallery) applied to the court by originating summons* for the following relief:—(i) that a scheme might be settled for the administration and management of the trusts of the charity relating to the freehold property and the contents thereof and the investments and money and for making provision for the conveyance and transfer of the premises by the applicant to the respondent, the Victoria University of Manchester, on the trusts and subject to the terms and conditions to be contained in such scheme on the footing that the trusts affecting the premises had become impracticable and that the premises ought to be applied cy-près; (ii) in so far as necessary execution of the trusts affecting the premises by the court.

---

* VAISEY, J., intimated that the summons should have been in the non-inter-partes form intituled "In the Matter of the Charitable Trusts Acts, 1853 to 1925" but that it was not necessary that it should be intituled also "In the Matter of the Charities Procedure Act, 1812", and leave to amend was given accordingly.

The facts appear in the judgment and are summarised in the headnote.

K. J. T. Elphinstone for the applicants, the Manchester Whitworth Institute.
D. S. Chetwood for the first respondents, the Victoria University of Manchester.
Denys B. Buckley for the second respondent, the Attorney-General.

Cur. adv. vult.

Dec. 20. **VAISEY, J.,** read the following judgment: This application asks that a scheme may be settled for the administration and management of the trusts of the charity relating to the freehold property known as the Whitworth Art Gallery situate in the City of Manchester and the contents thereof and the investments of moneys held for the purposes thereof and for the transfer of the said premises by the applicant, the Manchester Whitworth Institute, to the respondent, the Victoria University of Manchester, on the trusts and subject to the terms and conditions to be contained in such scheme. The grounds of the application are briefly that the trusts now affecting the said premises have become impracticable by reason of the insufficiency of the revenues available to carry out the original purposes of the charity and that the premises ought, to the limited necessary extent, to be applied cy-près.

The applicant, hereinafter called "the institute", was established in 1890 for certain charitable purposes in connexion with the City of Manchester in memory of the late Sir Joseph Whitworth, Baronet, with endowments provided out of his estate and subsequently increased by contributions from other sources. The institute was incorporated by royal charter dated Oct. 2, 1890, and its objects as therein set forth were various. In the past, however, the activities of the institute have been confined to only a few of its objects, which may be summarised as follows. The institute acquired and laid out a public park known as the Whitworth Park adjacent to the land on which there now stands the Whitworth Gallery hereinafter referred to and the said park was demised by the institute for a term of 999 years at a peppercorn rent to the Manchester City Corporation who undertook to maintain the same and have ever since done so. Further the institute took over, managed and developed, two institutions respectively known as the Manchester School of Art and the Manchester Technical School, but these have now been transferred to the Manchester City Corporation and there remains as the only activity in which the institute is now engaged, or has been engaged for many years past, the management and conduct of the Whitworth Gallery, hereinafter called "the gallery" being the museum and art gallery, open to the general public, which is situate on the south side of Manchester and about two miles from the centre of the city.

The gallery contains a permanent collection of pictures and other works of art and of textiles and other miscellaneous exhibits. Special exhibitions of works of art and textiles are from time to time held in the gallery, the freehold of which and of the site on which it stands is held by the institute in fee simple, and the institute also owns the permanent exhibits therein and the furnishings and fittings thereof. It is the practice of the institute from time to time to lend the pictures and other works for exhibitions elsewhere than in Manchester. The gallery enjoys a high reputation and provides a centre for persons interested in the pictorial arts. It is visited by students and other interested persons from various parts of the world. It possesses a famous and indeed magnificent collection of water colours and drawings, including a fine collection of drawings by the artists, J. R. Cozens and J. M. W. Turner. Its collection of textiles is of great historical interest and is particularly appropriate to the City of Manchester, the centre of the Lancashire textile industry.

The institute and the gallery have many well-wishers and supporters in Manchester and the surrounding districts and the gallery has in the past received and continues from time to time to receive many gifts of works of art for exhibition and substantial additions have been made to its collections by private benefactors. An unofficial group of persons known as "the Friends of the Whitworth" actively interest themselves in the gallery and subscribe annually to a fund for its support. The position, however, now is financially unsatisfactory. Its income from all sources has become increasingly insufficient to maintain the activities of the institute, while its current expenditure shows a continuing tendency to increase with no visible prospect of augmentation of its income from any source. The governors of the institute have come to the conclusion that the time cannot be far distant when the institute will either have to be closed down or its activities reduced to a scale quite unworthy of its traditions.

With these considerations in mind, the Victoria University of Manchester, hereinafter called the "university", have been approached with proposals for the transfer of the gallery to the university along with its contents and endowments and to the taking over by the university of the gallery as a museum and art gallery open as at present to the general public but having a special connexion with the university not dissimilar to the connexion which unites the Ashmolean Museum to the University of Oxford, or the Fitzwilliam Museum to the University of Cambridge.

It has now been provisionally agreed in the terms of the scheme, for which the approval of the court is now sought, which involves conditions which may be stated briefly as follows. First, that the university itself shall be the sole trustee of the gallery and solely empowered to exercise all the functions of management vested in the institute and, secondly, that the university, though accepting the obligation to keep the gallery open to the public, shall have special facilities therein for its own purposes for the instruction of art students and to hold examinations, receptions, musical concerts and recitals therein for which the rooms in the gallery are well suited, and for those purposes, when necessary, temporarily to exclude the public from the gallery or some part or parts thereof.

It is represented to the court that it is proper to accede to these conditions and that the university may be trusted to maintain the reputation and tradition of the gallery and for that purpose from time to time, as need arises, to supplement the income from endowments out of its own revenues, availing itself of the assistance and support of former members of the council of the institute and of the Friends of the Whitworth beforementioned, and particularly the services of Miss Margaret Pilkington, who has for many years acted as an honorary director of the gallery and has rendered loyal and efficient services to the institute, so long as she is able and willing to continue to act in that capacity. A draft scheme has been put before me and, with certain trifling modifications, receives my full approval, and I am satisfied that its confirmation is the best or perhaps the only means whereby the gallery can be kept in existence on its present scale and whereby the serious loss to the City of Manchester and the nation which would be involved in its being closed or continued on a greatly reduced scale can be obviated.

The only question on which a doubt was felt is the one on which I must now give my decision, i.e., whether this charity, having been founded by royal charter, is one to which the cy-près application may be directed on the ground of the insufficiency of its revenues. This question is answered in the affirmative in the text-books, especially TUDOR ON CHARITIES (5th Edn.), at pp. 178, 179, and 4 HALSBURY'S LAWS OF ENGLAND (3rd Edn.), pp. 416, 417. In fact, however, the question cannot be answered either affirmatively or in the negative without qualification, and the proper principle and true test to be applied may, in my judgment, be stated somewhat as follows. I turn first, however, to one of the latest cases on the subject, *A.-G.* v. *Christ's Hospital* (*Governors*) (1) ([1896] 1

Ch. 879), which at first sight seems to be contrary to the statements in the text-books. The difficulty of the decision is to discover whether it would have gone the other way if the existing governing body of the institution had supported the proposed scheme which was there sought to be sanctioned instead of opposing it, as they did. A passage from the judgment of CHITTY, J., reads as follows (ibid., at p. 888):

> "The extent and the limits of this jurisdiction [the jurisdiction of the court] were fully discussed in the argument. Many authorities bearing more or less on the present case were cited, and reference was made to an able and useful dissertation on the subject contained in the report of the Royal Commissioners mentioned in the preamble of [the Endowed Schools Act, 1869], and in great measure founded on the opinions given in evidence before the commission of eminent lawyers, such as Lord Westbury, Lord Hatherley, Sir Roundell Palmer, Mr. Wickens, and others. For the purposes of this decision, however, I think it unnecessary to examine critically the authorities cited or the opinions referred to. I prefer to state my own opinion broadly. I hold that it is beyond the jurisdiction of the court to sanction the Attorney-General's scheme in the face of the opposition of the existing governing body. Their title is founded on royal charter, and is established by Act of Parliament. To whatever lengths the court may have gone, it has never assumed legislative authority ; it has never by a stroke of the pen at one and the same time revoked a royal charter and repealed an Act of Parliament. It has never ousted from its rights of administering the charitable trusts such a body as the present governors against their will, and that, too, in a case where no breach of trust is charged. There is no authority in the books for any such proposition. Yet such is the proposition which underlies the Attorney-General's scheme. I consider that I am not at liberty to deprive the existing governing body of their right of control over the income of the funds vested in them, either permanently, as proposed by the scheme, or temporarily, as suggested by the Attorney-General in his reply. In a word, I cannot, under guise of executing the trusts cy-près, upset the constitution of the present governing body, or, by transferring their powers and duties of administering the trusts to another body, reduce them to the position of being bare trustees of the funds vested in them. To establish such a scheme as that submitted by the Attorney-General, nothing less than an Act of Parliament will suffice."

I have looked at some of the authorities cited in *A.-G.* v. *Christ's Hospital* (*Governors*) (1), and the proposition which seems to me to emerge from them is that a charitable corporation founded by royal charter cannot be re-founded or re-established by the court, but can be regulated and controlled by the court, especially on financial grounds, and in that case the court is entitled to have regard to altered circumstances: see the Harrow School case, *A.-G.* v. *Clarendon* (*Earl*) (2) ((1810), 17 Ves. 491), which seems to illustrate the nature of the distinction to be drawn. It was held that the court could not interfere in the matter of the election or a motion of the corporators, but could give directions by scheme as to the application of the income having regard to the founder's directions on the one hand and on the other to the alteration of circumstances which might render a literal adherence to them adverse to their general object and spirit. The following passage appears in the judgment of SIR WILLIAM GRANT, M.R. (ibid., at p. 500):

> "With regard to the application of the income, it is alleged, that some of the purposes, to which it ought to be applied, are neglected; and that part of it is applied to purposes, not within the scope of the charity. The purposes, to which, after providing for the sustentation of the school, the surplus income is to be applied, are partly specified by the founder's rules; and partly left to the discretion of the governors. As it appears, that the

> A application of the income is not in all respects agreeable to the directions of the founder, I think, it is fit, that it should for the future be fixed and ascertained by a scheme; having due regard on the one hand to the founder's directions, and on the other, to the alteration of circumstances, that may have taken place since his time; and which may be such as to render a literal adherence to his rules adverse to their general object and spirit."

B The same principle seems to be illustrated by two of the cases relating to Berkhamptead School, founded by Henry 8 and re-founded by Act of Parliament in the reign of Edward 6; the first, *Berkhampstead School Case* (3) ((1865), L.R. 1 Eq. 102) recites (ibid., at p. 111) a scheme of 1855 dealing with the insufficiency of the revenue of the foundation. The second, *Re Berkhampsted Grammar School* (4) ([1908] 2 Ch. 25), dealt with a similar predicament by means of a further scheme. C

In *A.-G.* v. *Foundling Hospital* (5) ((1793), 2 Ves. 42), Lord Commissioner EYRE says (ibid., at p. 47));

> "I am satisfied, that this court has a jurisdiction, that is, a limited jurisdiction, with regard to all things of this nature: but I am also satisfied, that it has no such jurisdiction as the counsel have proceeded on. There is D nothing better established, than that this court does not entertain a general jurisdiction to regulate and control charities established by charter. There the establishment is fixed and determined; and the court has no power to vary it. If the governors, established for the regulation of it, are not those, who have the management of the revenues, this court has no jurisdiction; and, if it is ever so much abused, as far as respects the jurisdiction E of this court, it is without remedy: but if those, established as governors, have also the management of the revenues, this court does assume a jurisdiction of necessity, so far as they are to be considered as trustees of the revenue. That is stated in the book upon charitable uses; and referred to in several authorities; particularly in *A.-G.* v. *Smart* (6) ((1748), 1 Ves. Sen. 72), and *A.-G.* v. *Middleton* (7) ((1751), 2 Ves. Sen. 327). The result F is, this court must not hastily take upon itself to interfere with those, who have by charter, and in this case by Act of Parliament, the whole control over this charity. But where, having also the management of the revenues, they are abusing their trust, the court has jurisdiction."

A.-G. v. *Smart* (6) and *A.-G.* v. *Middleton* (7), cited in *A.-G.* v. *Foundling Hospital* (5), are earlier authorities which appear to define the limits of the G court's jurisdiction, both of these decided by LORD HARDWICKE, L.C.

The draft scheme forming exhibit " T.D.B.3 " to the affidavit of Sir Thomas Dalmahoy Barlow, with some slight alterations suggested and approved during the hearing, is in my judgment a fit and proper scheme which I have full jurisdiction to sanction, and I make the necessary order for that purpose. The university has agreed to pay its own costs and the costs taxed as between H solicitor and client of the other parties. The scheme in its final form should be set out in a schedule to the order.

Order accordingly.

Solicitors: *Pritchard, Englefield & Co.*, agents for *Boote, Edgar & Co.*, Manchester (for the applicants and the first respondents); *Treasury Solicitor* (for the second respondent).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

MACFARLANE *v.* GWALTER.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Ormerod, L.JJ.), December 10, 11, 19, 1957.]

Highway—Non-repair—Grating admitting light to cellar of adjoining premises —Dedicated as part of highway—Liability of owner or occupier of adjoining premises for repair and for accident resulting from want of repair—Public Health Acts Amendment Act, 1890 (53 *&* 54 *Vict.* c. 59), *s.* 35 (1).

Nuisance—Highway—Pavement—Public nuisance—Grating admitting light to cellar of adjoining premises—Dedicated as part of highway—Liability of owner or occupier of adjoining premises for accident resulting from want of repair—Public Health Acts Amendment Act, 1890 (53 *&* 54 *Vict.* c. 59), *s.* 35 (1).

The plaintiff was walking along the pavement of a public highway when her left leg went through an iron grating. The grating, whose purpose was to admit light to the cellar window of an adjoining building, was in bad condition and constituted a dangerous trap. The defendant, who was the occupier of the adjoining building, knew of the condition of the grating and failed to remedy it. The grating had, it seemed, formed part of the highway at the time of its dedication. The plaintiff claimed damages for nuisance caused by the defendant's breach of duty to repair the grating, that duty being imposed, so it was contended, by s. 35 (1) of the Public Health Acts Amendment Act, 1890.

Held: owing to the dangerous condition of the grating it constituted a nuisance on the highway and the defendant was liable to the plaintiff in damages for her injury because, as occupier of the adjoining building, he was the person who was bound by s. 35 (1) of the Public Health Acts Amendment Act, 1890, to repair the grating.

Dictum of LORD KENYON, C.J., in *Russell* v. *Men of Devon* ((1788), 2 Term Rep. at p. 671), applied.

Penney v. *Berry* ([1955] 3 All E.R. 182) distinguished.

Appeal allowed.

[As to repair of gratings, see 19 HALSBURY'S LAWS (3rd Edn.) 291, para. 463, note (i); and for cases on the subject, see 26 DIGEST 418, *1369*.

For the Public Health Acts Amendment Act, 1890, s. 35 (1), see 19 HALSBURY'S STATUTES (2nd Edn.) 136.

For the Public Health Act, 1875, s. 149, see ibid., 69.]

Cases referred to:

(1) *Penney* v. *Berry*, [1955] 3 All E.R. 182; 119 J.P. 542; 3rd Digest Supp.

(2) *Horridge* v. *Makinson*, (1915), 84 L.J.K.B. 1294; 113 L.T. 498; 79 J.P. 484; 26 Digest 542, *2407*.

(3) *Russell* v. *Men of Devon*, (1788), 2 Term Rep. 667; 100 E.R. 359; 26 Digest 587, *2780*.

(4) *Cowley* v. *Newmarket Local Board*, [1892] A.C. 345; 62 L.J.Q.B. 65; 67 L.T. 486; 56 J.P. 805; 26 Digest 400, *1251*.

(5) *Pretty* v. *Bickmore*, (1873), L.R. 8 C.P. 401; 28 L.T. 704; 37 J.P. 552; 26 Digest 417, *1363*.

Appeal.

This was an appeal by the plaintiff from a judgment of His Honour JUDGE GLAZEBROOK given on July 10, 1957, at Gravesend County Court. The plaintiff was an infant and by her next friend claimed damages limited to £100 for personal injuries caused by the defendant's nuisance and breach of statutory duty. In the particulars of claim the plaintiff alleged that the defendant was possessed of a grating immediately adjoining a public highway and that the plaintiff while lawfully passing along the highway slipped through the grating and was injured. The plaintiff gave the following particulars of the causes of action:

> "Particulars of nuisance. The defendant wrongfully suffered the grating to remain in such a state as to be dangerous to persons lawfully passing along the highway.
>
> "Particulars of breach of statutory duty. The defendant in breach of s. 35 of the Public Health Acts Amendment Act, 1890, as occupier of [the premises adjoining the grating], failed to keep a grating in the surface of a street in good condition and repair."

The defendant by his defence admitted that he was the occupier of the premises, but denied the bad state of repair of the grating and alleged that the grating formed part of the highway which was dedicated to the public subject to the said grating. The defendant was tenant of the premises, and was, it appeared, under obligation as between himself and the landlord for repair of the premises. The county court judge dismissed the action on the grounds (i) that s. 35 (1) of the Act of 1890 gave no cause of action, (ii) that as the grating was fixed in the surface so as to become part of the highway the local authority was responsible for its repair.

Hugh Griffiths for the appellant, the plaintiff.
R. I. Kidwell for the respondent, the defendant.

Cur. adv. vult.

Dec. 19. **LORD EVERSHED, M.R.:** I will ask ORMEROD, L.J., to deliver the first judgment.

ORMEROD, L.J., read the following judgment: This is an appeal from an order of His Honour JUDGE GLAZEBROOK made on July 10, 1957, at Gravesend County Court dismissing an action by the plaintiff against the defendant for damages for personal injuries arising from the breach of duty of the defendant. The plaintiff is an infant aged twelve. On Oct. 27, 1956, she was walking along the pavement in Clarence Street, Gravesend, when her left leg went through an iron grating which was old and in bad condition. It appeared that one of the bars had broken and fallen into the area below the grating. The learned judge found that the grating was a dangerous trap to passers-by and that the defendant, who was the occupier of the adjacent building, by his servant Mrs. Jones knew of its condition before the accident and could have taken steps to repair it. The grating was fixed into the pavement and was two feet six inches by eighteen inches. It covered a small open area and its purpose was to provide light for the cellar window of the defendant's premises. There was no conclusive evidence available whether the grating was there when the street was dedicated, but the surveyor who was called said that the local authority would not now accept dedication of a street containing such a grating. The judge said:

> "It seems clear that if the grid, or some predecessor, was put there by the owner of the adjacent property, it must have been done before dedication because he would have had no power to do it afterwards";

and this appeal has been argued on the basis that the grid was there at the time of dedication. The learned county court judge held that the defendant was under no liability to the plaintiff either under the statute or at common law.

The questions for this court are whether the defendant was under any duty to repair the grating, and, if so, whether by reason of his failure to perform this duty a nuisance had been created on the highway causing injury to the plaintiff for which the defendant could be made liable in damages.

Counsel for the plaintiff argued that the defendant was under a duty to repair the grating by virtue of s. 35 (1) of the Public Health Acts Amendment Act, 1890. He submitted that the defendant, in breach of the duty, had allowed the grating to fall into so dangerous a condition as to cause it to become a

A nuisance on the highway, and that, the plaintiff having suffered injuries by reason of the nuisance, the defendant was liable to compensate her in damages. Section 35 (1) reads as follows:

> " All vaults, arches, and cellars under any street, and all openings into such vaults, arches, or cellars in the surface of any street, and all cellar-heads, gratings, lights, and coal holes in the surface of any street, and all B landings, flags, or stones of the path or street supporting the same respectively, shall be kept in good condition and repair by the owners or occupiers of the same, or of the houses or buildings to which the same respectively belong."

It should be noted that s. 35 (2) provides that where default is made in complying with the provisions of the section, the urban authority may, after notice, do the C necessary work and recover the cost from the owner or occupier. It was argued that the grating in question came within the meaning of sub-s. (1) and that the defendant was the occupier of the house or building to which the grating belonged, there being no reason for the existence of the grating other than to cover the small area which admitted light to the cellar of the defendant's premises.

We were referred to a number of authorities in support of this submission. D I propose to mention three of them. *Penney* v. *Berry* (1) ([1955] 3 All E.R. 182) was a case where the defendant was the owner of premises adjoining the highway and in the surface of the pavement was an opening into this cellar covered by a metal slab set in a large flagstone. In about 1950 the local authority raised the level of the pavement and so reconstructed it that the metal cover had a concrete surround and rested in a rebate in the concrete. Unfortunately, E it was so constructed that one side of the cover was three-quarters of an inch higher than the pavement, with the result that in January, 1953, the plaintiff tripped on the cover and was injured. It was held that she was not entitled to recover from the defendant. PARKER, L.J., said (ibid., at p. 183):

> " . . . the general principle, as I understand it, is that there can be no duty on the owner of land adjoining the highway where the nuisance is to F abate the nuisance, because the liability is, primarily at any rate, on the local authority, and, unless he has some statutory power to do so, the owner has no right to go on to the pavement to abate the nuisance. As SHEARMAN, J., put it in *Horridge* v. *Makinson* (2) ((1915), 84 L.J.K.B. 1294, at p. 1296): ' In my opinion the cases show that a liability is cast upon the owner of a house, in respect of a nuisance, only when such owner has a G duty to abate the nuisance, and he fails to do so '. I think I might add that it is only when such owner has a duty and a power to abate the nuisance."

PARKER, L.J., then referred to s. 35 (1) and said ([1955] 3 All E.R. at p. 184):

> " It is quite clear, therefore, that there was an obligation on the defendant to keep this cover . . . in good condition and repair. To my mind, the H only question in this case is what those words ' in good condition and repair ' are apt to cover."

PARKER, L.J., then discussed why in his view there was no breach of duty on the part of the defendant. This case was relied on by the plaintiff as establishing that there was a duty on the defendant to keep the slab in repair and, at least by inference, that if as a result of the defendant's breach the slab fell into dis- I repair, the defendant would be responsible for any injury thereby caused.

Russell v. *Men of Devon* (3) ((1788), 2 Term Rep. 667) was a case where the inhabitants of a county were sought to be made liable for injury caused to an individual in consequence of a county bridge being out of repair. LORD KENYON, C.J., held that such an action could not be maintained, but said (ibid., at p. 671):

> " Many of the principles laid down by the plaintiff's counsel cannot be controverted; as that an action would lie by an individual for an injury which he has sustained against any other individual who is bound to repair."

The principle that an individual cannot recover damages in respect of an injury arising from the default of the public in its duty to repair a highway remains today in the doctrine that a local authority cannot be made liable for injury to an individual arising from non-feasance in the repair of the highway. This would appear to be because the various statutes passed in the nineteenth century putting the liability to repair on surveyors and local authorities were regarded merely as a means of getting the repairs done and not as intending to create any new right of action; see per Lord Halsbury, L.C., in *Cowley* v. *Newmarket Local Board* (4) ([1892] A.C. 345 at p. 350).

In *Pretty* v. *Bickmore* (5) ((1873), L.R. 8 C.P. 401) an aperture covered by an iron plate was out of repair so that a passer-by was injured. The question at issue was whether the landlord or the tenant was liable to the plaintiff in view of the terms of the demise, but in the course of his judgment Bovill, C.J., said (ibid., at p. 404):

> " The person who is in possession of the premises and who allows the coal-plate to be in a dangerous condition is the person responsible to the public for any injury resulting from its being out of repair."

On behalf of the defendant, counsel agreed that if the grating in question did not form part of the dedicated highway the defendant would be liable. His submission was that as the grating was in position at the time the highway was dedicated and was fixed to the highway it was part of the highway and became vested in the local authority by reason of the Public Health Act, 1875, s. 149, which provides that all streets being or which at any time become highways repairable by the inhabitants at large shall vest in and be under the control of the urban authority. He argued in the first place that the gratings and other matters referred to in s. 35 (1) of the Act of 1890 comprised only cases where the gratings, etc., were not a dedicated part of the highway and, therefore, not vested in the local authority. For my part, I cannot accept this submission. The sub-section refers in the first place to " All vaults, arches, and cellars under any street "—matters which would be unlikely to be the subject of dedication —" and all openings into such vaults ", etc., and then goes on to refer to " all cellar-heads, gratings ", etc. There is no restriction to cellar-heads, etc., which do not form part of a dedicated highway. Counsel for the defendant sought to draw support for his argument from the words

> " shall be kept in good condition . . . by the owners or occupiers of the same, or of the houses or buildings to which the same respectively belong."

He submitted that the word " belong " was ambiguous in its meaning, but that it must carry an element of proprietary interest. I think that the meaning of the words is plain. The sub-section refers to certain structures which are either under the street or in the surface of the street, and in my view its intention is to throw on to the owners or occupiers of these structures, or on the owners or occupiers of the adjoining buildings, the duty of keeping them in repair whether they have been the subject of dedication or not. A grating such as the one in question belongs to the adjoining house or building in the sense that it came into existence and has continued to exist for the sole purpose of providing access of light to the cellar of that house or building, and, therefore, the duty to repair it falls on the defendant. It was argued that as the grating was part of the highway it was vested in the local authority and, therefore, the effect of s. 35 was to throw on to the authority the duty of repairing it and that this pointed strongly to the construction that the sub-section was referring only to structures which had not been the subject of dedication. For my part, however, on reading the section as a whole I have no doubt that the view which I have already expressed is the right one.

It was further submitted on behalf of the defendant that assuming the section applies to a dedicated object, the plaintiff is still not entitled to succeed. Counsel for the defendant argued that the plaintiff must sue on the statute, and that as the section in question was not one the breach of which would give rise to a remedy the plaintiff was bound to introduce what he called a "middle term", the concept of control, between the statute and liability. He argued that this was not a logical thing to do. The question whether a breach of the duty imposed by the section would give rise to a remedy was not argued before us, although counsel for the plaintiff wished to keep the point open. I fail to see what is illogical in introducing what counsel for the defendant called a middle term. The position is that there was a structure on the highway and it was the duty of the defendant to keep it in repair. Whether that duty arose by statute or from any other circumstance does not appear to be relevant. The defendant having failed in his duty, the structure fell out of repair and became dangerous to passers-by and thereby became a nuisance on the highway. As a result of that nuisance the plaintiff was injured. I see no reason why in these circumstances she cannot recover damages from the defendant. It is true that if the duty to repair was on the local authority she would not have been able to recover unless she could show that the nuisance was due to misfeasance; but it is not suggested here that the defendant is in any sense the successor of the inhabitants at large so as to be able to claim the protection of the rule as to non-feasance. Lord Kenyon, C.J., in *Russell* v. *Men of Devon* (3) regarded as incontrovertible the principle that an action would lie by an individual for an injury which he has sustained against any other individual who is bound to repair, and in my judgment there are no circumstances in this case to give rise to a different conclusion. For these reasons, I would allow the appeal and enter judgment for the plaintiff in the sum of damages assessed by the learned county court judge.

ROMER, L.J.: I have had the advantage of reading in advance the judgment which Ormerod, L.J., has given, and I so fully concur in that judgment, both in the reasoning and its conclusions, that there is nothing I desire to add.

LORD EVERSHED, M.R.: I likewise have had the advantage of seeing the judgment of Ormerod, L.J., in advance, and, like Romer, L.J., I feel that any addition I might make to the reasoning of it would be mere surplusage on my part. In confining myself, therefore, to that expression of agreement, I shall not, I hope, be thought to be disrespectful to the judgment of the learned judge with whom we are disagreeing or to the cogent and attractive argument of counsel for the defendant.

Appeal allowed. Judgment for plaintiff for £25.

Solicitors: *Church, Bruce & Hawkes,* Gravesend (for the appellant, the plaintiff); *Tolhursts,* Gravesend (for the respondent, the defendant).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

Re McMORRAN (*deceased*).
MERCANTILE BANK OF INDIA, LTD. *v.* PERKINS.

[CHANCERY DIVISION (Harman, J.), November 20, 21, December 20, 1957.]

Conflict of Laws—Power of appointment—Special power—Power given by English will—Exercise by Scottish will—Law relevant for construction of instrument exercising power—Whether valid exercise of power.

Power of Appointment—Exercise—Special power—Power given by English will—Exercise in Scottish will—Relevant law.

A testator, resident and domiciled in England, by his will, which was proved in 1940, bequeathed a share of residue on trusts under which his son was entitled to appoint by deed or will one-half of the income of the share to his wife if she survived him. The son was resident and domiciled in Scotland and made a Scottish trust disposition and settlement, dated in September, 1943, giving all property " over which I may have power of disposal at my death " in trust for his wife for life. The son died in November, 1943, and his widow survived him. The trust disposition was subsequently confirmed in Scotland and the confirmation was resealed in England. The disposition was sufficient according to Scottish law to be a testamentary exercise of a special power of appointment, such powers being known to Scottish law, but as the disposition did not specifically refer to the special power of appointment given by the testator's will it would or might be insufficient to exercise it if construed by English law, although the son had no other power of appointment at his death.

Held: the special power of appointment given by the English will was exercised by the Scottish disposition because the disposition was framed with reference to Scottish law and the testator's son must be taken to have meant what the words of the disposition signified according to Scottish law; therefore, although the exercise of the special power of appointment in favour of the son's wife was excessive, it was valid to the extent of one-half of the income of his share of the testator's residuary estate.

Re D'Este's Settlement Trusts ([1903] 1 Ch. 898) criticised.

Re Price ([1900] 1 Ch. 442), *Re Simpson* ([1916] 1 Ch. 502) and *Re Waite's Settlement Trusts* ([1957] 1 All E.R. 629) considered.

[As to the execution of a power by the will of a testator domiciled abroad, see 7 HALSBURY'S LAWS (3rd Edn.) 61, 62, para. 115; and for cases on the subject, see 11 DIGEST (Repl.) 413-418, *667-700*.]

Cases referred to:

(1) *Re Knight, Re Wynn, Midland Bank Executor & Trustee Co., Ltd.* v. *Parker*, [1957] 2 All E.R. 252; [1957] Ch. 441.

(2) *Re Price, Tomlin* v. *Latter*, [1900] 1 Ch. 442; 69 L.J.Ch. 225; 82 L.T. 79; 11 Digest (Repl.) 415, *686*.

(3) *Pouey* v. *Hordern*, [1900] 1 Ch. 492; 69 L.J.Ch. 231; 82 L.T. 51; 11 Digest (Repl.) 414, *677*.

(4) *Re Pryce, Lawford* v. *Pryce*, [1911] 2 Ch. 286; 80 L.J.Ch. 525; 105 L.T. 51; 11 Digest (Repl.) 418, *697*.

(5) *Re Lewal's Settlement Trusts, Gould* v. *Lewal*, [1918] 2 Ch. 391; 87 L.J.Ch. 588; 119 L.T. 520; 11 Digest (Repl.) 416, *692*.

(6) *Re D'Este's Settlement Trusts, Poulter* v. *D'Este*, [1903] 1 Ch. 898; 72 L.J.Ch. 305; 88 L.T. 384; 11 Digest (Repl.) 416, *688*.

(7) *Re Simpson, Coutts & Co.* v. *Church Missionary Society*, [1916] 1 Ch. 502; 85 L.J.Ch. 329; 114 L.T. 835; 11 Digest (Repl.) 416, *690*.

(8) *Re Walker, MacColl* v. *Bruce*, [1908] 1 Ch. 560; 77 L.J.Ch. 370; 98 L.T. 524; 11 Digest (Repl.) 415, *684*.

(9) *Re Waite's Settlement Trusts, Westminster Bank, Ltd.* v. *Brouard*, [1957] 1 All E.R. 629.
(10) *Muir* v. *Muir*, [1943] A.C. 468.
(11) *Alexander's Trustees* v. *Alexander's Trustees*, 1917 S.C. 654; [1917] 2 S.L.T. 52; 37 Digest 432, *379 viii.*
(12) *Gemmell's Trustees* v. *Shields*, 1936 S.C. 717.

Adjourned Summons.

The plaintiff, the sole trustee of the will of Thomas McMorran, deceased, by an originating summons dated June 20, 1957, asked for the determination of the question whether the testator's son, Thomas White McMorran, deceased, by his trust disposition and settlement dated Sept. 8, 1943, exercised the following powers conferred on him by the testator's will: (a) the power to appoint to any wife who might survive him during the residue of her life or for any less period any part not exceeding one-half of the annual income of his settled share; (b) the power to appoint the corpus of his settled share amongst his issue. The testator died on Apr. 18, 1940, domiciled in England and his will and three codicils were proved in the Principal Probate Registry on June 1, 1940. The testator's son died on Nov. 6, 1943, domiciled in Scotland, and confirmation of his trust disposition and settlement was issued in Scotland on Jan. 24, 1944, and was resealed in the Principal Probate Registry in England on Feb. 8, 1944.

E. G. Wright for the plaintiff, the trustee.
T. J. R. Barnes for the first and second defendants.
E. I. Goulding for the third and fourth defendants.

Cur. adv. vult.

Dec. 20. **HARMAN, J.**, read the following judgment: Thomas McMorran (whom I shall call the father) made his will in English form on Aug. 4, 1927. In it he described himself as of Frithwood House, Eastbury, in the County of Hertford, and of 149, Leadenhall Street in the City of London, merchant. There seems no doubt that he was at all material times resident and domiciled in England. The plaintiff is the present trustee of this will which was proved in England in 1940. By it the father made a general gift to his trustees on the usual administrative trusts. The beneficial trusts, as varied by a codicil dated Nov. 29, 1932, were, as to two-thirds for the wife while his widow, and subject to that for his children equally, but settled as to each share on trust for the child for life with remainder to such of the issue of the child as the child should by deed or will appoint, but no appointee was to take before attaining twenty-one; the gift in default of appointment was for grandchildren of the testator at twenty-one or marriage. Superimposed on this was a further power for each child by deed or will to appoint to a surviving spouse a life or less interest in any part not exceeding one-half of the income of that child's share. The trustees were empowered to pay over a child's share to him or her absolutely on attaining twenty-five.

The father had four daughters and one son, Thomas White McMorran, whom I shall call " the son ". The father's widow died in 1948. There remains undistributed two-thirds of the son's share which is now represented by investments worth about £30,000. The son, it appears, became resident and domiciled in Scotland, and made his will in Scottish form by a trust disposition and settlement dated Sept. 8, 1943. The relevant portion of this instrument is as follows:

> " I assign, dispone, devise, legate and bequeath to them, as trustees under these presents (the persons or person acting for the time as trustees or trustee under these presents being hereinafter referred to as ' my trustee ') the whole means and estate, heritable and moveable, real and personal, wherever situated, which shall belong to me, or over which I may have the power of disposal at the time of my death in trust for the following purposes, videlicet: (First) For payment of my debts, sickbed, funeral and executry

> expenses: (Second) I direct my trustees to pay to my wife Mrs. Mary Anne Donald or McMorran in the event of her surviving me the sum of £500 free of duty as soon as possible after my decease to enable her to meet current expenses: (Third) I direct my trustees in the event of my wife surviving me to deliver and pay to her free of all death duties, videlicet: (One) to deliver to her the whole household furniture and plenishing of every kind whether useful or ornamental belonging to me at the time of my death, and (Two) to pay to her during her lifetime after my death the free annual income of the residue of my estate, but declaring that she shall be bound as a condition of receiving the said income to maintain and educate our children in a manner suitable to their station in life until they are able to maintain themselves: (Fourth) I direct my trustees to hold the residue of my said means and estate for behoof of my children and the issue of such of them as may, before attaining a vested interest as hereinafter provided, die leaving issue, and to account for and pay over the same to the said children and remoter issue equally share and share alike, the issue of any child who shall have died before attaining a vested interest taking their parents share, original and accrescing, equally among them if more than one: Declaring (one) That the shares of residue falling to my children or remoter issue shall vest and be payable on the death of the survivor of my said wife and me if the children shall then have attained the age of twenty-five years complete . . ."

This instrument was on the son's death in 1943 registered according to Scottish law: it has since been resealed in England. It appears that the son had no powers of appointment save those conferred on him by the father's will. The defendants to the summons are, first, the son's widow, who has re-married, and, second, third and fourth his children, two of whom are infants. The question is whether the Scottish instrument exercises the English powers of appointment.

The plaintiff has taken advice in Scotland on this matter, and has been advised that in a Scottish court the powers would be held to be well exercised applying Scottish principles of construction. On the other hand, in an English court applying English principles of construction it seems likely that the powers would be held not to have been exercised: see *Re Knight, Re Wynn, Midland Bank Executor & Trustee Co., Ltd.* v. *Parker* (1) ([1957] 2 All E.R. 252). This is a most unfortunate divergence. Both systems are familiar with powers whether general or special, and both apply the same tests, but the courts of the two countries construe the language differently, the Scots holding that a general reference in a will to powers which the testator has or may have is a sufficient reference to a special power, while the English courts, generally speaking, take the contrary view. In *Re Knight* (1), a testatrix gave her residuary estate on trust for sale and directed her trustees to stand possessed of the residue of the proceeds after payment of expenses on trust for a daughter and for the children of a deceased son and a daughter in specified shares. The residuary estate was expressed as " including any property over which I may have any power of disposition at the date of my death ". Under the terms of the will of the testatrix's father she had a special power of appointment of a share of the residue of her father's estate amongst a class of objects which included all the persons who were beneficially entitled to her own residuary estate. The class of objects did not include her trustees. It was held that the intention to exercise a special power must be gathered from the whole will; and that the words used by the testatrix were not, in the context of her will, apt to exercise the special power of appointment conferred on her by her father's will.

The first question, therefore, to be answered is whether the Scots or the English rule should be followed. The cases on the question whether foreign wills execute English powers are numerous, and I have not found them easy to

A reconcile. Most of them concern general powers where a difficult question emerges, viz., whether s. 27 of the Wills Act, 1837, ought to be imported into a foreign will notwithstanding the rule that a will, generally speaking, should be construed in accordance with the law of the testator's domicil. I begin with *Re Price, Tomlin* v. *Latter* (2) ([1900] 1 Ch. 442), a case of a general power where the headnote reads as follows:

B

> " A will of a domiciled foreigner, which is valid by the law of the testator's domicil and has been recognised as a valid will in this country by the Probate Division, is capable of operating as an execution of a power of appointment by will over personal estate under an English instrument, although the formalities required by s. 9 and s. 10 of the Wills Act have not been observed
> C . . . Although as a general rule a will is to be construed according to the law of the testator's domicil, this rule does not apply where there are indications on the face of the will that the testator wrote it with reference to the law of some other country."

This case shows that, so far as validity is concerned, a foreign will admitted to probate in this country, notwithstanding that it does not comply with English D formalities, is capable of executing an English power. This is now well settled law. There was there an indication that the will was written with an eye on the law of this country, and it is arguable that this was the ground of the decision. STIRLING, J., said (ibid., at p. 452):

> " In general a will is to be construed according to the law of the domicil E of the testator: ' but this is a mere canon of interpretation, which should not be adhered to when there is any reason, from the nature of the will, or otherwise, to suppose that the testator wrote it with reference to the law of some other country ': DICEY, CONFLICT OF LAWS, p. 695. Considering first the law of France, according to which prima facie the will is to be construed, the evidence shows that the will of Madame Forfillier is a complete F disposition of all the property which she could dispose of; but it also appears that the mode of disposition by appointment is not practised in France, and that if a French court had to consider the effect of the will in this respect it would apply to English law. It is contended with regard to the law of England that the provisions of the Wills Act including s. 27, are inapplicable, and that consequently the law of England applicable is the law G as it existed before that Act, and that, there being no reference in the will either to the power or to the property, it is not a good execution of the power. If I am to apply the law as it existed before the Wills Act, questions of difficulty might arise; but it appears to me that I can decide this case upon another ground. The testatrix says, ' I declare that this will annuls all the others . . . and that it shall thus be considered in England the same H as in France '. I think that that amounts to a declaration by the testatrix that she meant the will to operate as her last will in England as well as in France. I think it is indicated upon the face of the will that she wrote it with reference to the law of England as well as the law of France. Therefore I think that I am entitled to apply the rules of construction which would by English law be applied to a will expressed in the same terms and I of the same date as that annexed to the letters of administration, including the rule of construction introduced by s. 27 of the Wills Act."

STIRLING, J.'s decision, apart from the special point, turned on the fact that French law has no knowledge of powers and, therefore, would apply English law including s. 27.

In the same volume is *Pouey* v. *Hordern* (3) ([1900] 1 Ch. 492), a case of a special power, where the judge decided that the will which purported to exercise the power was capable of doing so, notwithstanding that the testatrix by French law could not, so far as her own property was concerned, have disposed of it except to a limited extent. Farwell, J., said (ibid., at p. 494):

> " But the power in this case is a special power, and the execution of such a power does not bring the appointed property into the will of the appointor at all, but operates as a nomination of the persons whose names are to be inserted in the settlement as entitled in remainder in lieu of the power of appointment. There is, therefore, no disposition of property belonging to the testatrix."

This last principle does not apply to a general power as is shown by *Re Pryce, Lawford* v. *Pryce* (4) ([1911] 2 Ch. 286). Here, although it was held that the testatrix domiciled in Holland could, by a will in Dutch form, exercise the power and so make the appointed fund her own for all purposes, she could only dispose of it so far as Dutch law gave her testamentary capacity. A like conclusion was reached in *Re Lewal's Settlement Trusts, Gould* v. *Lewal* (5) ([1918] 2 Ch. 391), where Peterson, J., held that the testatrix, though an infant, could exercise a general power by a will in French form, but only to the extent of her testamentary capacity according to the law of France.

Re D'Este's Settlement Trusts, Poulter v. *D'Este* (6) ([1903] 1 Ch. 898) reached a different conclusion as regards s. 27 and has not been followed. The reasoning, however, of Buckley, J., seems to me to be apposite, where he says (ibid., at p. 903):

> " What would be the court of construction to determine the effect of this French will ? This being a foreign instrument, executed by a foreigner in her domicil, prima facie it would have to be considered according to the law of the domicil. That is not, indeed, disputed. But it is said, and said truly, that where you have a power exercisable by will, the thing which you look at must no doubt be a will, otherwise it is not an exercise of the power; but that, when you have got it and read it, it takes effect not as a will—because ex hypothesi the property does not belong to the testator—but operates under the settlement containing the power. That is true. Then it is said that I must take this French document and read it, not as a will in the sense in which I have explained, but as if the directions contained in it were introduced into the instrument which contained the power. That is quite right; but how must I read it ? I have, referentially, to introduce into the instrument which contains the power a foreign document. I have to see whether the power was exercised, and therefore to find out the meaning of what is expressed by the donee of the power ? Now how am I to ascertain the meaning of the donee of the power ? I must ascertain it according to the law of the place applicable to the document executed by the donee, and to the domicil of that person, and that law is to be taken as the law governing its construction. If I do that, I have to read the French will and say what its meaning is according to the principle of French construction, excluding, therefore, s. 27, which is a rule for English construction. The evidence as to French law is that powers of appointment are unknown in France. If a court of construction in France were to read this document for the purpose of determining its effect as regards this power, it would have to be informed by evidence what a power of appointment is in our law; and, having learned what it is, it would have to apply the proper principles of construction in France to ascertain whether or not this property passed under the instrument. Section 27, which is a rule of construction here and not there, as it appears to me, would have no place in the discussion."

This case was criticised by Neville, J., in *Re Simpson, Coutts & Co.* v. *Church Missionary Society* (7) ([1916] 1 Ch. 502), where he says in effect that Buckley, J.'s conclusion did not follow from his premise. In this I respectfully concur, for the French law, not knowing powers, must necessarily have recourse to the

English law when confronted with one. Neville, J., says (ibid., at p. 508):

> "The evidence shows that the words used would be sufficient according to French law to pass all her personal property. A power of disposition by will over property not belonging to the testator is, however, unknown to French law, and in ascertaining whether the will disposed of such property a French court would be compelled to inquire what such a power was and how it could be executed by an English will. The answer would be that the bequest if contained in an English will would be sufficient to pass the property subject to the power. And so in an English court the construction which would be applied to an English will must be applied to the construction of a French will valid in England so far as regards the power. Lord Wrenbury, then Buckley, J., in *Re D'Este* (6) held that s. 27 of the Wills Act did not apply to a French will, holding, I think, that if s. 9 and s. 10 applied the will was not entitled to probate, while if they did not apply neither could s. 27 apply. I am unable to see why . . . I think I am right in saying that Buckley, J.'s decision depended mainly on the view that French rules of construction must be applied in determining the meaning of a French will, and, if so, s. 27 could not apply because French law knows nothing of s. 27. But neither does it know anything of powers of appointment by will, so that a resort to English law was essential, involving, as it appears to me, the consideration of what was necessary for the execution of the power by will."

Neville, J., also in an earlier passage in his judgment expressed this opinion (ibid., at p. 507):

> "It will appear later that in my judgment in regard to a power English rules of construction must always apply, at all events where powers are unknown to the law of the domicil."

If this means that the language must be construed in all respects as though it appeared in an English will, I think it may be too broadly stated. *Re Walker, MacColl* v. *Bruce* (8) ([1908] 1 Ch. 560) seems to show that a Scots will is perfectly capable of exercising an English power if on its true construction it does so. In the recent case of *Re Waite's Settlement Trusts, Westminster Bank, Ltd.* v. *Brouard* (9) ([1957] 1 All E.R. 629), again a case of a general power, Danckwerts, J., made observations which seem to show that he would apply the English rules of construction to the foreign document. So far as validity is concerned and the question of capacity, I agree with him, but if he intended to go further and import the instrument exercising the power into the English law for all purposes, I take leave respectfully to doubt his conclusion. Anyhow, he was not dealing with this question.

None of the cases, in my judgment, really touches the point which I have to deal with here. This is a special power given by an English will, and the instrument exercising such a power must, therefore, for many purposes, be read back into the English will because the appointor is not disposing of property in which he himself has an interest, but is merely, so to speak, the agent of the donor exercising a power of selection: see Lord Romer's observations in *Muir* v. *Muir* (10) ([1943] A.C. 468 at p. 481). From this it is argued that the words exercising the power must be read for all purposes into the English will and be given such effect as the law of England would give them. I do not agree with this. The fact that a Scots will is written in the English language makes it none the less a foreign instrument. This particular will contains a number of terms of art only to be understood by reference to the Scottish law, and I think the general principle must still apply that in questions of construction, as opposed to questions of validity and capacity, the English court must find the true meaning of the appointor from the words he has used in the frame in which he has used them. This testator made his will with an eye, so to speak, turned exclusively on the Scottish legal system, and the document can only be understood by reference to that system. It would, therefore, in my judgment, be wrong to pick out the words alleged to constitute the appointment and give them an effect which the English law would give them, for the testator, making his will in Scottish form and using Scottish terms of art, must be supposed to have meant them to signify that which they would signify to a Scottish court. If this be right, then the English court must ascertain the effect which the Scottish court would give to the relevant words. This is not a case like the French cases where the foreign system has no knowledge of powers and must, therefore, refer back to the English one. As I have said, Scots law is as familiar as English with powers. Scottish law is a question of fact in an English court and, when I turn to the evidence, that is contained in the opinions of two Scottish lawyers, both of whom opine that a will in the form of the son's will here would, according to Scottish principles, be held to be a valid exercise of the English power having regard to the fact that reference is made to property "over which I may have the power of disposal at the time of my death". One of the Scots lawyers expresses the view that in Scotland *Re Knight* (1) would have been decided the other way. I have considered two of the Scots cases cited, namely, *Alexander's Trustees* v. *Alexander's Trustees* (11) (1917 S.C. 654) and *Gemmell's Trustees* v. *Shields* (12) (1936 S.C. 717), and they seem to me to justify the conclusion of the Scottish lawyers. One of these it is true takes the view that the question is a difficult one on which Scottish trustees might well seek the opinion of the Scottish court. Nevertheless, he expresses his opinion to agree with that of the other Scottish lawyer, who, for his part, has no doubts to put forward. In the circumstances I must, dealing with the question, as I do, as one of fact, accept the conclusion at which both arrive, and hold that the Scottish will must be taken to have operated to exercise the special power given to the testator by the English will of the father so far as it can do so, and notwithstanding that the execution is excessive. In the case of the power to appoint to a wife, this only extended to one-half the income, and the exercise can only be valid to that extent. As to the power to appoint to issue, this, if exercised, operated in favour of the son's children, the same persons as take in default of appointment. The children, therefore, take the income of the half of the fund not appointed to their mother in any event. It is uncertain whether the question of the validity of the deferment of vesting sought to be imposed by the Scottish instrument will arise. It has not been argued before me, and I do not propose to decide it at present. I propose, therefore, to answer question 1 of the summons by declaring that the trust disposition exercised the power in the case of the wife to the extent of one-half.

Declaration accordingly.

Solicitors: *Bird & Bird* (for all parties).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

A

HILL v. BAXTER.

[Queen's Bench Division (Lord Goddard, C.J., Devlin and Pearson, JJ.), December 5, 6, 19, 1957.]

Road Traffic—Dangerous driving—Automatism—Whether mens rea an element B *of the offence—Road Traffic Act*, 1930 (20 *&* 21 *Geo.* 5 *c.* 43), *s.* 11 (1).

Road Traffic—Traffic sign—Automatism—Whether mens rea an element of the offence of failing to conform to a traffic sign—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5 *c.* 43), *s.* 49 (*b*).

Automatism—Defence to criminal charge—Mens rea not element of offence charged.

C A driver of a motor vehicle on a public road drove across a road crossing in disregard of a Halt sign, and his vehicle collided with another motor vehicle. Informations charging him with dangerous driving, contrary to s. 11 (1) of the Road Traffic Act, 1930, and with failing to conform to the traffic sign, contrary to s. 49 (b) of that Act, having been preferred against him, he gave evidence that he had remembered nothing after driving to a D point some little distance before the scene of the accident. The magistrates found that the accused must have exercised care and skill in driving in order to reach the place of the accident from the point where his loss of memory occurred. They accepted his evidence and dismissed the informations, finding that he was not conscious at the time of the accident, "with the implication that he was not capable of forming any intention as to his manner E of driving". On appeal,

Held: s. 11 (1) and s. 49 (b) of the Road Traffic Act, 1930, enact absolute prohibitions and mens rea is no part of the offences against those enactments; the accused had in fact been driving the motor vehicle, there was no evidence which justified a finding that he was not fully responsible in law for his actions and the case would, therefore, be remitted to the magis- F trates with a direction to convict.

Per Lord Goddard, C.J.: the onus was on the driver to prove that he was in a state of automation (see p. 195, letter C, post).

Per Devlin and Pearson, JJ.: such a defence as that an accused was in a trance or black-out ought not to be considered until the defence has produced at least prima facie evidence; but we would reserve the question G where the burden of proof ultimately lies (see p. 196, letter H, and p. 197, letter G, post).

Appeal allowed.

[**Editorial Note.** On the defence of automatism the present case may be compared with *R.* v. *Charlson* ([1955] 1 All E.R. 859) and *R.* v. *Harrison-Owen* ([1951] 2 All E.R. 726), in both of which cases, however, the crimes charged H were offences for the establishing of which proof of mens rea was required. Mens rea was not an element of the offences charged in the present case.

As regards the onus of proof of insanity as a defence to crime, see 10 Halsbury's Laws (3rd Edn.) 288, para. 531.

For the Road Traffic Act, 1930, s. 11 (1), s. 49 (b), see 24 Halsbury's Statutes (2nd Edn.) 586, 616; and for the amending provisions of the Road Traffic Act, I 1956, s. 26, s. 35, Sch. 8, see 36 Halsbury's Statutes (2nd Edn.) 827, 838, 875, 876.]

Cases referred to:

(1) *Kay* v. *Butterworth*, (1945), 173 L.T. 191; 110 J.P. 75; 2nd Digest Supp.

(2) *R.* v. *Aves*, [1950] 2 All E.R. 330; 114 J.P. 402; 34 Cr. App. Rep. 159; 2nd Digest Supp.

(3) *Woolmington* v. *Public Prosecutions Director*, [1935] All E.R. Rep. 1; [1935] A.C. 462; 104 L.J.K.B. 433; 153 L.T. 232; 2nd Digest Supp.

(4) *Holmes* v. *Public Prosecutions Director*, [1946] 2 All E.R. 124; [1946] A.C. 588; 115 L.J.K.B. 417; 175 L.T. 327; 2nd Digest Supp.

(5) *R.* v. *Lobell*, [1957] 1 All E.R. 734.

(6) *Public Prosecutions Director* v. *Beard*, [1920] A.C. 479; sub nom. *R.* v. *Beard*, 89 L.J.K.B. 437; 122 L.T. 625; 84 J.P. 129; 14 Digest (Repl.) 71, *332*.

Case Stated.

This was a Case Stated by justices for the County Borough of Brighton in respect of their adjudication as a magistrates' court sitting at Brighton. They dismissed two informations preferred against the respondent, Kenneth Baxter, under s. 11 (1) and s. 49 (b) of the Road Traffic Act, 1930, on the ground that at the time of the alleged offences he was not capable of forming any intention as to his manner of driving. The facts appear in the judgment of LORD GODDARD, C.J.

Anthony Harmsworth for the appellant.
J. D. Alliott for the respondent.

Cur. adv. vult.

Dec. 19. The following judgments were read.

LORD GODDARD, C.J.: This Special Case Stated by justices for the County Borough of Brighton concerns two informations preferred against the respondent, the first for the dangerous driving of a motor vehicle contrary to s. 11 (1) of the Road Traffic Act, 1930, and the second for failing to conform to a Halt sign contrary to s. 49 (b) of the Act. The facts found by the justices are that at 10.45 p.m. on the evening of Apr. 12 this year the respondent drove a motor van along Springfield Road, Brighton, in a westerly direction and where that road crosses Beaconsfield Road he ignored an illuminated Halt sign, drove across the road junction at a fast speed and came into collision with a car which was being driven northwards in Beaconsfield Road. The respondent's van then carried on for a short distance and overturned. A police constable arrived and found the respondent in a dazed condition and at the hospital to which he was taken he said:

> "I remember being in Preston Circus going to Withdean. I don't remember anything else until I was searching for my glasses. I don't know what happened."

The justices found that to be in Springfield Road on the way to Withdean from Preston Circus involved a substantial and unnecessary detour but that the respondent must have exercised skill in driving in order to reach Springfield Road by whatever route he took. The justices apparently accepted the respondent's evidence and found that he remembered nothing from the time when he was at Preston Circus till the accident had happened. They were of opinion that the respondent was not conscious of what he was doing after leaving Preston Circus and to this finding they add the words " with the implication that he was not capable of forming any intention as to his manner of driving ". They dismissed the informations, accepting a submission that loss of memory could only be attributed to the respondent being overcome by illness without warning.

There was no evidence for the defence other than that of the respondent himself, but it seems that as the prosecution did not object the justices allowed two letters from a doctor who had examined the respondent to be put in. This was quite irregular; agreed medical reports so often used in civil actions have no place in criminal courts. Evidence must be given on oath and be subject to cross-examination unless there is a statutory exception allowing documents or certificates to be put in as evidence, as for instance under s. 41 of the Criminal Justice Act, 1948. The justices have referred to these letters in the Case so we have looked at them. They are certainly in no way favourable to the respondent; the consultant neurologist who examined the respondent could find no

A trace of illness or abnormality. He said in his first report he had had an E.E.G. —that is some form of encephalogram—done and was going to examine the respondent again when the report would be through in a fortnight's time. In his further report on May 2 the doctor says the report showed no abnormality and that from a medical point of view it is impossible to say whether he had "a black-out" or not. So there is no medical or scientific evidence of any B illness at all.

The first thing to be remembered is that the statute contains an absolute prohibition against driving dangerously or ignoring Halt signs. No question of mens rea enters into the offence; it is no answer to a charge under those sections to say "I did not mean to drive dangerously" or "I did not notice the Halt sign". The justices' finding, that the respondent was not capable of C forming any intention as to the manner of driving, is really immaterial. What they evidently meant was that the respondent was in a state of automation. But he was driving and, as the Case finds, exercising some skill, and undoubtedly the onus of proving that he was in a state of automation must be on him. This is not only akin to a defence of insanity but it is a rule of the law of evidence that the onus of proving a fact which must be exclusively within the knowledge D of a party lies on him who asserts it. This no doubt is subject to the qualification that where an onus is on the defendant in a criminal case the burden is not as high as it is on a prosecutor. The main contention before us on the part of the appellant was that there was no evidence on which the justices could find that the respondent was in a state of automatism or whatever term may be applied to someone performing acts in a state of unconsciousness. There was in fact no E evidence except that of the respondent, and, while the justices were entitled to believe him, his evidence shows nothing except that after the accident he cannot remember what took place after he left Preston Circus. This is quite consistent with being overcome with sleep or at least drowsiness. That drivers do fall asleep is a not uncommon cause of serious road accidents and it would be impossible as well as disastrous to hold that falling asleep at the wheel was any F defence to a charge of dangerous driving. If a driver finds that he is getting sleepy he must stop. The justices no doubt were greatly influenced by the dictum—and it is only a dictum—of HUMPHREYS, J., in *Kay* v. *Butterworth* (1) ((1945), 110 J.P. 75). In that case the learned judge after emphasising that drowsiness or sleep would be no excuse said (ibid.):

> G "I do not mean to say that a person should be made liable at criminal law who, through no fault of his own, becomes unconscious while driving, as, for example, a person who has been struck by a stone or overcome by a sudden illness, or when the car has been put temporarily out of his control owing to his being attacked by a swarm of bees . . ."

I agree that there may be cases where the circumstances are such that the H accused could not really be said to be driving at all. Suppose he had a stroke or an epileptic fit, both instances of what may properly be called Acts of God; he might well be in the driver's seat even with his hands on the wheel but in such a state of unconsciousness that he could not be said to be driving. A blow from a stone or a swarm of bees I think introduces some conception akin to "novus actus interveniens". In this case, however, I am content to say that I the evidence falls far short of what would justify a court holding that this man was in some automatous state. There was no evidence that he was suffering from anything to account for what is so often called a "black-out" and which probably, if genuine, is epileptic in origin. Nor was there any evidence that he had ever had an attack of this description before. As I have said, his own evidence, and that is all there was, is consistent with having fallen asleep, or having his mind full of other matters and not paying proper attention. A defence of automatism is in effect saying that the accused did not know or appreciate the nature and quality of his actions, so it is getting very near a defence of insanity. It may be that in homicide cases attention may have to be given to the matter where diminished responsibility is set up. In the present case I am content to rest my judgment on the ground that there was no evidence which justified the justices finding that he was not fully responsible in law for his actions and that his intention was immaterial as there was here an absolute prohibition. I would allow the appeal. I desire to say in view of some discussion at the hearing that this is certainly not a case of perverse finding by justices, who obviously considered the case with great care and anxiety. The question asked by the justices is answered in the negative and the case must go back with a direction to convict. The penalty is a matter for the justices, but we have no doubt they will bear in mind the view of the neurologist as to the fitness of the defendant to drive.

DEVLIN, J.: I agree that if the onus lies on the defence to produce some evidence of automatism, they have failed to do so, with the result that the justices came to a wrong conclusion in law. I do not find it necessary, before deciding whether there is such an onus, to determine just what part automatism plays in liability for crime. It is a novel point that would require careful consideration; the answer would certainly depend among other things on the nature of the liability which the prosecution had to establish.

I am satisfied that even in a case in which liability depended on full proof of mens rea, it would not be open to the defence to rely on automatism without providing some evidence of it. If it amounted to insanity in the legal sense, it is well established that the burden of proof would start with and remain throughout on the defence. But there is also recognised in the criminal law a lighter burden which the accused discharges by producing some evidence, but which does not relieve the prosecution from having to prove in the end all the facts necessary to establish guilt. This principle has manifested itself in different forms; most of them relate to the accused's state of mind and put it on him to give some evidence about it. Thus the fact that an accused is found in possession of property recently stolen does not of itself prove that he knew of the stealing. Nevertheless it is not open to the accused at the end of the prosecution's case to submit that he has no case to answer; he must offer some explanation to account for his possession though he does not have to prove that the explanation is true: *R.* v. *Aves* (2) ([1950] 2 All E.R. 330). In a charge of murder it is for the prosecution to prove that the killing was intentional and unprovoked and that burden is never shifted (*Woolmington* v. *Public Prosecutions Director* (3), [1935] All E.R. Rep. 1) ; but, though the prosecution must in the end prove lack of provocation, the obligation arises only if there is some evidence of provocation fit to go to the jury; *Holmes* v. *Public Prosecutions Director* (4) ([1946] 2 All E.R. 124). The same rule applies in the case of self-defence : *R.* v. *Lobell* (5) ([1957] 1 All E.R. 734). In any crime involving mens rea the prosecution must prove guilty intent, but if the defence suggests drunkenness as negativing intent, they must offer evidence of it, if indeed they do not have to prove it: *Public Prosecutions Director* v. *Beard* (6) ([1920] A.C. 479 at p. 507). It would be quite unreasonable to allow the defence to submit at the end of the prosecution's case that the Crown had not proved affirmatively and beyond a reasonable doubt that the accused was at the time of the crime sober, or not sleepwalking or not in a trance or black-out. I am satisfied that such matters ought not to be considered at all until the defence has produced at least prima facie evidence. I should wish to reserve for future consideration when necessary the question of where the burden ultimately lies.

As automatism is akin to insanity in law there would be great practical advantage if the burden of proof were the same in both cases. But so far insanity is the only matter of defence in which under the common law the burden of proof has been held to be completely shifted.

In my judgment there is not to be found in the Case Stated evidence of automatism of a character which would be fit to leave to a jury. It must be remembered that the justices were required to presume that the accused was not suffering from any disease of the mind, since he did not challenge the legal presumption of sanity. Although he was asserting that he did not know the nature and quality of his act and so inevitably that he was suffering from a defect of reason or understanding, he was not saying that he was a victim of any disease of the mind. Unless there was evidence which showed that his irrationality was due to some cause other than disease of the mind, the justices were not entitled simply to acquit.

I agree that the conclusion which this court has reached does not mean that the justices have acted in any way perversely. We have been told that the chairman of the justices was a medical man and it may be that he felt able to draw inferences from the evidence which are not apparent to a layman. But judges of all kinds sit as laymen and not as experts and verdicts of all kinds must be given according to the evidence. I do not doubt that there are genuine cases of automatism and the like, but I do not see how the layman can safely attempt without the help of some medical or scientific evidence to distinguish the genuine from the fraudulent.

I have drawn attention to the fact that the accused did not set up a defence of insanity. For the purposes of the criminal law there are two categories of mental irresponsibility, one where the disorder is due to disease and the other where it is not. The distinction is not an arbitrary one. If disease is not the cause, if there is some temporary loss of consciousness arising accidentally, it is reasonable to hope that it will not be repeated and that it is safe to let an acquitted man go entirely free. If, however, disease is present the same thing may happen again and therefore since 1800 the law has provided that persons acquitted on this ground should be subject to restraint. The acquittal is now given in the illogical and disagreeable form of the verdict " Guilty but insane ", and while it seems right that in such a case some conditions should be imposed, the only restraint known to the law is indefinite detention in what used to be called a criminal lunatic asylum. So it would be very surprising to find this defence raised in answer to charges under the Road Traffic Act, 1930. Whatever the theory of the law may be, mental disease is in practice not available as an excuse for the commission of any of the lesser crimes. I agree with the order proposed.

PEARSON, J.: I agree with the judgment of LORD GODDARD, C.J., subject to the reservation and explanations which DEVLIN, J., has made with regard to the burden of proof in a case such as this. The prosecution have to prove that the accused was driving dangerously on the major charge in this case. On the facts of this case if he was driving at all he was unquestionably driving dangerously, and therefore the question at issue was and is whether he was driving the van. In any ordinary case when once it has been proved that the accused was in the driving seat of a moving car, there is prima facie an obvious and irresistible inference that he was driving it. No dispute or doubt will arise on that point unless and until there is evidence tending to show that by some extraordinary mischance he was rendered unconscious or otherwise incapacitated from controlling the car. Take the following cases. (1) The man in the driving seat is having an epileptic fit, so that he is unconscious and there are merely spasmodic movements of his arms and legs. (2) By the onset of some disease he has been reduced to a state of coma and is completely unconscious. (3) He is stunned by a blow on the head from a stone which passing traffic has thrown up from the roadway. (4) He is attacked by a swarm of bees so that he is for the time being disabled and prevented from exercising any directional control over the vehicle and any movements of his arms and legs are solely caused by the action of the bees. In each of these cases it can be said that at the material time he is not driving and therefore not driving dangerously. Then suppose that the man in the driving seat falls asleep. After he has fallen asleep A he is no longer driving, but there was an earlier time at which he was falling asleep and therefore failing to perform the driver's elementary and essential duty of keeping himself awake and therefore he was driving dangerously. Similarly in the case of a man who knows that he is liable to have an epileptic fit but nevertheless drives a vehicle on the road, there is a question of fact whether driving in these circumstances can properly be considered reckless or B dangerous. The answer might depend to some extent on the degree and frequency of the epilepsy and the degree of probability that an epileptic fit might come on him.

For the purpose of construing the word " drive " in the Road Traffic Act, 1930, s. 11, one can have regard to the language of s. 15 (1) of the same Act. The opening words of that section before it was amended by the Road Traffic Act, C 1956, were:

> " Any person who when driving or attempting to drive, or when in charge of, a motor vehicle on a road or other public place is under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle, shall be liable . . .",

D

and so on. In this case there is a clear finding that the appellant was driving and driving with skill. It is said in the Case:

> " (H) The respondent intended to go to Withdean from Preston Circus, and he had made a substantial and unnecessary detour by driving into Springfield Road. (I) The respondent must have exercised skill in driving in order to reach Springfield Road from Preston Circus by whatever route E he had taken."

The importance of the finding that he was driving with skill is the necessary implication that he was controlling the car and directing its movements. Therefore, he was driving, and his driving was dangerous. Therefore the offence was committed and there is no evidence to support the acquittal. The facts proved show that the respondent was driving and driving dangerously, and if the burden F of proof was on the defence they failed to prove an extraordinary mischance rendering it impossible for the respondent to control the van and direct its movements. I agree with the proposed order.

Case remitted to justices with direction to convict.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Brighton (for the appellant); *Jolly & Co.*, Brighton (for the respondent).

[*Reported by* E. Cockburn Millar, *Barrister-at-Law.*]

R. *v.* PRITAM SINGH.

[LEEDS ASSIZES (Mr. Commissioner Wrangham), December 12, 1957.]

Evidence—Affirmation—Conditions precedent to affirmation—Sikh affirming owing to impracticability of administering oath according to his religion—"Lawfully sworn"—Oaths Act, 1888 (51 *&* 52 *Vict. c.* 46), *s.* 1—*Perjury Act*, 1911 (1 *&* 2 *Geo.* 5 *c.* 6), *s.* 1 (1), *s.* 15 (2).

The defendant, a Sikh, had been a witness in proceedings against another person in a magistrates' court. According to the defendant's religion, the Sikh faith, an oath sworn on the "Granth", the holy book of the Sikhs, would have been binding on the defendant, but, as no copy of the "Granth" was available in the magistrates' court, it was impracticable to administer an oath to the defendant in accordance with his religion and he made an affirmation before giving his evidence. The defendant had not objected to taking the oath according to his religion. He was later charged with having committed perjury in the proceedings in the magistrates' court.

Held: the defendant was not lawfully sworn, within s. 1 (1) of the Perjury Act, 1911, in the magistrates' court, because, under s. 1 of the Oaths Act, 1888, a person was permitted to make a solemn affirmation instead of taking an oath only if he objected to taking an oath on one of the two grounds provided by that section; and, therefore, there was no case to go to the jury on the charge of perjury.

[As to evidence on oath or affirmation, see 15 HALSBURY'S LAWS (3rd Edn.) 436, 437, paras. 786, 788; and for cases on the subject, see 22 DIGEST (Repl.) 448, 449, *4886-4901*.

For the Oaths Act, 1888, s. 1, see 9 HALSBURY'S STATUTES (2nd Edn.) 605; and for the Perjury Act, 1911, s. 1 (1) and s. 15, see 5 HALSBURY'S STATUTES (2nd Edn.) 963, 969.]

Case referred to:

(1) *R.* v. *Moore*, (1892), 61 L.J.M.C. 80; 66 L.T. 125; 56 J.P. 345; 22 Digest (Repl.) 449, *4901*.

Trial on Indictment.

The defendant, Pritam Singh, was charged, before Mr. Commissioner WRANGHAM and a jury at Leeds Assizes, with having committed perjury in proceedings against another person at the magistrates' court at Huddersfield. The defendant was a Sikh and an oath sworn by him on the "Granth", the holy book of the Sikhs, would have been binding on him. A copy of the "Granth" was not available at the magistrates' court and the defendant made an affirmation before giving his evidence. At the trial of the defendant, after evidence for the Crown had been given, counsel for the defence submitted that there was no case to go to the jury because the defendant had not been lawfully sworn in the proceedings in the magistrates' court.

E. John Parris for the defendant: The defendant was not "lawfully sworn", within s. 1 (1) of the Perjury Act, 1911. The sub-section reads:

> "If any person lawfully sworn as a witness or as an interpreter in a judicial proceeding wilfully makes a statement material in that proceeding, which he knows to be false or does not believe to be true, he shall be guilty of perjury . . ."

The original Act permitting an affirmation to be made instead of an oath was the Quakers and Moravians Act, 1833, which was enlarged by the Oaths Act, 1888. Section 1 of the Act of 1888 reads:

> "Every person upon objecting to being sworn, and stating, as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath."

The form of affirmation is contained in s. 2. It will be seen from s. 1 that it is the witness himself who must make the objection—that is a condition precedent before he can be lawfully affirmed. Then there are two grounds on which he may be lawfully affirmed, namely, (i) if he is an agnostic, and (ii) if he says that the taking of an oath is contrary to his religious belief, as it is, for example, in the case of Quakers who believe that, when Our Lord forbade swearing, that precluded the taking of an oath. Neither of those two grounds set out in s. 1 applies in the present case, and I submit that, if a person who says that he is a Sikh is allowed to affirm, the affirmation is unlawful.

The position at common law is stated in ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE (33rd Edn.) (1954), p. 507, para. 857:

> "The general common law rule is that the testimony of a witness to be examined viva voce in a criminal trial is not admissible unless he has previously been sworn to speak the truth."

R. v. *Moore* (1) ((1892), 61 L.J.M.C. 80) is a case exactly on this point, even the religion of one of the two witnesses in that case being the same as that of the defendant. Although each of the witnesses had a religious belief and no religious objection to taking an oath, he made an affirmation and gave evidence. No objection to the evidence was taken until after the verdict had been given. It was held by the Court for Crown Cases Reserved that the evidence was inadmissible. In ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE (33rd Edn.), p. 1288, in a note to s. 15 (1) of the Perjury Act, 1911, some doubt is thrown on the binding authority of the decision in *R.* v. *Moore* (1), which, being in 1892, was a direct commentary on the Act of 1888. In my submission, the doubt is quite wrong. Section 15 (1) of the Act of 1911 reads:

> "For the purposes of this Act, the forms and ceremonies used in administering an oath are immaterial, if the court or person before whom the oath is taken has power to administer an oath for the purpose of verifying the statement in question, and if the oath has been administered in a form and with ceremonies which the person taking the oath has accepted without objection, or has declared to be binding on him."

That sub-section relates to oaths. For the position in regard to affirmation one must turn to s. 15 (2), which reads:

> "... The expression 'oath' in the case of persons for the time being allowed by law to affirm ... instead of swearing, includes 'affirmation' ..."

In a note between those two sub-sections, as set out in ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE (33rd Edn.) at p. 1288, it is stated:

> "Oath in this sub-section [s. 15 (1)] includes affirmation and it appears to override *R.* v. *Moore* (1)."

In my submission, however, that note is not correct, because, when the interpretation of the word "oath" is enlarged to include affirmations, it is only affirmations "in the case of persons for the time being allowed by law to affirm"—in other words, persons who are allowed to affirm under s. 1 of the Oaths Act, 1888, which permits a person to affirm only if he objects to taking an oath on one of the two grounds stated in the section. At common law evidence was inadmissible unless an oath was taken. The Act of 1888 made one exception, and

A another exception is in the case of young children*: only these exceptions are permitted. Therefore, in my submission, the evidence of the defendant was inadmissible.

J. A. Cotton for the Crown: I submit that the court in this particular instance was entitled to have the defendant affirm. The practical difficulty in this case is that the "Granth" is a bible of which only three copies are known to exist in this B country. Two are kept in the custody of temples, and the copy produced here today is, I understand, from the library in Leicester. No such copy was available at the Huddersfield magistrates' court, and in those circumstances the defendant was asked to make an affirmation.

MR. COMMISSIONER WRANGHAM gave the following ruling: C Members of the jury, the position is this. Strictly speaking, in a case of this kind, the duty of the prosecution is to bring before the court the whole of the evidence which they have, and then, at the end of that evidence, it is open to counsel for the defendant to submit to me that for some reason or other there is no evidence for the jury to consider. Ordinarily, I would then have to give a ruling on that submission and say either that there was evidence for you to consider, in which D case you would consider it, or that there was not, in which case I should have to direct you to return a verdict of "Not guilty" because there was not enough evidence to justify your even considering it. In this case it is agreed by both learned counsel that it would be idle to go through the formality of hearing the whole of the evidence if I were of opinion that the defendant was not properly sworn in the Huddersfield magistrates' court.

E The charge against the defendant is that he committed perjury in the magistrates' court in a case against a man called Mohammed Ali. It is clear, members of the jury, that the first thing that the prosecution have to prove in order to establish their case is that the defendant was lawfully sworn. They then have to prove that he said what they say he did. They then have to prove that what they say he said was untrue and untrue to his knowledge. But before we get to the F question of what he said and whether it was true or not, we have, first, the question whether he was lawfully sworn. The evidence is that he was not sworn at all, he was affirmed. There is an Act of Parliament [the Oaths Act, 1888, s. 1], which provides that any witness who wants to affirm, on the ground that he has no religious belief (because he is, for example, an atheist) or that his religious belief forbids him to take the oath (for example, in the case of a Quaker), G can affirm instead of taking the oath. If there was any indication that the defendant fell into either of those two classes, his affirmation would be as good as his oath and he would be equally liable to be prosecuted for perjury. The evidence, however, is precisely the other way. The evidence is that the defendant has a religious belief, the Sikh faith; that there is a form of oath which he would regard as binding on him as a Sikh; and that, in any case, he never indicated H that he wanted to affirm. The real reason why he affirmed instead of taking the oath was because it was impracticable in the magistrates' court to administer the Sikh oath. Apparently, the holy book of the Sikh religion is very difficult to procure, and it was not available in the magistrates' court. You may think that, where it was found impossible or difficult that a man should be sworn according to the oath of his own religion, it would be reasonable if Parliament provided that I he should be permitted by his own consent to affirm and that such affirmation should count as an oath, but Parliament has not yet made such an enactment. In the circumstances, therefore, I am bound to direct you that there never would be evidence fit for you to consider on this charge, and I therefore ask you to return on my direction a formal verdict of not guilty on this indictment.

[The jury returned a verdict of not guilty.]

---

* See the Children and Young Persons Act, 1933, s. 38; 12 HALSBURY'S STATUTES (2nd Edn.) 1002.

E. John Parris: I wonder if your Lordship would let me say at this stage that, had the case gone further, the defendant would have strongly asserted that what he said on affirmation was the truth.

MR. COMMISSIONER WRANGHAM: You want it known that there was, in fact, a conflict on the merits ? It is right that it should be known there was that conflict.

Solicitors: *Drabble & Stephenson*, Huddersfield (for the defendant); *Town clerk*, Huddersfield (for the Crown).

[*Reported by* G. M. SMAILES, ESQ., *Barrister-at-Law.*]

Re MATHESON (*deceased*).

[LIVERPOOL CONSISTORY COURT (The Chancellor (Edward Steel, Esq.)), December 13, 1957.]

Burial—Disinterment—Faculty for removal from consecrated ground—Remains to be cremated and ashes to be placed with those of deceased's widow.

Ecclesiastical Law—Faculty—Jurisdiction—Faculty for removal of dead body from consecrated ground for purpose of cremation.

There is no legal impediment to the granting of a faculty, in a proper case and for sufficient reasons, for the disinterment of remains from consecrated ground for the purpose of cremation.

M. died in 1946 and his remains were interred in a consecrated churchyard. The decision as to the place of interment was made by his widow. In 1956 the widow decided that her own remains after her death should be cremated, and she desired, if it were possible, to have M.'s remains disinterred and cremated, and that her own ashes after her death should be placed with those of M. The widow died before she was able to present a petition for a faculty authorising her to remove M.'s remains from the churchyard for cremation, and a petition was presented by M.'s son with the object of carrying out his mother's wishes.

Held: a faculty would be granted, subject to a condition that it should not be acted on until a licence from the Secretary of State had been obtained.

Re Dixon ([1892] P. 386) considered.

[As to a faculty for the removal of a dead body from consecrated ground, see 4 HALSBURY'S LAWS (3rd Edn.) 103, para. 294; and for cases on the subject, see 7 DIGEST 561, *363-369*.

As to the necessity for a licence from the Secretary of State, see 4 HALSBURY'S LAWS (3rd Edn.) 104, para. 295, text and notes (f) (g).

As to the exercise of faculty jurisdiction generally, see 13 HALSBURY'S LAWS (3rd Edn.) 417, paras. 923, 924.]

Case referred to:

(1) *Re Dixon*, [1892] P. 386; 56 J.P. 841; 7 Digest 561, *369*.

Petition.

The petitioner sought a faculty authorising him to remove the remains of his father from a consecrated churchyard for cremation so that the ashes might be placed with the ashes of the petitioner's mother (the widow of the deceased), in fulfilment of wishes expressed by her before her death.

R. P. Heaton, the petitioner's solicitor*.

---

* Solicitors were expressly empowered to practise before the ecclesiastical courts by the Solicitors Act, 1877, s. 17 (which has been repealed); the material provision is now contained in the Solicitors Act, 1957, s. 2 (1) (d).

MR. CHANCELLOR STEEL: In this case the court is asked to grant a faculty to enable the remains of the late Dr. Alexander Matheson to be removed from the consecrated churchyard of St. Luke, Orrell, in Lancashire, so that the remains may be cremated and the ashes placed with the ashes of Mrs. Mary Margaret Matheson who was his widow.

Dr. Matheson died on May 20, 1946, and his remains were interred on May 23, 1946, in St. Luke's Churchyard. I understand that the decision as to the place of interment was made by his widow and it seems fair to assume that in making such decision she was either carrying out what she knew to be the wishes of the deceased or what she at that time believed to be his wishes. In 1955 and 1956 it would appear that Mrs. Matheson was considering what arrangements she wished to make for the disposal of her own remains after death and decided in favour of cremation. Having reached this decision, she desired, if it were possible, to have the remains of her late husband disinterred, such remains cremated, and, when the time came, for her own ashes to be placed with the ashes of her husband. On reaching this decision, Mrs. Matheson wrote to the learned registrar of this court with a view to presenting a petition for a faculty. However, before she was able to present a petition she died and the present application is made by her son.

Having seen and heard the petitioner, I am satisfied that his motive in presenting the petition is the laudable desire to carry out his mother's wishes and that if this petition were refused considerable distress would be caused to him. The vicar and churchwardens of St. Luke have signified their consent to the removal of the remains should a faculty be granted. The petitioner stated in evidence that, so far as he was aware, his late father had never expressed any desire to be cremated.

At the outset I felt some doubt whether the faculty prayed for was one which I could lawfully grant. Such doubt arose from consideration of *Re Dixon* (1) ([1892] P. 386). That was an application in the Consistory Court of London which was heard by the chancellor, DR. TRISTRAM, Q.C., and the facts were almost identical with the facts in the present case. The applicant was the widow and she desired to disinter the remains of her husband with a view to cremation. Evidence was given by the widow that her husband had told her that she might either bury his body or have it cremated as she wished. To that extent the applicant in that case was in a rather stronger position than the present petitioner, for I know that Dr. Matheson had never expressed any views at all with regard to cremation. At first sight it would appear from the headnote to *Re Dixon* (1) that the learned chancellor refused the application on the ground that it was one which he could not lawfully grant, and this view is supported on a first reading of the report itself.

I am very much indebted to the petitioner's solicitor for the assistance which he gave me and for the research which he conducted. As a result of his researches he informed me that he believed that faculties for the removal of bodies from consecrated ground with a view to cremation had been granted in recent years in the dioceses of Carlisle, Winchester and Wells, and the correctness of this information was confirmed by the registrar of this diocese. It follows from this that at least three chancellors have decided that, in a proper case and for sufficient reasons, there is no legal impediment to the granting of a faculty for the disinterment of remains from consecrated ground for the purpose of cremation. I have taken time to consider the matter and have re-read *Re Dixon* (1) several times and with great care. Although the language used in the report is not free from difficulty, I have come to the conclusion that DR. TRISTRAM did not refuse the faculty prayed because he was satisfied that he was precluded by law from granting it, but he refused it because, in the exercise of his discretion, he was not satisfied that it should be granted.

From the earliest times it has been the natural desire of most men that after death their bodies should be decently and reverently interred and should remain undisturbed. Burial in consecrated ground secured this natural desire, because no body so buried could lawfully be disturbed except in accordance with a faculty obtained from the church court. As all sorts of circumstances which cannot be foreseen may arise which make it desirable or imperative that a body should be disinterred, I feel that the court should be slow to place any fetter on its discretionary power or to hold that such fetter already exists. In my view there is no such fetter, each case must be considered on its merits and the chancellor must decide, as a matter of judicial discretion, whether a particular application should be granted or refused.

Having reached the conclusion that there is no legal obstacle in the way of the faculty being granted, I now come to the difficult task of deciding whether, as a matter of discretion, it should be granted. As I have said, the primary function of the court is to keep faith with the dead. When a man nears his end and contemplates Christian burial, he may reasonably hope that his remains will be undisturbed, and the court should ensure that, if reasonably possible, this assumed wish will be respected. In all these cases the court must and will have regard to the supposed wishes of the deceased. I say supposed wishes because it can rarely, if ever, happen that the circumstances giving rise to the application can have been contemplated, still less discussed, in the lifetime of the deceased. However, in deciding this matter I feel that one has to try to imagine such a discussion during the lifetime of the deceased. If Dr. Matheson had been asked whether he would wish his body to remain buried for a period of more than eleven years and then be disinterred for the purpose of cremation, I am sure that he would have recoiled in horror from the thought. Having started this hypothetical conversation, I do not think that one can leave the matter there. The alternative would have to be put, namely, that, towards the end of her days, his widow longed to have his ashes resting alongside her own, and that, as she herself was unable to give effect to this wish, her son, and his son, had sought to carry out her desires. As I said at the beginning of this judgment, I am satisfied that very real distress would be caused to the petitioner if he was unable to carry out his mother's dying wish. I think that in such circumstances the deceased would have desired to avoid distress to his descendants. Doing the best that I can to speculate on the wishes of the deceased if such wishes could be ascertained, which I must do to guide me in the exercise of my discretion, I have come to the conclusion after earnest consideration that this is a faculty which I ought to grant. I therefore decree the faculty as prayed, subject to a condition that it shall not be acted on until a licence from the Secretary of State has been obtained.

Order accordingly.

Solicitors: *Ackerley, Heaton & Pigot,* Wigan (for the petitioner).

[*Reported by* K. B. EDWARDS, ESQ., *Barrister-at-Law.*]

BROWNSEA HAVEN PROPERTIES, LTD. *v.* POOLE CORPORATION.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Ormerod, L.JJ.), November 22, 25, 27, 28, December 16, 1957.]

Road Traffic—Regulation of traffic—Prevention of obstruction of streets—One-way traffic system for all vehicles in two streets—Order by local authority—For six months' holiday season—" Route " to be observed—" Any occasion when the streets are thronged or liable to be obstructed "—Town Police Clauses Act, 1847 (10 *&* 11 *Vict. c.* 89), *s.* 21.

Statute—Construction—Ejusdem generis rule—Rule applied to a phrase that did not include the word " other "—" And in any case "—Town Police Clauses Act, 1847 (10 *&* 11 *Vict. c.* 89), *s.* 21.

Judgment—Judicial decision as authority—Stare decisis—Construction of statute—Decisions of Divisional Court overruled after standing for substantial period of time.

By s. 21 of the Town Police Clauses Act, 1847, certain local authorities were empowered to make " orders for the route to be observed by all carts, carriages, horses, and persons, and for preventing obstruction of the streets . . . in all times of public processions, rejoicings, or illuminations, and in any case when the streets are thronged or liable to be obstructed . . ." A local authority, purporting to act under the powers thus conferred, made an order, dated Mar. 5, 1957, which in effect created a one-way traffic system in two adjoining streets within the district of the local authority for all vehicles for a period of six months from Apr. 19, 1957, to Oct. 19, 1957. Section 46 (2) of the Road Traffic Act, 1930, as amended by s. 29 (4) of the Road and Rail Traffic Act, 1933, gave local authorities power to make orders for one-way traffic on specified roads subject to confirmation of such orders by the Minister of Transport and Civil Aviation*, but an order under s. 21 of the Act of 1847 could be made without confirmation by the Minister. The plaintiffs, who owned a hotel in one of the streets affected by the order of Mar. 5, 1957, obtained a declaration in the Chancery Division that the order was ultra vires and void. On appeal,

Held: (i) the order of Mar. 5, 1957, was ultra vires and void for the following reasons—

(a) the words " and in any case " in s. 21 of the Town Police Clauses Act, 1847, should ~~be interpreted~~ ejusdem generis and limited to cases of the same class or genus as the three preceding instances, viz., " public processions, rejoicings, or illuminations ", and thus were confined to particular and extraordinary occasions and did not enable an order for such a continuous period as from Apr. 19, 1957, to Oct. 19, 1957, to be made (see particularly, p. 213, letters A and B, p. 214, letter I, post).

(b) as there would not be injustice or inconvenience in giving practical effect to the decision of the Court of Appeal (stated at (a) above) on the construction of s. 21 of the Act of 1847 (and, per ROMER, L.J.), as breach of s. 21 was visited with penal consequences (see p. 222, letter D, post), previous decisions of the Divisional Court to the contrary, although they had stood for some years, would be overruled (see p. 218, letters E and I, p. 222, letter F, and p. 224, letters D and E, post).

Teale v. *Williams* ([1914] 3 K.B. 395); *Edwards* v. *Wanstall* ((1929), 142 L.T. 288), and *Etherington* v. *Carter* ([1937] 2 All E.R. 528) overruled on the construction of the words " in any case " in s. 21 of the Act of 1847.

Bourne v. *Keane* ([1919] A.C. 815) considered.

---

* By the Transfer of Functions (Ministry of Civil Aviation) Order, 1953 (S.I. 1953 No. 1204), the style and title of the Minister of Transport was changed to the "Minister of Transport and Civil Aviation ".

(ii) the words " route to be observed " in s. 21 of the Town Police Clauses Act, 1847, were wide enough to enable orders to be made creating one-way traffic systems (see p. 211, letter F, p. 220, letter E, p. 223, letter C, post).

Per Romer, L.J.: the summer holiday season is not a special event or occasion comparable to "public processions, rejoicings, or illuminations" for the purposes of s. 21 of the Act of 1847 (see p. 222, letters G and I, post; cf., p. 224, letter C, post).

Decision of Vaisey, J. ([1957] 3 All E.R. 211) affirmed on other grounds.

Treasury Solicitor—Representing local authority on matter of concern to Ministry —Interest of Crown in subject-matter of litigation—Revenue Solicitors' Act, 1828 (9 *Geo.* 4 *c.* 25), *s.* 1.

Local Authority—Representation by Treasury Solicitor—Appeal concerning validity of traffic order—Interest of Crown in subject-matter of litigation—Whether representation proper.

On appeal by a local authority against a declaration of the Chancery Division of the High Court that an order made by the local authority under s. 21 of the Town Police Clauses Act, 1847, was ultra vires and void, the Treasury Solicitor acted for the local authority and instructed their counsel. The order made by the local authority was one which, in effect, created a one-way traffic system temporarily, for six months expiring on Oct. 19, 1957, in two adjoining streets within the district of the local authority as a preliminary to the making of an order under s. 46 (2) of the Road Traffic Act, 1930, as amended by s. 29 (4) of the Road and Rail Traffic Act, 1933. This latter legislation gave local authorities power to make orders for one-way traffic on specified roads subject to confirmation by the Minister of Transport and Civil Aviation, but an order under s. 21 of the Act of 1847 could be made without the Minister's confirmation. The respondents to the appeal objected that, the Crown having no interest in the litigation, could not properly instruct the Treasury Solicitor to act on behalf of the local authority.

Held: the Crown had such an interest in the subject-matter of the dispute as justified the Treasury Solicitor's appearing for the local authority because the real question at issue was whether a class of local authorities, of which the appellants were one, had power to make an order such as had been made in the present case under s. 21 of the Town Police Clauses Act, 1847, and traffic control was a matter of concern to the Minister of Transport and Civil Aviation; moreover, the availability of the power enacted by s. 21 remained a live issue, although the temporary order in the present case had expired.

R. v. *Canterbury* (*Archbp.*) ([1903] 1 K.B. 289) considered and applied.

Per Romer, L.J.: I am not prepared to hold that the mere ipse dixit of a Minister of the Crown that he or his department have an interest in legal proceedings to which neither he nor the Crown is a party precludes the court from inquiring whether that is so or not, when objection is taken to the intervention of the Treasury Solicitor (see p. 219, letter D, post; cf., p. 210, letter B, and p. 223, letter C, post).

[**Editorial Note.** Section 46 (1) of the Road Traffic Act, 1930, is repealed and s. 46 (2) of that Act and s. 29 (4) of the Road and Rail Traffic Act, 1933, are affected by s. 33 of the Road Traffic Act, 1956, which was brought into operation on Dec. 1, 1957, by the Road Traffic Act (Commencement No. 6) Order, 1957 (S.I. 1957 No. 1840). By s. 33 (8) of the Act of 1956, s. 46 of the Act of 1930 has ceased to apply as respects the London Traffic Area; and it may be observed that under s. 36 of the Act of 1956, which empowers the Commissioner of Police to establish experimental traffic schemes in London, the consent of the Minister to the regulations establishing such schemes is made requisite.

A Section 36 of the Act of 1956 was brought into operation on Mar. 1, 1957, by the Road Traffic Act, 1956 (Commencement No. 3) Order, 1957 (S.I. 1957 No. 3). One-way traffic orders made by councils generally no longer require ministerial confirmation (see s. 33 (3) of the Act of 1956).

As to the Treasury Solicitor, see 7 HALSBURY'S LAWS (3rd Edn.) 386, para. 816; and for the Revenue Solicitors' Act, 1828, s. 1, see 24 HALSBURY'S STATUTES B (2nd Edn.) 13.

As to the ejusdem generis rule in the interpretation of statutes, see 31 HALSBURY'S LAWS (2nd Edn.) 495, 496, paras. 631-634; and for cases on the subject, see 42 DIGEST 672, 673, *836-843*.

As to when a decision of long standing may be overruled by a court of superior jurisdiction, see 19 HALSBURY'S LAWS (2nd Edn.) 257, para. 557; and for cases C on the subject, see 30 DIGEST (Repl.) 216, 217, *578-597*.

For the Town Police Clauses Act, 1847, s. 21, the Road Traffic Act, 1930, s. 46, s. 49, and the Road and Rail Traffic Act, 1933, s. 29 (4), see 24 HALSBURY'S STATUTES (2nd Edn.) 521, 611, 615, 702.

For the Road Traffic Act, 1956, s. 33 and s. 36, see 36 HALSBURY'S STATUTES D (2nd Edn.) 834, 840.]

Cases referred to:

(1) *R.* v. *Canterbury* (*Archbp.*), [1903] 1 K.B. 289; 72 L.J.K.B. 188; 88 L.T. 150; 11 Digest (Repl.) 609, *406*.

E (2) *Sun Life Assurance Co. of Canada* v. *Jervis*, [1944] 1 All E.R. 469; [1944] A.C. 111; 113 L.J.K.B. 174; 170 L.T. 345; 36 Digest (Repl.) 366, *39*.

(3) *Tillmanns & Co.* v. *S.S. Knutsford, Ltd.*, [1908] 2 K.B. 385; 77 L.J.K.B. 778; sub nom. *S. S. Knutsford, Ltd.* v. *Tillmanns & Co.*, 99 L.T. 399; *on appeal*, sub nom. *S. S. Knutsford, Ltd.* v. *Tillmanns & Co.*, [1908] A.C. 406; 17 Digest (Repl.) 283, *907*.

F (4) *Sandiman* v. *Breach*, (1827), 7 B. & C. 96; 9 Dow. & Ry. K.B. 796; 5 L.J.O.S.K.B. 298; 108 E.R. 661; 8 Digest (Repl.) 74, *491*.

(5) *R.* v. *Cleworth*, (1864), 4 B. & S. 927; 9 L.T. 682; 28 J.P. 261; 122 E.R. 707; sub nom. *R.* v. *Silvester*, 33 L.J.M.C. 79; 42 Digest 938, *103*.

(6) *R.* v. *Wallis*, (1793), 5 Term Rep. 375; 101 E.R. 210; 16 Digest 371, *2084*.

(7) *Dudderidge* v. *Rawlings*, (1912), 108 L.T. 802; 77 J.P. 167; 42 Digest 842, *4*.

G (8) *Teale* v. *Williams*, [1914] 3 K.B. 395; 83 L.J.K.B. 1413; 111 L.T. 285; 78 J.P. 383; 42 Digest 842, *3*.

(9) *Edwards* v. *Wanstall*, (1929), 142 L.T. 288; 94 J.P. 51; Digest Supp.

(10) *Etherington* v. *Carter*, [1937] 2 All E.R. 528; Digest Supp.

(11) *Waring* v. *Wheatley*, (1951), 115 J.P. 630; 2nd Digest Supp.

H (12) *Robinson Brothers* (*Brewers*), *Ltd.* v. *Houghton & Chester-le-Street Assessment Committee*, [1937] 2 All E.R. 298; [1937] 2 K.B. 445; 106 L.J.K.B. 835; 157 L.T. 147; 101 J.P. 321; *affd.* H.L., [1938] 2 All E.R. 79; 107 L.J.K.B. 369; sub nom. *Robinson Brothers* (*Brewers*), *Ltd.* v. *Durham County Assessment Committee* (*Area No.* 7), [1938] A.C. 321; 158 L.T. 498; 102 J.P. 313; Digest Supp.

I (13) *West Ham Union* v. *Edmonton Union*, [1908] A.C. 1; 77 L.J.K.B. 85; 98 L.T. 1; 72 J.P. 9; Digest Supp.

(14) *Bourne* v. *Keane*, [1919] A.C. 815; 89 L.J.Ch. 17; 121 L.T. 426; 42 Digest 668, *782*.

Appeal.

The defendants, Poole Corporation, appealed from a decision of VAISEY, J., dated July 31, 1957, and reported [1957] 3 All E.R. 211. The plaintiffs, Brownsea Haven Properties, Ltd., who were the owners of a hotel in Poole, applied by originating summons for a declaration that an order dated Mar. 5, 1957, and made by the defendants in purported exercise of the powers conferred on them by s. 21 of the Town Police Clauses Act, 1847, was ultra vires and void. The effect of the order was to create a one-way traffic system in two adjoining streets in Poole for all vehicles for a period of six months from Apr. 19, 1957, to Oct. 19, 1957, inclusive. The purpose of making the order was to test the efficiency of the one-way traffic system in the two streets as a preliminary to an order establishing it under s. 46 (2) of the Road Traffic Act, 1930, as amended by s. 29 (4) of the Road and Rail Traffic Act, 1933. Vaisey, J., held that the order was ultra vires and void because, as s. 46 (2) of the Road Traffic Act, 1930, as amended, contemplated that one-way streets should be created only with the confirmation of the Minister of Transport, a temporary order under s. 21 of the Act of 1847 which did not require the confirmation of the Minister could not be validly made for the purpose of trying out a one-way traffic system as a preliminary before making and applying for confirmation of an order under s. 46 (2) of the Act of 1930.

In the Court of Appeal, the defendants were represented by the Treasury Solicitor. The plaintiffs took the preliminary point that the Treasury Solicitor was not empowered to represent the defendants as the Crown had no interest in the subject-matter of the appeal. The plaintiffs in their notice under R.S.C., Ord. 58, r. 6, said that they would contend that the judgment of Vaisey, J., should be affirmed on the grounds set out in the judgment and on the further ground that the order of Mar. 5, 1957, did not prescribe any route to be observed by traffic within the meaning of s. 21 of the Act of 1847. With leave of the court the notice was amended by raising the further point that the power to make orders under s. 21 of the Act of 1847 was restricted to special occasions.

Denys B. Buckley and *J. L. Arnold* for the defendants, Poole Corporation.
G. D. Squibb, Q.C., and *J. L. Harman* for the plaintiffs.

Cur. adv. vult.

Dec. 16. The following judgments were read.

LORD EVERSHED, M.R. (read by Romer, L.J.): This is an appeal against a judgment of Vaisey, J., declaring ultra vires and void an order made by the defendants, Poole Corporation, on Mar. 5, 1957, under powers which they claim to be available to them under s. 21 of the Town Police Clauses Act, 1847. Omitting formal parts, the terms of that order, the intended effect of which was to make, for the period of six months specified therein, the thoroughfare described in the order what is commonly called a " one-way street ", were as follows:

> " Whereas the streets to which this order applies are during certain seasons of the year thronged and liable to be obstructed.
>
> " Unless upon the direction or with permission of a police officer in uniform from Apr. 19, 1957, to Oct. 19, 1957 (both dates inclusive), the route to be observed by all vehicles in
>
> " (i) Banks Road between its junction with Panorama Road shall be towards their south-western junction and
>
> " (ii) Panorama Road shall be towards its north-eastern junction with Banks Road.
>
> " For the purposes of this order ' vehicle ' includes bicycles and similar machines whether mechanically propelled or not.
>
> " All constables are hereby directed to enforce the provisions of this order."

Before counsel for the corporation could begin to open the appeal on their behalf, counsel for the plaintiff-respondents took a preliminary objection which, A in the form as it was first presented, was that the instructions of counsel for the corporation came from a solicitor who had no practising certificate in accordance with the Solicitors Act, 1957. The real substance, however, of the objection was directed to the fact that the Treasury Solicitor (who, being in fact a member of the Bar, is incapable of obtaining a practising certificate) was representing the corporation for the purpose of the appeal. The office of Treasury Solicitor is B derived from the Revenue Solicitors' Act, 1828, s. 1*. He normally acts for Her Majesty or for Ministers of the Crown or other persons in the service of Her Majesty; but he may also, in certain circumstances, be instructed by or on behalf of the Crown to offer his services to a private individual in the course of litigation and, if his services are accepted, may thenceforward act for such private individual. The circumstances which justify such instructions and such C a result are that the Crown has an interest in the subject-matter of the litigation: see the decision of this court in *R.* v. *Archbishop of Canterbury* (1) ([1903] 1 K.B. 289). So far there was no contest between counsel for both parties. It was, however, the contention of counsel for the plaintiffs that the Crown had, in truth, no interest whatever in the subject-matter of the present appeal, which was one exclusively between Poole Corporation, on the one hand, and the D plaintiffs, who are owners of a property† within the local jurisdiction of the corporation, on the other; and counsel sought particular support for his submission from the circumstance that the order of Mar. 5, 1957, had in any case expired on Oct. 19 last, so that (as he claimed) the only live issue between the plaintiffs and the corporation was that of the award by VAISEY, J., to the plaintiffs of the costs of the action.

E After hearing arguments from counsel, we intimated that we were not disposed to accept the objection as fatal to the appeal in limine; and we proceeded to hear the substance of the appeal accordingly. In the result, I have for my part been strongly confirmed in the view which I had been earlier disposed to take, namely, that the Crown has in the present case an interest in the subject-matter amply sufficient to support and justify its intervention. In *R.* v. *Archbishop of* F *Canterbury* (1) the question at issue had been whether, on the election of a bishop, objections could be put forward on doctrinal grounds after confirmation of the election by the archbishop‡, and the court had no difficulty in holding that the Crown had a sufficient interest in the matter to justify the Treasury Solicitor's appearance for and representation of the archbishop. No exposition is to be found in the judgments of what constitutes a sufficient "interest" for present G purposes. Counsel for the corporation submitted that it sufficed if the Crown or some Minister of the Crown or perhaps the Treasury Solicitor himself asserted the existence of an "interest" in the Crown. The argument does not appear to have been advanced by the then Solicitor-General, Sir Edward Carson, in *R.* v. *Archbishop of Canterbury* (1), and the language, at any rate of ROMER, L.J., seems clearly to avoid so deciding. He said ([1903] 1 K.B. at p. 294):

H

> "Under those circumstances, the Crown, for what appear to me good and sufficient reasons, came to the conclusion that it was to the interest of the Crown that it should, at its own expense, defend on behalf of the archbishop."

I Later in his judgment ROMER, L.J., said (ibid., at p. 295):

> "It appears to me that where the Crown for good and sufficient reasons thinks it is for its interests that the defence of an individual, in an action

---

* Section 87 of the Solicitors Act, 1957, expressly saves the rights of the Solicitor to the Treasury.

† The plaintiffs were the owners of a hotel situated in Banks Road near the point of its south-western junction with Panorama Road.

‡ See *R.* v. *Canterbury (Archbp.)*, [1902] 2 K.B. 503.

> or proceeding against him, should be undertaken, and the Treasury Solicitor is delegated by the Treasury authorities to act as solicitor for that individual, that is within the rights of the Crown, and is within the purview of the ordinary duties of the solicitor."

No doubt, in ninety-nine cases out of a hundred, the view of a Minister of the Crown that the Crown was " interested " in any given subject-matter would, at the least, strongly support the conclusion that it was; but I should not, as at present advised, be disposed to hold that in such cases the ipse dixit of a Minister or his representative was itself conclusive. In the present case, however, I feel no doubt at all that the Crown has an " interest ", according to the ordinary acceptation of that word, in the subject-matter in dispute. Traffic control is notoriously a matter of national concern; and the real question at issue in the action is whether a broad class of local authorities, of which the corporation are one, has, by virtue of the Act of 1847, power, of its own motion, to regulate traffic within the ambit of its jurisdiction by means of orders of the kind so far successfully impugned in this action; or whether such orders can only competently be made under the much more recent road traffic legislation which requires their confirmation by the Minister of Transport and Civil Aviation. In my judgment, it is impossible sensibly to deny that the Crown, and particularly the Minister of Transport and Civil Aviation, has an interest in that question. Nor can I accept the argument of counsel for the plaintiffs that the expiry of the corporation's order of Mar. 5, 1957, according to its terms, makes the matter purely academic or that the only " live issue " is one of costs, in which (as such) the Crown could legitimately have no interest at all. The question of the scope and availability to the corporation of s. 21 of the Act of 1847 for the purposes of traffic regulation remains, in my view, a " live issue ", notwithstanding the expiry of the March order by effluxion of time. It is not in doubt that the corporation wish to avail themselves of the powers of the Act of 1847 (if they subsist) for the purposes of traffic regulation as occasion may require; and we were informed that the decision of the court below has similarly affected other municipal authorities. Put conversely, it is not suggested that the order of March, 1957, exhausted the intended invocation by the corporation of the powers of the Act of 1847 for regulating the traffic of Banks Road and Panorama Road, let alone other thoroughfares within their jurisdiction: still less that (as in *Sun Life Assurance Co. of Canada* v. *Jervis* (2), [1944] 1 All E.R. 469) the result of this appeal could be said to be a matter of indifference to the plaintiffs.

I turn, therefore, to the substance of the appeal itself. Section 21 of the Town Police Clauses Act, 1847 (of the powers conferred by which the corporation's recited order of March, 1957, purported to be an exercise) reads as follows:

> " The commissioners may from time to time make orders for the route to be observed by all carts, carriages, horses, and persons, and for preventing obstruction of the streets, within the limits of the special Act*, in all times of public processions, rejoicings, or illuminations, and in any case when the streets are thronged or liable to be obstructed, and may also give directions to the constables for keeping order and preventing any obstruction of the streets in the neighbourhood of theatres and other places of public resort; and every wilful breach of any such order shall be deemed a separate offence against this Act, and every person committing any such offence shall be liable to a penalty not exceeding 40s."

It was the contention of counsel for the plaintiffs, which they put in the forefront of their case in support of the conclusion of VAISEY, J., that the corporation's order, the declared intention and effect of which was to make of

---

* Originally, the Act of 1847 applied only to towns where it was incorporated in a local Act, but certain provisions including s. 21 were applied, with adaptations, to all boroughs and urban districts by the Public Health Act, 1875, s. 171, s. 316 (19 HALSBURY'S STATUTES (2nd Edn.) 79, 109).

Banks Road and Panorama Road (as defined in the order) a " one-way street ", was outside the scope of the section since, notwithstanding the express use therein of the five vital words, the order did not amount to an order for " the route to be observed " by vehicles as that phrase in the section ought properly to be interpreted. The argument of counsel for the plaintiffs was to the effect that the word " route " in the section was used, and used exclusively, in the same sense as that in which it is used in phrases like " a bus route " or " a tram route " and signified the course or the street or streets used (or to be used) by vehicles in proceeding from one point to another, regardless of direction; that the phrase was not apt to mean or include merely a direction to be followed; and, more particularly, that an order " for the route to be observed " was never intended to mean or cover, and should not be taken to mean or cover, an order designed to give to a particular street or streets a special quality or characteristic, namely, such that any vehicle in the street or streets, whatever might be its point of entry or its destination, must move in the street in one direction only. In support of the argument, it was said, and said with some force, that the idea of " one-way streets " as a means of dealing with day-to-day traffic congestion was something not dreamt of in 1847; and counsel drew attention to the language of s. 46 of the Road Traffic Act, 1930, in which a distinction is drawn in the paragraphs of sub-s. (2) between the specification of routes to be followed by vehicles, on the one hand, and, on the other, the prohibition of the driving of vehicles on a specified road otherwise than in a specified direction*. Finally, it was submitted that the inapplicability of the section to a " one-way street " order is shown by the terms of the present order itself, which, by straining the language of the section to achieve such a purpose, produces the result that, as a strict matter of language, a vehicle cannot turn out of Banks Road or Panorama Road into one or other of the side streets, but must pursue the stipulated direction, at least to the south-western junction of the two roads.

Notwithstanding the strong reliance placed by counsel for the plaintiffs on this part of their case (which was made the subject of their notice under R.S.C., Ord. 58, r. 6), I have felt unable to give to the essential words " the route to be observed " so strict and confined a meaning. Although it is, no doubt, true that the words may have been primarily intended—particularly having regard to their context and to the immediately following words " by *all* carts, carriages, horses, *and persons* "—to provide for such expedients as the temporary closing of certain streets or parts of streets and the total diversion of all traffic, including pedestrian, it does not seem to me that the words according to their ordinary and proper usage can be interpreted so as to exclude the ordering of traffic in a thoroughfare to observe one " direction " or " route " therein only. The word " route " is, after all, defined in the SHORTER OXFORD ENGLISH DICTIONARY as:

> " A way, road, or course; a certain direction taken in travelling from one place to another . . ."

Moreover, if a total diversion of all traffic from a particular street or part of a street is comprehended, I do not see why, on the principle that the greater includes the less, there is not also included the diversion of that part only of the traffic that would otherwise go in one direction along it. The point is, in the end, a short one, and I hope I shall not be thought disrespectful of the plaintiffs' argument if I do not attempt further elaboration. In my judgment the plaintiffs fail on this point to sustain the judgment under appeal.

It is, however, by no means the end of the case. The corporation's order which is challenged in these proceedings recites that the streets to which it applies are " during certain seasons of the year thronged and liable to be obstructed ". The order then proceeds to make those streets one-way streets for twenty-four hours of the day during the six months' period from Apr. 19, 1957

---

* See para. (a) and para. (c) of s. 46 (2) of the Road Traffic Act, 1930 (24 HALSBURY'S STATUTES (2nd Edn.) 611).

(which was Good Friday) to Oct. 19, 1957. The words of the section which, according to the corporation, were applicable and justified the making of the order, were the words " and in any case when the streets are thronged and liable to be obstructed ". Those words follow immediately the enumeration " in all times of public processions, rejoicings, or illuminations ", and the question emerged during the argument whether, on their proper construction in the context in which they appear, the words " in any case ", etc., ought not to be confined to special events, that is, occasions strictly similar to public processions, rejoicings and illuminations, or, at most, to short periods of time when the ordinary day-to-day traffic conditions are liable to be dislocated or obstructed by crowds of pedestrians or streams of vehicles, and whether, therefore, the words ought to be treated as not apt or intended to cover the ordinary day-to-day traffic conditions in particular streets so as to provide authority for the making of " one-way street " orders (as counsel for the corporation admitted that his clients claimed to be entitled to do) for long or indefinite periods of time in the general interest of local traffic regulation. It became plain during the argument that the choice must lie between construing the general words as limited to special or extraordinary occasions of obstruction, whether or not strictly similar to the preceding examples, on the one hand, and, on the other, giving them inevitably the wide significance claimed by counsel for the corporation. No middle course—for example, such as to authorise the making of orders for experimental periods only—appeared possible; and if the latter view is correct, the result may appear remarkable. Parliament, in the Road Traffic Act, 1930, thought it right, by the amended terms of s. 46 which I have earlier cited, to require that proposals for making one-way street regulations should be confirmed by the Minister of Transport*. Yet, if counsel for the corporation is right, there exists and had always existed a parallel or corresponding statutory power exercisable without any ministerial control. It was this result which plainly impressed VAISEY, J., and constrained him to decide, as he did, against the validity of the order. If, on its true construction, s. 21 of the Act of 1847 has the wide ambit for which counsel for the corporation contends, then the court must so decide, notwithstanding the strangeness of the result. The court, however, will not, in my judgment, be astute to pronounce in favour of such a conclusion, and certainly not the less so since modern traffic conditions calling for one-way street regulation could not have been in the contemplation of the legislation of 1847. The motor traffic to be found in Banks Road and Panorama Road, Poole, "in certain seasons of the year", could not have been within the mischief which the Act of 1847 was designed to remedy.

The plaintiffs do not appear in the court below to have argued for a limitation of the general words to particular or extraordinary occasions; nor had they raised the point in their notice under R.S.C., Ord. 58, r. 6. They, no doubt, rightly felt that the point was concluded against them before VAISEY, J., by certain decisions of the Divisional Court later mentioned. Counsel for the plaintiffs told us that in this court also he had felt those cases to be a serious obstacle, since the earliest of them had been decided over forty years ago; and he had also felt somewhat constrained by the fact that the same general words appeared in the Metropolitan Police Act, 1839 (as well as in some private Acts), in a context which made the argument for limitation of their effect more difficult. After discussion before us, however, counsel for the plaintiffs asked for leave to amend his notice so as specifically to raise the point, and, since counsel for the corporation did not oppose, we gave leave accordingly.

---

* By the Road and Rail Traffic Act, 1933, s. 29 (4); 24 HALSBURY'S STATUTES (2nd Edn.) 702; councils are empowered to make orders restricting the use of vehicles on specified roads under s. 46 of the Act of 1930 (which authorised the Minister to make such orders on the councils' application) without previous reference to the Minister, but his confirmation is necessary. This states the position immediately prior to Dec. 1, 1957; for subsequent amendments of the sections cited, see Editorial Note, p. 206, ante.

I propose to express my view on the point in the first instance, treating it as res integra and without regard to the Divisional Court decisions. So treating it, I have come to the conclusion that in the context in which they appear the words " in any case " ought to be treated as intended only to cover " cases " of the same class or " genus " as the three preceding instances, that is, either " cases " strictly similar to " public processions, rejoicings, or illuminations ", or, alternatively, " cases " of obstruction or dislocation of a special, or particular, and extraordinary kind; and the words ought not, therefore, to be treated as covering the circumstances of ordinary day-to-day traffic conditions.

The books provide numerous examples of the application of the so-called " ejusdem generis " rule of construction. I take for a statement of the appropriate principle the following passages from the judgment of Farwell, L.J., in *Tillmanns & Co.* v. *S. S. Knutsford, Ltd.* (3) ([1908] 2 K.B. 385), a case in which this court held the rule to apply so as to limit the phrase " in consequence of war, disturbance or any other cause" to causes of the same kind as the two named instances. The learned lord justice, after observing that there was no room for the application of the rule unless there was a class or category, proceeded (ibid., at p. 403):

> " But when there is a clear category followed by words which are not clear, unambiguous general words, it would violate a settled rule of construction to strike out and render unmeaning two words which were presumably inserted for the purpose of having some meaning."

Later in his judgment he said (ibid., at p. 404):

> " Now, if the words in this case had been ' in consequence of war, disturbance, or any cause whatsoever, whether similar to those preceding or not ', there would have been no room for argument, because there would be no real category at all: it is universality, and not a category; it is the whole range of causes. But, inasmuch as you have simply the words ' any other cause ', which are ambiguous, then the rule does apply. The rule may be taken as stated by Lord Tenterden, C.J., in *Sandiman* v. *Breach* (4) ((1827), 7 B. & C. 96 at p. 100): ' Where general words follow particular ones, the rule is to construe them as applicable to persons ejusdem generis'. The same rule was applied in *R.* v. *Cleworth* (5) ((1864), 4 B. & S. 927), which turned on the construction of a statute enacting that no tradesman, artificer, workman, labourer or other person whatsoever should do or exercise any worldly labour, etc., on the Lord's Day. Cockburn, C.J., said (ibid., at p. 932): ' Then there is a general expression " other person whatsoever "; but, according to a well-established rule in the construction of statutes, general terms following particular ones apply only to such persons or things as are ejusdem generis with those comprehended in the language of the legislature '. Crompton, J., and Blackburn, J., both agreed. If, therefore, there is a category, then the rules, which have come down to us from former generations and which still remain in full force, will apply . . ."

The impression which the language of the present section clearly forms on my mind is that, within the principle above stated, the general words " in any case ", etc., were intended to be confined and should be confined to cases within the " genus " or category of which public processions, rejoicings and illuminations are specific instances. The three instances suffice, in my judgment, to constitute a genus which, even if not confined to instances strictly similar to those three, may be stated as special occasions (not necessarily limited to a single day) when the ordinary day-to-day use of street or highways is, or is A liable to be, obstructed or dislocated by substantial numbers of persons, on foot or in vehicles, participating as spectators or otherwise in the occasion. It is quite true that the word " other " does not occur before the word " case " as, in the authorities, it commonly does in the general words following the particular instances; but I cannot find that the presence of that word has been regarded as essential to the application of the rule, as it is, in my judgment, irrelevant to its B principle. No reliance is put on the presence of the word in *Tillmanns & Co.* v. *S. S. Knutsford, Ltd.* (3) or in the older authorities therein cited; and see *R.* v. *Wallis* (6) ((1793), 5 Term Rep. 375) referred to by ROMER, L.J., in the judgment which he is about to deliver and which I have had the advantage of seeing. As a matter of English, it may indeed be said that the word " other " would tend rather against the limitation of the general words. Nevertheless, C counsel for the corporation put the absence of the word " other " in the forefront of his argument. He might even, as I understood him, have been disposed to concede, had the phrase been " and in any *other* case ", etc., that the general words so introduced should be limited to instances ejusdem generis as public processions, etc. But he argued that the relevant part of the section should be treated as applicable to two distinct sets of circumstances, namely: (i) public D processions, rejoicings or illuminations (of which throngs and obstructions were not essentially characteristic), and (ii) " any case ", in which streets were thronged or liable to be obstructed. It is, however, in my judgment, impossible to accept the view that Parliament were legislating in regard to " times of public processions, rejoicings, or illuminations" as a distinct and confined class of occasion with which throngs and street obstructions were not necessarily in- E volved. The power conferred is one for ordering " the route to be observed . . . *and . . . for . . . preventing . . . obstruction of the streets* ". It seems to me, therefore, impossible to treat the three specified examples of public processions, etc. (and, if necessary, I would treat the word " public " as applicable to all three) otherwise than as instances when the streets are thronged and liable to be obstructed. If this is right, then in my judgment it is impossible to construe F the general words which follow in any sense different from that which they would bear if the word " other " appeared before the word " case ". Even if there be two distinct classes of occasion or event (as counsel for the corporation contended) so that the class introduced by the words " in any case " were not to be interpreted as ejusdem generis with the three events " public processions, rejoicings, G or illuminations ", still, the use of the word " case " seems to me naturally apt, and in the context only apt, to refer to particular or special occasions or events, and not (as would have been, for example, such a word as "circumstances") to mean the ordinarily recurring or day-to-day conditions of particular thoroughfares. If, indeed, the latter had been intended, nothing would have been easier than for Parliament to have said so, or at any rate to use a simpler and wider H phrase such as " and whenever ". In the end, the question may resolve itself into no more than that of determining, on the true construction of the section, what are the limits (if any) of the " category " introduced by the words " in any case ": and in my judgment the category is a limited one which, on any view of it, excludes the circumstances of the six months' period of April to October. I, therefore, if I am free to do so in light of the decided cases, would I hold that the general words must be limited so as to be applicable to instances only of particular and extraordinary occasions, a view which appears to me to be in better conformity with the general tenor or purpose of the section, having regard particularly to the traffic conditions of 1847.

I have expressed my view so far on this matter on the assumption that the question is novel. The assumption is, however, not correct, having regard to the Divisional Court decisions earlier mentioned. Our attention was directed to five such decisions. The first is *Dudderidge* v. *Rawlings* (7) ((1912), 108 L.T. 802), decided in December, 1912, before Ridley, Coleridge and Bankes, JJ. The case was one in which Bristol Corporation had made an order under s. 21 of the Act of 1847, which, after reciting that certain streets were thronged and liable to be obstructed between certain hours on weekdays, ordered the constables to control traffic at cross-roads in those streets by what we now know as ordinary point-duty directions. The appellant was a taxicab driver who declined to obey the signals of a constable operating under the order and had been fined accordingly as for an offence within the terms of the section. The case in the Divisional Court turned on the narrow point (decided adversely to the appellant) whether disobedience to the constable amounted to a breach of the corporation's order or only to disregard of the constable's signal, which would not itself be an offence under the section. The question of the scope and meaning of the words " in any case ", etc., with which we are concerned, does not appear to have been raised or debated at all.

The matter is, however, otherwise with the second case, *Teale* v. *Williams* (8) ([1914] 3 K.B. 395), decided in April, 1914. There Eastbourne Corporation had made an order under the section which, after reciting, like the Bristol order, that certain streets were thronged and liable to be obstructed between certain hours on weekdays, ordered (among other things) that no hawker should use the said streets during such hours for the sale of specified goods from trucks or barrows; and gave directions to the police to enforce such order. On a prosecution of the respondent, a hawker, for breach of the order, the local justices had held that the section, on its true construction, only authorised an order to deal with extraordinary occasions of obstruction. On appeal to the Divisional Court this decision was reversed. It appears from the leading judgment of Avory, J., that some part of the argument had turned on the submission that the hawker was doing no more than using the King's highway in the ordinary course. It is, however, clear that the point now before us was argued and expressly decided in a sense contrary to that which has commended itself to me. Avory, J., said ([1914] 3 K.B. at p. 398):

> " The question is whether the words ' in any case ' mean that they may make such an order applicable to any street which is usually thronged or usually liable to be obstructed. In my opinion that is the plain meaning of the words, and they are not intended to be limited to cases of extraordinary occasions of obstruction similar to those of public processions, rejoicings, or illuminations."

It is, however, no less clear that Rowlatt, J., did not himself share this view, although he did not in the end dissent. He said (ibid.):

> " However the words are wide, and as my brethren do not feel the difficulty which I feel I do not desire to dissent, especially as their construction is from the public point of view much the more beneficial."

Shearman, J., on the other hand, went even further than Avory, J., and, since his judgment was quoted in full and approved expressly by Lord Hewart, C.J., in the fourth of the cases*, I venture to set it out here at length. He said ([1914] 3 K.B. at p. 398):

> " I am of the same opinion. The only question left to the court in this case is whether the words of s. 21 authorise the making of a general order for the regulation of traffic in any street where the ordinary traffic of such street makes such a regulation necessary in the opinion of the local authority. In my judgment the words are amply wide enough to confer such a power. The section begins with a general reference to the regulation of traffic—

---

* *Etherington* v. *Carter* (10).

> ‘ The commissioners may from time to time make orders for the route to be observed by all carts, carriages, horses, and persons, and for preventing obstruction ’. Those are the opening words. Then it goes on to give two or three particular occasions—‘ in all times of public processions, rejoicings, or illuminations ’. Having given those three special occasions it then uses the widest possible words ‘ and in any case when the streets are thronged or liable to be obstructed ’. I cannot entertain much doubt that ‘ in any case ’ means in any case and not in a few special cases. It appears to me that although the statute is not very aptly worded the intention is merely to give a few examples and then to confer the widest possible power to be exercised by the local authority.”

The next case, *Edwards* v. *Wanstall* (9) ((1929), 142 L.T. 288) came before LORD HEWART, C.J., SWIFT and BRANSON, JJ., in November, 1929. The facts of the case were for practical purposes identical with those in *Teale* v. *Williams* (8), and that fact, together with the further fact that fifteen and a half years had passed since *Teale* v. *Williams* (8) had been decided, are matters to which I shall attach some importance later in this judgment. In *Edwards* v. *Wanstall* (9) the local justices of Herne Bay appear to have taken the point (which had not been raised in *Teale* v. *Williams* (8)) that an order for an indefinite period, even though otherwise within the scope of s. 21 of the Act of 1847, was in truth a bye-law which required confirmation under the Public Health Act, 1875; and that, since the order in question had not been so confirmed, it was invalid. The Divisional Court took the view that the case was directly covered by *Teale* v. *Williams* (8) and allowed the appeal accordingly. LORD HEWART, C.J., in following *Teale* v. *Williams* (8), is not reported as having expressed any view of his own; and BRANSON, J., confined himself to concurrence with his brethren. SWIFT, J., however, though also of the opinion that *Teale* v. *Williams* (8) was binding, expressed “a good deal of sympathy with the doubts which were expressed by ROWLATT, J.,” in the earlier case. SWIFT, J., found difficulty in persuading himself that it was, in truth, intended that the section in question should extend to the making of “ a permanent order closing a number of streets to particular classes of persons for every day of the week ”.

The fourth case is *Etherington* v. *Carter* (10) ([1937] 2 All E.R. 528), before LORD HEWART, C.J., HUMPHREYS and SINGLETON, JJ. This case also, like the two preceding ones, concerned the making of an order under the section for the prohibition of sales by hawkers in certain streets*. In this case the streets were in the immediate neighbourhood of Windsor Castle, and the order made differed from the orders in the two preceding cases in that its operation was not limited to specified hours during the day. There can be no doubt that on this occasion LORD HEWART, C.J., did express his own personal opinion, which was in strong support of the earlier decisions. Indeed, he went so far as to cite at length the judgment of SHEARMAN, J., in *Teale* v. *Williams* (8) and to express his own entire agreement with that judgment. As regards the absence of any limit as to hours, the learned Lord Chief Justice thought the point immaterial, since it would have no practical significance during the hours when the hawker would, in the ordinary course, be plying his trade. On the other hand, it may be added that HUMPHREYS, J., expressly reserved his view as to the validity of an order made without limitation as to times or hours in a case in which the evidence showed the obstruction to occur or to be likely to occur only during certain periods.

The last of the five cases is *Waring* v. *Wheatley* (11) ((1951), 115 J.P. 630), which came before LORD GODDARD, C.J., and SLADE and DEVLIN, JJ. I need not, however, take time on this case, for it turned solely on the circumstance that the information had omitted the word “ wilfully ” and, therefore, did not

---

* During the months of May to September, inclusive.

A disclose the offence named in s. 21 of the Act of 1847. Although other points were taken in the argument, the judgment of LORD GODDARD, C.J. (with which his two brethren agreed), is limited to the single one of the absence of the word " wilfully ".

From these cases it is, to my mind, clear that *Teale* v. *Williams* (8) involved the rejection of any limitation in scope of the general words " in any case ", etc., B to specific occasions, and that that decision has since been followed and treated as binding by the Divisional Court in the few later cases in which the point has been raised. The cases are not, of course, binding on this court; but there is well-established authority for the view that a decision of long standing, on the basis of which many persons will in the course of time have arranged their affairs, should not lightly be disturbed by a superior court not strictly bound C itself by the decision. The matter was recently considered exhaustively in *Robinson Brothers (Brewers), Ltd.* v. *Houghton & Chester-le-Street Assessment Committee* (12) ([1937] 2 All E.R. 298, affirmed [1938] 2 All E.R. 79). In that case the members of this court, having concluded that a decision* on a question of rating pronounced some forty years previously by a Divisional Court was plainly wrong, overruled it accordingly, although the earlier decision had, D without doubt, been frequently acted on in rating matters in the meantime, and although no judicial doubt had previously been cast on its correctness. GREER, L.J., cited in his judgment ([1937] 2 All E.R. at p. 303) the well-known passage from the speech of LORD LOREBURN, L.C., in *West Ham Union* v. *Edmonton Union* (13) ([1908] A.C. 1 at p. 4):

> E " Great importance is to be attached to old authorities, on the strength of which many transactions may have been adjusted and rights determined. But where they are plainly wrong, and especially where the subsequent course of judicial decisions has disclosed weakness in the reasoning on which they were based, and practical injustice in the consequences that must flow from them, I consider it is the duty of this House to overrule them, if it has F not lost the right to do so by itself expressly affirming them."

GREER, L.J., however, was not deterred from overruling the earlier Divisional Court case by reason of the absence of any " disclosure of weakness in the reasoning " of the Divisional Court decision in later judgments. Nor do I think that LORD LOREBURN'S language should be treated, or has in practice G been treated, as laying it down that the power to overrule should never be exercised unless all the circumstances referred to by LORD LOREBURN are present and their conditions satisfied.

In my judgment, and with all respect to the contrary opinions expressed in the cited cases, I think that, in so far as those cases depended on a conclusion that H the words " in any case ", etc., are unlimited by the context in which they appear, they cannot be supported. Having given the matter my best consideration, I feel it my duty to state my own opinion that the conclusion arrived at by SHEARMAN, J., and adopted by LORD HEWART, C.J., that the words quoted were used in the widest possible sense so as to authorise the making of general orders for traffic regulation wherever the ordinary traffic in a street made such I regulation necessary in the opinion of the local authority, is clearly wrong: and I am comforted and confirmed in this opinion by the similar view which clearly appealed to ROWLATT, J., and SWIFT, J. Although I am unable to agree that the words " in any case ", etc., were intended or are apt to confer the widest possible powers on the local authority, I must not be taken to be saying that the decisions in the cited cases cannot properly be otherwise supported. It was conceded by counsel for both parties that the powers contained in the latter part of the section are not necessarily limited by the language in the earlier part—in other words, that the local authority may, by the section be empowered (in addition to the authority conferred by the earlier part of the section) to give directions to the local constables for keeping order and preventing obstruction of streets which would comprehend the subject-matters of the Divisional Court cases. The words " other places of public resort " are exceedingly wide, and plainly cannot, in my judgment, be confined to places of the same kind as " theatres ", a word which of itself cannot form a category. It seems to me, therefore, that the decision in the fourth of the cited cases, namely, *Etherington* v. *Carter* (10), could well have been supported in reliance on this part of the section since, as was observed in the judgment of Lord Hewart, C.J., the environs of Windsor Castle are places to which very large numbers of the public from distances far and near are apt to resort. The full circumstances relating to the relevant streets in Eastbourne and Herne Bay are not fully stated in *Teale* v. *Williams* (8) and *Edwards* v. *Wanstall* (9), but it may well be that these decisions could be similarly supported on their facts under the second half of the section.

---

* *Bradford-on-Avon Assessment Committee* v. *White*, [1898] 2 Q.B. 630.

I have referred already to the fact that *Edwards* v. *Wanstall* (9), of which the facts were almost identical with those in *Teale* v. *Williams* (8), came before the Divisional Court fifteen and a half years after *Teale* v. *Williams* (8); from which it may not unreasonably be inferred that no great number of other similar orders had in the meantime been made. Further, since 1930 and the coming into operation of the Road Traffic Act, 1930, the requisite police powers would appear to be covered by s. 49 of that Act—if and to the extent that they cannot be supported (as I have suggested) by the terms of the second part of s. 21 of the Town Police Clauses Act, 1847.

In the circumstances, I am not satisfied that either injustice or inconvenience would be caused by giving effect now to the conclusion which I have formed on the words " and in any case ", etc., in s. 21 of the Act of 1847. Counsel for the corporation was not (and could not, in the nature of things, have been) fully instructed as to the extent to which the section had been invoked by other local authorities for the making of orders comparable to that in the present case. I am not satisfied that the section has or can have been relied on to any substantial extent for the making of " one-way street " orders for indefinite periods of time. The traffic conditions which today require or justify such measures of traffic regulation are recent phenomena. In making provision expressly directed to such a form of traffic regulation, Parliament in 1933* thought it right to require the safeguard of confirmation by the Minister. The court ought not, in my judgment, to arrive readily at a conclusion in conflict with this declared parliamentary intention, and certainly should not be inclined to regard the opposite view as unjust. Having regard particularly, therefore, to the views of Rowlatt, J., and Swift, J., and also to the facts (i) that the decision in *Teale* v. *Williams* (8), so far as it rested on the Act of 1847, substantially lost its significance sixteen years later with the passing of the Act of 1930, (ii) that the decision cannot be regarded as one which has stood " for a long period of time " as that phrase was used, for example, by Lord Buckmaster in *Bourne* v. *Keane* (14) ([1919] A.C. 815 at p. 874), (iii) that the decision itself and those which followed it may be capable of being supported on other grounds, and (iv) that the validity of the application of the section in the Act of 1847 to circumstances such as those in the present case has never, in fact, been previously considered by any court, I think that the Divisional Court decisions ought to be disapproved in so far as they rested on the unlimited construction of the words " and in any case ", etc.

The point was also suggested in argument by the plaintiffs that the corporation's order of March, 1957, fell outside the authority of s. 21, on the ground that, after reciting the thronging and liability to obstruction of the relevant streets

---

* See footnote, p. 212, ante.

"during certain seasons of the year", it proceeded to apply the "one-way" traffic regulation for the period from Apr. 19 to Oct. 19, a period which was not shown to correspond with any of the "seasons of the year" previously mentioned: and also on the further ground that, in any case, the thronging or obstruction sought to be prevented was not shown to have occurred or to be apprehended for twenty-four hours of all the days and nights of the period of operation of the order. To this point, if open to the plaintiffs, the observations of Humphreys, J., in *Etherington* v. *Carter* (10) are relevant. Counsel for the corporation took the objection that the point had not been taken before Vaisey, J., and was not raised in the plaintiffs' notice under R.S.C., Ord. 58, r. 6, and that (if it had been so taken or raised) evidence could have been directed to it. In the circumstances, I do not propose to say anything more on the point. For the reasons which I have endeavoured to state, I think that this appeal should be dismissed.

ROMER, L.J.: I agree. As this appeal proceeded on its course it became quite apparent that the preliminary objection of counsel for the plaintiffs to the appearance of counsel for the corporation on the instructions of the Treasury Solicitor was altogether untenable. I am not prepared to hold, as counsel for the corporation at one stage of his argument invited us to do, that the mere ipse dixit of a Minister of the Crown that he or his department has an interest in legal proceedings to which neither he nor the Crown is a party precludes the court from inquiring whether that is so or not, when objection is taken to the intervention of the Treasury Solicitor. There is a passage in the judgment of Sir Richard Henn Collins, M.R., in *R.* v. *Archbishop of Canterbury* (1) ([1903] 1 K.B. 289 at p. 293) which lends some support to that view, but, as the Solicitor-General, Sir Edward Carson, had not relied on the point in argument, there is no reason to suppose that Sir Richard Henn Collins, M.R., was intending to decide it; and, as a mere obiter dictum, it was at variance with the observations of Romer, L.J., in the course of his judgment in that case. Nevertheless, it is quite clear, in my opinion, that it is a matter of real concern to the Minister of Transport and Civil Aviation, and, therefore, to the Crown, if a question arises, as it does in the present case, as to the comparative powers of traffic control conferred by the Town Police Clauses Act, 1847, and the Road Traffic Act, 1930, respectively. Nor can I accept the contention of counsel for the plaintiffs that, as the corporation's order, which is challenged in these proceedings, expired some time since, the only issue remaining is as to the costs of the hearing below, in which, admittedly, the Crown is in no way interested. The decision of Vaisey, J., was that the order was ultra vires and void and he made a declaration to that effect; and the practical result of that decision, so long as it stands, is that the corporation cannot make a similar order in the future. To say that they could do so in theory is to take an unrealistic view of the matter. The corporation want to know, for their future guidance, whether the judge was right or wrong in saying that they acted beyond their powers in making the order, and in my judgment they are entitled to come to this court for the purpose of finding out.

On the main issue, the learned judge based his decision in favour of the plaintiffs on the view that, although s. 21 of the Town Police Clauses Act, 1847, was not repealed by the Road Traffic Act, 1930, it was not open to the corporation to use the powers conferred by s. 21, without any local inquiry or restriction, in an experimental way pending an order under s. 46 of the Act of 1930 being confirmed by the Minister. At the hearing before this court, counsel for the plaintiffs, whilst, of course, relying on and supporting the basis of the learned judge's decision, put their case in the first instance in a somewhat different way. The corporation's order of Mar. 5, 1957, has been stated by Lord Evershed, M.R., and I will not repeat its terms; but the first point taken by the plaintiffs is that it was not an order "for the route to be observed" by the traffic which was affected by it, and was, therefore, not such an order as is authorised by s. 21 of

the Act of 1847. " Route ", they say, is a line between two termini; it may be a A
roadway or a sea way (Mr. Harman, junior counsel for the plaintiffs, mentioned
the short sea route by way of illustration) or an air way, but, whichever it is,
it possesses the characteristics of linking two termini and being available to
traffic proceeding in either direction. The plaintiffs say that neither of these
characteristics is to be found in the route which the corporation purported to
prescribe by their order and which is nothing more nor less than a one-way B
circuit. In my judgment, this is too narrow a construction of the relevant
language of s. 21. The plaintiffs' contemplation of a " route " within this
language would be something in the nature of a by-pass. I quite agree that it
would include a by-pass, but I am unable to see why it should be limited to a
by-pass or any other way in which traffic is permitted to move in both directions.
Many by-passes have dual carriage ways and I should have thought that each C
carriage way could fairly be described as a route to be observed by the traffic
which wished to travel in the permitted direction. Section 21 is dealing with
traffic obstruction and with means of preventing it; and in that context the
words " route to be observed " postulate the diversion of traffic along a way or
ways to be prescribed and the direction which the traffic is to take. So, in the
order under consideration, the route to be observed by all traffic (e.g., traffic D
from Bournemouth) wishing to get from the north-east junction of Banks Road
and Panorama Road to the south-west junction is by way of Banks Road, and
the route for all traffic wishing to get from the south-west junction to the north-
east junction is by way of Panorama Road. The fact that these two routes,
when taken together, constitute a one-way circuit and that all traffic entering
the circuit by a side road must turn right or left, as the case may be, does not E
appear to me to be relevant. The truth of the matter is that, unless the word
" route " in the section excludes the idea of one-way traffic, the plaintiffs'
contention on this point cannot, as it seems to me, succeed; and in my judgment
there is no sufficient ground for such exclusion.

The next question which I propose to consider is whether the words " and in F
any case " in s. 21, following as they do on a reference to " all times of public
processions, rejoicings, or illuminations ", are to be limited in some, and if so
what, way, or whether they should receive a general and uncontrolled construction.
If the words had been " in any *other* case " it could scarcely be contended*,
I should have thought, that such a construction should be attributed to them,
for the resulting universality would render wholly otiose the reference to public G
processions, etc.; and, indeed, it was largely on the omission of the word "other"
that counsel for the corporation founded his argument in favour of an unlimited
construction. To justify, said counsel, the cutting down of the normal meaning
of words it is necessary to find some ambiguity in the language. Such an
ambiguity arises, or may arise, from the word " other " when following on specific
examples of a genus, and in such instances the ejusdem generis principle will H
usually be applied, for otherwise the specific examples would be redundant.
But, said counsel, the word " other " does not appear in s. 21, and this, said he,
is not surprising, for " public processions, rejoicings, or illuminations " do not
constitute a genus at all.

It is quite true that, in most of the cases in which the ejusdem generis principle I
has been applied to statutory language, the stated examples of a genus have been
followed by the word " other ". There are, however, cases to be found in the
books where the principle has been applied notwithstanding the absence of the
word " other "—see, for example, *R.* v. *Wallis* (6) ((1793), 5 Term Rep. 375),
where the Court of King's Bench applied it to the words " cities, towns corporate,
boroughs, and places " in s. 1 of the Statute 9 Anne c. 20, in relation to persons

---

* Cf. p. 214, letter C ante.

intruding into public offices. In the course of his judgment in that case, LORD KENYON, C.J., said (ibid., at p. 379):

> ". . . the word ' places ', in the Act only extends to offices in places of the same kind with those before enumerated; otherwise the legislature would have used only one compendious word, which would have included places of every denomination. In one of the cases cited, FOSTER, J., observed, that the Statute of Anne was drawn by POWELL, J., and that accurate judge would not have introduced all these different words, if the last alone would have been sufficient."

The other members of the court took a similar view.

The doctrine of ejusdem generis is only a part of a wider principle of construction, namely, that, where reasonably possible, some significance and meaning should be attributed to each and every word and phrase in a written document. That being the object of the doctrine, it is difficult to see what difference it can make whether the word " other " is or is not used, provided—and this is essential—that the examples which have been given are referable to a clearly ascertainable genus. It is, accordingly, vital to ascertain whether the three examples which precede the words " and in any case " in s. 21 all possess a common characteristic or quality. In my opinion, and having regard to the context in which they appear, they plainly do. Whether or not the word " public " in the section governs not only " processions " but " rejoicings " and " illuminations " as well, so that all three activities were envisaged as possessing a public element, it is not necessary to decide, although I think on the whole that it does. The object of s. 21, as is stated by the introductory words of the section, is to confer " Power to make orders for preventing obstructions in the streets during public processions, etc."; not generally, it is to be observed, but on particular occasions. The body of the section enumerates three such particular occasions and it is quite manifest that each of them is calculated to attract a crowd of persons who collect together; and a crowd of persons who collect together is, in turn, calculated to obstruct the streets in which it gathers. From this I deduce that the element which is common to all of the three instances enumerated in the section is that they only happen from time to time, but, when they do occur, they are likely to attract a crowd of people whose presence will inevitably, in a great or lesser degree, obstruct the streets. I must confess that I entertain no doubt, having heard elaborate argument on the point, that the words " and in any case " are limited to events which possess the common characteristics to which I have referred; that is to say, they are limited to special occasions which, by their nature, are likely to attract a crowd. They may be short (e.g., a public oration) or they may be comparatively long (e.g., coronation celebrations); but they must be occasions of a special kind as distinct from the everyday life of a town. The contrary argument which counsel for the corporation submitted to us substitutes (in effect) " whenever " for the words " in any case when " and deprives the words " in all times of public processions, rejoicings, or illuminations " of any effect at all; and I must reject a contention which involves these results. Further than this, it appears to me that, if the argument is sound, there was very little object in empowering the commissioners (as the section does) to

> ". . . give directions to the constables for . . . preventing any obstruction of the streets in the neighbourhood of theatres and other places of public resort . . ."

—for, on the corporation's contention, *all* streets (including these streets) where obstruction is ordinarily to be expected could be made the subject of an order under the earlier part of the section.

Thinking, as I clearly do, that the words " and in any case " should receive the limited interpretation which I have stated, the next question is whether effect can properly be given to this view having regard to the earlier decisions of the Divisional Court in which a contrary opinion was expressed. These authorities have been fully reviewed in the judgment of Lord Evershed, M.R., and I will not refer to them in any detail again. It cannot, of course, be disputed that in *Teale* v. *Williams* (8) ([1914] 3 K.B. 395) the court declined to apply the ejusdem generis principle to the words now under consideration, or that this decision was followed in *Edwards* v. *Wanstall* (9) ((1929), 142 L.T. 288), and in *Etherington* v. *Carter* (10) ([1937] 2 All E.R. 528). These decisions are not binding on this court, but they are naturally entitled to the weight and respect which all decisions of the Divisional Court receive; and this court would normally be extremely hesitant to overrule them. I am, however, impressed by four considerations which in their totality are sufficient, in my judgment, to remove this case from the principle stare decisis. (i) Rowlatt, J., in *Teale* v. *Williams* (8), and Swift, J., in *Edwards* v. *Wanstall* (9), expressed themselves in terms which, as it seems to me, show that those cases would have been decided differently had those two learned judges been left to arrive at their own unaided conclusions. (ii) Breaches of s. 21 are visited with penal consequences. In my judgment, it is not right that persons should suffer such consequences for failing to observe orders which a local authority has no power to make; and if this court is of opinion that the powers conferred by s. 21 of the Act of 1847 are, in fact, narrower than they have hitherto been held to be, it is its bounden duty to say so. (iii) The overruling of the previous decisions will in no way affect property rights or disturb titles. (iv) The powers of making orders such as that now in dispute have been for many years and still are exercisable by local authorities by virtue of s. 46 of the Road Traffic Act, 1930, subject only to ministerial approval*. These considerations, when taken together, fully justify this court, in my judgment, in substituting its own view of the meaning of s. 21 for that which commended itself to the majority, but not all, of the judges who decided the earlier cases. The stare decisis principle was much debated in the well-known case of *Bourne* v. *Keane* (14) ([1919] A.C. 815), but I can find nothing in the speeches of any of their Lordships in that case, or in any other decision bearing on this subject, which, in view of the considerations which I have mentioned, render it either undesirable or improper for this court to give effect to its own conclusions.

On the footing, then, that (contrary to his contention) the ejusdem generis principle should be applied, counsel for the corporation next submitted that the six months' holiday season at Poole can fairly be regarded as an " event " comparable to public processions, rejoicings and illuminations. He said, quite rightly, that an event need not be limited in duration to one day but may well extend over several days, and he suggested that the summer season at a popular seaside resort may properly be regarded as a special event or occasion equally with a prolonged public holiday or a visit by units of the Home Fleet. In my opinion it would not be right to accept this contention. There is nothing special about the summer season except that it is the time when most people take their holiday, and I cannot agree that that constitutes a special event for any relevant purpose. It is a question of degree whether an occasion is so much outside the general run of affairs in the life of a seaside resort as to be regarded as beyond the ordinary; and I cannot think that the summer holiday period, recurring year after year and lasting from April to October, can reasonably be so regarded.

On the views above expressed, the appeal fails, and it is unnecessary to consider whether it fails also on the ground that the order which Poole Corporation made was ultra vires as being of a merely experimental nature. I feel considerable sympathy with the learned judge's conclusions on this point, to which he

---

* Subsequently one-way traffic orders have become able to be made without confirmation by the Minister; see Road Traffic Act, 1956, s. 33 (3).

A was led by the comparative provisions of s. 21 of the Act of 1847 and s. 46 of the Road Traffic Act, 1930, respectively. However, it is the fact that whilst certain of the provisions of the earlier Act were repealed by the later one, s. 21 was left undisturbed; and it is, therefore, a little difficult, perhaps, to say that the corporation could be acting ultra vires if they exercised statutory powers which remained vested in them under and by virtue of s. 21. It is not necessary, B however, to express any concluded opinion on this matter because the appeal, in my judgment, fails for the other reasons which I have already indicated.

ORMEROD, L.J.: I agree that this appeal should be dismissed. I have had the opportunity of reading the judgments delivered by LORD EVERSHED, M.R., and ROMER, L.J., and I am in full agreement with the reasons given by C them for dismissing the plaintiffs' preliminary objection. Nor do I wish to add anything to what has been said on the question whether an order made in pursuance of s. 21 of the Town Police Clauses Act, 1847, prescribing the direction in which traffic shall move in certain streets, is within the power given to the authorities to make orders " for the route to be observed by all carts," etc. In my judgment, on the plain meaning of the words, the powers given by the D section are amply wide enough to include such an order.

The important question in this appeal, as I see it, is whether, on the proper construction of the section, the words " and in any case when the streets are thronged ", etc., should bear an unrestricted meaning, or whether by reason of the ejusdem generis rule their meaning should be restricted by the preceding words " in all times of public processions, rejoicings, or illuminations ". This E question was the subject of judicial consideration as long ago as 1914, when in *Teale* v. *Williams* (8) ([1914] 3 K.B. 395) it was decided by the Divisional Court that an order prohibiting hawkers from using certain streets during certain hours for the sale of certain specified goods from trucks or barrows was within the powers given by the section. The order made no reference to any special occasion, but merely recited that certain streets were thronged and liable to be F obstructed on weekdays. AVORY, J., expressed the view that on the plain meaning of the words of the section the authorities were enabled to make an order applicable to any street which was usually thronged or usually liable to be obstructed. ROWLATT, J., did not dissent from this view, although he expressed himself as feeling some difficulty in accepting it. SHEARMAN, J., on the other hand, went further than AVORY, J., and expressed the view that the G words were amply wide enough to authorise the making of a general order for the regulation of traffic in any street where the ordinary traffic of such street made such a regulation necessary in the opinion of the local authority. *Teale* v. *Williams* (8) was followed by other cases in the Divisional Court to which reference has been made in the judgments already delivered, and to which, therefore, I do not propose to refer, except to note that in *Edwards* v. *Wanstall* (9) ((1929), H 142 L.T. 288), which came before LORD HEWART, C.J., SWIFT and BRANSON, JJ. SWIFT, J., expressed the view (ibid., at p. 290) that, although he was bound by the decision in *Teale* v. *Williams* (8), he had " a good deal of sympathy with the doubts which were expressed by ROWLATT, J. . . . " It should also be noted that in *Etherington* v. *Carter* (10) ([1937] 2 All E.R. 528), LORD HEWART, C.J., not only expressed the view that he was bound by the decision of *Teale* v. *Williams* I (8), but also said that he was in entire agreement with the view expressed by SHEARMAN, J.

The question which now falls to be considered is whether these cases can be considered to be rightly decided, depending, as they do, on the view that the words " in any case ", etc., bear an unrestricted meaning. I have come to the conclusion that they cannot be so considered. In my view, in the context in which they appear in the section, the meaning of the words is limited by the preceding words " in all times of public processions, rejoicings, or illuminations ". It is a well established rule of construction that, if there are words in a section referring to particular instances from which a genus may properly be derived, then the generality of the words following will be restricted to that genus unless the context shows the contrary. Counsel for the corporation argued in this case that no genus could be derived from the particular instances given in this section. His contention is that the section deals with two classes of cases, the one being the class set out in the instances mentioned, the other the wider class implied in the words " in any case ", etc. I find it difficult to accept this view. " Public processions, rejoicings, or illuminations" may well be cases when the police require to have powers to regulate the traffic, for the very good reason that they are cases when the streets are liable to be thronged or obstructed. In my view, the type of case with which the section is intended to deal is something in the nature of an " occasion " when the streets, for reasons other than the normal day-to-day usage, are likely to contain more than the usual amount of traffic, whether on foot or otherwise. Such an occasion might well, of course, last more than a single day, but could not, in my view, be held to cover a substantial part of the year when the press of traffic, although heavy and liable from time to time to cause obstructions, is due to no more unusual a cause than the advent of summer.

In these circumstances, I agree that this appeal should be dismissed, even though it means overruling the decisions of the Divisional Court in *Teale* v. *Williams* (8) and the subsequent cases, always bearing in mind that this court will not lightly overrule decisions which have been standing for a number of years, and on which many local authorities may have acted. It does appear that prior to the Road Traffic Act, 1930, the powers of the police for regulating traffic were mainly, if not wholly, derived from the section under consideration, and that, in consequence, many orders were made under the section which were, no doubt, for the benefit and convenience of the public. The police now have ample powers under the Road Traffic Acts, and no inconvenience to the public is likely to be caused by the decision that the order in this case is ultra vires. For these reasons, I, too, would dismiss this appeal.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Treasury Solicitor* (for the defendants); *Cripps, Harries, Hall & Co.* (for the plaintiffs).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

CORKE *v.* CORKE AND COOKE.

[COURT OF APPEAL (Hodson, Morris and Sellers, L.JJ.), October 15, December 16, 1957.]

Divorce—Evidence—Statements made by alleged adulteress to third party tending to show innocence—Admissibility.

Evidence—Statements on other occasions—Subsequent statement by party to third party tending to show innocence—Admissibility.

Statements made by a wife on other occasions, subsequent to an alleged act of adultery by her, and in her husband's absence are not admissible in confirmation of her denial of the alleged adultery in a suit for divorce.

The husband and an inquiry agent kept watch one night at the house where the wife was living and heard the wife and the co-respondent talking together for about fifteen minutes about midnight in the co-respondent's bedroom and heard the sound of creaking of a bed. The wife, having heard a noise, came downstairs and confronted the husband and the inquiry agent, who accused her of adultery; she denied this and they left the premises. Shortly afterwards the wife and the co-respondent dressed and went to a telephone kiosk from which the wife spoke to her doctor and asked him to examine her and the co-respondent to prove that sexual intercourse had not taken place between her and the co-respondent. The doctor refused to come, saying that in any event any evidence which he could give would be valueless.

A In a defended suit for divorce the husband alleged that adultery had taken place in the co-respondent's bedroom at the time when he and the inquiry agent were keeping observation. On the question whether the wife was entitled to give evidence of the words spoken by her to the doctor,

Held (MORRIS, L.J., dissenting): the evidence was inadmissible since statements by a party to an alleged act of adultery, made afterwards to third B persons and tending to show that adultery had not been committed, were of no probative value.

Jones v. *South Eastern & Chatham Ry. Co.'s Managing Committee* ((1918), 87 L.J.K.B. 775) applied.

[As to inadmissibility of complaints of violence, see 15 HALSBURY'S LAWS (3rd Edn.) 287, para. 520, note (g); and for a case on the subject, see 22 DIGEST C (Repl.) 75, *506*.

As to confessions of adultery, see 12 HALSBURY'S LAWS (3rd Edn.) 239, para. 448, note (e); and for cases on the subject, see 27 DIGEST (Repl.) 325, *2699-2701*.]

Cases referred to:

(1) *Moriarty* v. *London, Chatham & Dover Ry. Co.*, (1870), L.R. 5 Q.B. 314; D 39 L.J.Q.B. 109; 22 L.T. 163; 34 J.P. 692; 22 Digest (Repl.) 75, *508*.

(2) *Jones* v. *South Eastern & Chatham Ry. Co.'s Managing Committee*, (1918), 87 L.J.K.B. 775; 118 L.T. 802; 11 B.W.C.C. 38; 22 Digest (Repl.) 75, *506*.

(3) *R.* v. *Lillyman*, [1896] 2 Q.B. 167; 65 L.J.M.C. 195; 74 L.T. 730; 60 J.P. 536; 14 Digest (Repl.) 453, *4390*.

E (4) *Gillie* v. *Posho, Ltd.*, [1939] 2 All E.R. 196; 22 Digest (Repl.) 72, *476*.

(5) *R.* v. *Hardy*, (1794), 24 State Tr. 199; 14 Digest (Repl.) 135, *987*.

(6) *Ross* v. *Ellison* (*or Ross*), [1930] A.C. 1; 96 L.J.P.C. 163; 141 L.T. 666; 27 Digest (Repl.) 316, *2643*.

(7) *Harris* v. *Public Prosecutions Director*, [1952] 1 All E.R. 1044; [1952] A.C. 694; 116 J.P. 248; 14 Digest (Repl.) 423, *4118*.

F (8) *Noor Mohamed* v. *R.*, [1949] 1 All E.R. 365; [1949] A.C. 182; 14 Digest (Repl.) 421, *4097*.

Appeal.

The husband appealed against an order of Mr. Commissioner BLANCO WHITE, Q.C., dated Feb. 18, 1957, whereby he dismissed the husband's petition for divorce on the ground of the wife's adultery with the co-respondent. On the same G date, the commissioner rejected the wife's cross-prayer in her answer for divorce on the ground of the husband's cruelty. The case is reported for the observations of the Court of Appeal concerning the admissibility of certain evidence adduced on behalf of the wife and admitted at the hearing of the petition.

H. B. Grant for the husband.

D. E. Peck for the wife.

H The co-respondent did not appear on the appeal.

Cur. adv. vult.

Dec. 16. The following judgments were read.

HODSON, L.J.: This is an appeal by the husband from an order of Mr. Commissioner BLANCO WHITE, Q.C., who on Feb. 18, 1957, dismissed a petition for I divorce based on adultery, finding that the husband had not sufficiently proved the contents of his petition. The suit was defended and both the wife and the co-respondent gave evidence denying the adultery alleged, but the commissioner found himself unable to regard either of them as a witness of truth. He carefully considered the evidence (which is summarised in his judgment) tending to show whether or not the case was proved against the wife and co-respondent and dismissed charges of cruelty made by the wife against the husband in her answer. No complete transcript of the evidence was lodged and the commissioner's summary has been accepted as accurate.

By his judgment, the learned commissioner made it clear that the balance was tilted in his mind in favour of the defence by one piece of evidence and said in terms that, if that evidence were excluded, further consideration would in his view be necessary before he could decide whether adultery had been proved or not. Having admitted the evidence, he found in favour of the defence and concluded by indicating that, in his view, if he were wrong, there should be a new trial. This position was accepted by counsel for the wife, who has resisted the appeal, the co-respondent not having been represented or taken any part in the appeal. If this concession were rightly made, and there was a case for the wife and the co-respondent to answer on the facts found, the court would have no alternative to ordering a new trial, if the court were of opinion that the scales were weighted in favour of the defence by an inadmissible piece of evidence.

It is necessary first to consider what the case for the husband was on the facts found by the commissioner. The wife had left the husband, driven, not by his cruelty, but by his conduct in showing her that he wanted to be rid of her. Her evidence as to this was accepted. She was thereafter living in the house at Eastbourne on an income of £3 10s. a week, out of which she had to pay £1 a week rent and to support herself and her children. The husband lived in another part of Eastbourne. No suggestion was made against her as a mother to the children or as to her moral character. She was almost inevitably forced to take in lodgers. The husband knew this and did not object to male lodgers, of which the co-respondent was not the first. At the time of her alleged adultery, Apr. 2/3, 1955, she had two lodgers, a Mrs. Pelling in a small bedroom over the kitchen and the co-respondent in a larger back room normally occupied by one or more of the children. No evidence was given to show that the wife and the co-respondent were on terms other than those of landlady and lodger, nor was there any concealment from the husband of the position.

The husband on Mar. 12 inquired by letter of the wife what her intentions were with regard to the co-respondent. On receipt of the letter by the wife, the co-respondent visited the husband and they both saw the wife, but nothing of significance occurred at this conversation and the husband expressed himself satisfied, although his was only a pretended satisfaction. The husband then engaged an inquiry agent to watch the house. The effect of his evidence was that the co-respondent came to the house at nine o'clock; there was conversation in the co-respondent's bedroom and creaking of the bed lasting about fifteen minutes somewhere about midnight. There was no dispute that the bed was creaking and that the wife was sitting on the co-respondent's bed. What she was doing in the co-respondent's room was explained by the wife and the co-respondent but their evidence was not accepted by the commissioner, who did not feel that their explanation was correct and expressly disbelieved the wife when she said that was the first time she had been in the co-respondent's bedroom. Even if this answer is disbelieved, the fact remains that there was no evidence that the wife had ever been in the co-respondent's bedroom when he was there on any other occasion and the rejection of her denial is no substitute for such evidence.

The wife heard a noise, as she said, as she left the co-respondent's bedroom, went downstairs and confronted the husband and the inquiry agent, who accused her of adultery, which she denied. The co-respondent came down also and, so far from making any admission of adultery, abused the husband roundly. The commissioner, in a careful judgment, recognised that the wife was of good reputation and that there was a considerable disparity of age between the parties, the co-respondent being fifty-six and the wife thirty-four years of age; and that there was nothing in the evidence to show that the relationship between the parties was other than an extremely friendly one between lodger and landlady. He also noticed that the husband and the inquiry agent spoke to conversation during the fifteen minutes on the night in question, which struck him as remarkable if they were purporting to prove that adultery was then taking place.

He also noticed that Mrs. Pelling, although handicapped as a witness by deafness, said that she never saw any improper conduct or familiarity between her landlady and the other lodger.

On these facts standing alone, unsupported by the further matter which influenced the commissioner's mind, it appears to me that the petition should fail and that this court is in a position to support the commissioner's judgment. Opportunity for adultery no doubt there was, but evidence of inclination to commit adultery there is none, unless it can be inferred from the circumstances that the landlady, the wife, was talking to the co-respondent who was in his bed in his own bedroom for fifteen minutes on the night in question. I cannot draw that inference from those circumstances, nor do I feel it possible to do so when the additional circumstance is added that the wife was disbelieved when she said this was the first time that she had been in the co-respondent's room and that the co-respondent was found to be a witness unworthy of credit, having given an answer which the commissioner found to be untrue with regard to his own marital situation. Since, however, the commissioner rested his final decision on a piece of evidence which in his view settled the question in favour of the defence, and this has been the only ground of appeal argued in this court, I ought to express my view on it, especially as, if he was right in the conclusion that the matter was otherwise so evenly balanced that this piece of evidence tilted the scale in favour of the defence, there would be the necessity for a new trial if the evidence were wrongly admitted.

The ground of appeal reads as follows:

> "That the learned judge misdirected himself in law in admitting evidence of the contents of a telephone conversation between the [wife] and one, Dr. Churcher, in the early morning of Apr. 3, 1955, as part of the examination-in-chief of Dr. Churcher and of the [wife] and co-respondent."

The evidence admitted was to the effect that, after the departure of the husband and the inquiry agent, the wife at the instigation of the co-respondent rang up her doctor, Dr. Churcher, and asked him to come down at once—this was about 12.30 in the morning of Apr. 3—and examine her and a gentleman to prove that they had not been guilty of adultery with one another. The doctor did not come, because he said that he could prove nothing of the kind, and when he gave evidence he confirmed that he had been asked to examine the wife and a person staying in the house but made it plain that any negative evidence he would have given would have been in his opinion valueless. What then was asked was as follows:

> "Counsel for the wife: Will you please answer this question 'yes' or 'no'. Did [the wife] make a request to you that was somewhat surprising? The commissioner: Wait a moment. That is not evidence. You can ask whether [the wife] spoke to him. Dr. Churcher: Oh, yes. Counsel: Did what she said to you surprise you in any way? The commissioner: That is not evidence, whether he was surprised. I take it it is relevant to cruelty? Counsel: Relevant to adultery. The commissioner: Then I do not know that you are entitled to get anything. When you are dealing with cruelty you are entitled to ask if there is a complaint. Counsel: Am I not entitled to ask whether what was said to him affected his mind in any way? The commissioner: No. Nobody is charging anyone with being cruel to the doctor. Counsel: What I am trying to get is the impression of what was said, not the words said. The commissioner: No."

In view of the basis advanced to justify the question, I think that the learned commissioner was clearly right in not allowing the matter to be pursued. Later, when the doctor was being cross-examined, the learned commissioner put this question:

> "Did she, when she rang you up on the telephone, by any chance ask you if

> she could be examined to see whether she had had recent sexual connexion? A.—She asked me to come to examine her and someone who was staying in the house."

Objection was taken and the learned commissioner ruled as follows:

> " I hold that it is admissible as conduct on her part, at any rate so far as it deals with recent matters, to show innocence of a matter of which she had been accused. What she says to the doctor is not evidence of anything that has happened but it is conduct on her part."

The commissioner relied on art. 7 of Stephen's Digest of the Law of Evidence (12th Edn.), p. 13, which reads as follows:

> " When there is a question whether any act was done by any person, the following facts are deemed to be relevant, that is to say—any fact which supplies a motive for such an act, or which constitutes preparation for it; any subsequent conduct of such person apparently influenced by the doing of the act, and any act done in consequence of it by or by the authority of that person."

He said the conduct of the wife in ringing up the doctor seemed to be clearly admissible on the general principle indicated in that article, and the words she spoke to the doctor also appeared to him to be admissible as explaining what she was doing in ringing up the doctor. He concluded by saying that this subsequent conduct threw great light on the fact whether or not she had committed adultery.

The question is really whether her words spoken to the doctor can be received because her conduct in thus ringing up the doctor is of no significance without the words spoken, either given in evidence or inferred from the fact that she spoke to him at all at that time. At first impression there is much to be said for the view formed by the learned commissioner; but on consideration I have come to the conclusion that this view is incorrect and not supported by authority, which, indeed, is all the other way. It is first to be noticed that the article in Stephen's Digest is dealing with matters which are evidence against any person not in their favour. This appears from the illustrations which follow the article itself, the last of which, taken from a civil case, I will read:

> " (e) The question is, whether A suffered damage in a railway accident. The fact that A conspired with B, C, and D to suborn false witnesses in support of his case is deemed to be relevant, as conduct subsequent to a fact in issue tending to show that it had not happened."

This illustration was taken from *Moriarty* v. *London, Chatham & Dover Ry. Co.* (1) ((1870), L.R. 5 Q.B. 314), where it was held that evidence was rightly received as amounting to evidence of an admission, by conduct, of the plaintiff that he had a bad case. The rule in this article deals with admissions and it does not follow that conduct of a party evidenced by statements in his or her own favour can be proved to support his or her case.

A good illustration of the rule as to the rejection of statements not amounting to admissions is contained in *Jones* v. *South Eastern & Chatham Ry. Co.'s Managing Committee* (2) ((1918), 87 L.J.K.B. 775). A woman's hand was injured by blood poisoning. She alleged that the injury was caused by pinching her thumb on a nail while working on her employers' premises. They alleged that the injury was received at her home. Evidence was heard of statements made by her to certain persons that she had done it at home and evidence to the contrary effect of statements made by her, inter alia, to a doctor was rejected as inadmissible. It was argued on her behalf that such evidence should be received to substantiate the consistency of her story as to the accident and to show that it was not subsequently fabricated, especially as evidence of statements adverse to her interest had been admitted. This argument was not accepted. It was held by the Court of Appeal that the statements in the appellant's favour were rightly rejected as inadmissible. Swinfen Eady, L.J., said (ibid., at p. 777):

A "Then it was argued that there is in certain cases a rule under which a witness may be asked to give particulars of what a person has said shortly after an occurrence . . . not as being evidence of the facts complained of but as being evidence of the consistency of the story of the complainant from beginning to end, and it is said that such a question ought to have been admitted in the present case on that principle. The answer is twofold;
B first, that the principle has no application to a case of this kind. No doubt in cases especially of violence upon women and girls the rule is established under which a question of that kind is allowed to be put, and a recent statement is allowed to be given in evidence—see *R.* v. *Lillyman* (3) ([1896] 2 Q.B. 167)—that is to say, that, upon the trial of an indictment for offences against women and girls involving violence, the fact that complaint is made
C by the prosecutrix shortly after the occurrence, with the particulars of the complaint made, so far as they relate to the charge against the prisoner, are allowed to be given in evidence on the part of the prosecution, not as being evidence of the facts complained of, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the box, and as tending to negative any consent of hers. That is a special class of case in
D which such evidence has for a very long time been allowed to be admitted, but it has nothing to do with such a case as the present."

BANKES, L.J., was of the same opinion and NEVILLE, J., gave judgment as follows (87 L.J.K.B. at p. 778):

"I have come to the same conclusion. The short point is whether the learned county court judge rejected the evidence improperly under these
E circumstances. The applicant, who had injured her thumb, alleged that the injury was occasioned upon her employers' premises, and gave evidence to that effect. She was cross-examined to show that she had made statements after the happening of the accident inconsistent with her story there, and the point made, as I understand it, is, that that being so, it is permissible to call evidence to show that she had made statements to persons consistent
F with the story which she told in the box so as to negative an idea suggested by the cross-examination of her story being a made-up affair. I think that the cases which have been cited are in no sense in pari materia, and I think that we have simply to apply here the general rule of evidence that statements may be used against a witness as admissions, but that you are not entitled to give evidence of statements on other occasions by the witness
G in confirmation of her testimony. I think, therefore, that no question of any difficulty arose before the county court judge, and that he was perfectly right in ruling as he did."

In the opinion of the Privy Council these observations of NEVILLE, J., correctly set out the rule (see *Gillie* v. *Posho, Ltd.* (4), [1939] 2 All E.R. 196 at p. 201). The rule is of long standing and is always strictly applied in criminal cases: see the
H language of EYRE, C.J., in *R.* v. *Hardy* (5) ((1794), 24 State Tr. 199 at p. 1093)—

"Nothing is so clear as that all declarations which apply to facts, and even apply to the particular case that is charged, though the intent should make a part of that charge, are evidence against a prisoner and are not evidence for him, because the presumption upon which declarations are
I evidence is, that no man would declare anything against himself, unless it were true; but that every man, if he was in a difficulty, or in the view to any difficulty, would make declarations for himself."

Different considerations may well apply where the state of a person's mind is in issue (for example, domicil cases) but those considerations do not in my judgment apply to this case which involves the straight issue of adultery. This offence could be proved by admissions tending to show that it had been committed but cannot be disproved by statements of the person charged afterwards made to third persons tending to show that it had not been committed.

It appears from the authorities that the rule is justified by the risk of fabrication by a person who in the words of EYRE, C.J., might be in a difficulty. Take this case; the wife seeks to support her defence by showing that she was ready to submit to a scientific investigation to show that the charge made against her must be untrue. If she had submitted to an examination evidence as to her condition would, of course, be relevant and admissible but the statement that she made to the doctor that she was willing to be examined to this end is of no value. Persons who are unjustly charged will often react in different ways. Some may protest their innocence to all and sundry, others may be so stunned by the allegation that they refrain from so doing or taking any prompt steps to assert their freedom from guilt. There is no reason, in my opinion, why justice requires the admissibility of such evidence in favour of an accused person for it seems that the fundamental basis of the rule is that such evidence has no probative value.

Since on the view which I have formed on the facts found by the learned commissioner who heard and carefully considered the evidence the conclusion ought to be that adultery is not proved quite apart from the admissibility of the evidence which I have just discussed, the result would therefore be not that there should be a new trial but that the judgment of the learned commissioner should be affirmed and the appeal dismissed. I should add that, although counsel for the husband confined his argument to the point whether or not the commissioner had rightly admitted the questioned evidence, he was offered but did not avail himself of the opportunity of arguing the case on the basis that in any event on the facts as found (apart from this evidence) the appeal should be allowed.

MORRIS, L.J.: The learned commissioner had before him a husband's petition for dissolution based on the allegation of adultery between the wife and the co-respondent. The wife and the co-respondent denied adultery and the wife alleged that her husband had treated her with cruelty and she cross-prayed for dissolution. The learned commissioner in his judgment said that having had an opportunity of watching the demeanour of the husband and wife in the witness-box he did not regard either of them as being particularly reliable as witnesses. He formed a similar opinion in regard to the co-respondent. Having considered the evidence the learned commissioner rejected the charges of cruelty made by the wife and not being satisfied that the wife and the co-respondent had at any time committed adultery he rejected the husband's petition. There was a specific charge that adultery had been committed on the night of Apr. 2/3, 1955. In rejecting it the learned commissioner was considerably influenced by certain evidence which he accepted in regard to the conduct of the wife and the co-respondent on the night in question.

The husband alleged and sought to prove that on the night of Apr. 2/3, 1955, the wife had intercourse with the co-respondent in a bedroom in a house in Eastbourne. The wife and the co-respondent were admittedly in the house. The husband and an inquiry agent kept observation at the back of the house. The co-respondent had a bedroom at the back. The husband and the inquiry agent heard a man and a woman conversing in that room; they also heard the noise of the creaking of a bed in that room; they heard that noise during a period of about a quarter of an hour at about midnight. The court was invited to say that adultery was being committed by the wife with the co-respondent. The wife and the co-respondent said that the conversation was in fact theirs and that it did take place in the co-respondent's bedroom at a time when the co-respondent was in his bed alone. They gave a full explanation as to why it was and as to how it came about that the wife went into the room. They denied that there was any intercourse. The task of the court was to decide whether or not there had been intercourse. In discharging that task the court would have to consider and weigh up all the relevant evidence and decide what inferences could fairly be drawn. As LORD BUCKMASTER said in his speech in *Ross* v. *Ellison* (*or Ross*) (6) ([1930] A.C. 1 at p. 7):

> "Adultery is essentially an act which can rarely be proved by direct evidence. It is a matter of inference and circumstance. It is easy to suggest conditions which can leave no doubt that adultery has been committed, but the mere fact that people are thrown together in an environment which lends itself to the commission of the offence is not enough unless it can be shown by documents, e.g., letters and diaries, or antecedent conduct that the association of the parties was so intimate and their mutual passion so clear that adultery might reasonably be assumed as the result of an opportunity for its occurrence."

In the same case LORD ATKIN in his speech (ibid., at p. 21) said:

> "But from opportunities alone no inference of misconduct can fairly be drawn unless the conduct of the parties prior, contemporaneous, or subsequent justifies the inference that such feelings existed between the parties that opportunities if given would be used for misconduct."

After the husband and the inquiry agent had observed and listened they made their presence known and in circumstances which need not be detailed they orally charged the wife and then the co-respondent with having had intercourse. The charge was denied. The husband and the inquiry agent then left. After an interval of a few minutes the wife and the co-respondent went to a nearby telephone call box and the wife telephoned her doctor. The wife gave evidence that she asked her doctor if he would then come to her house in order to examine her and to examine the co-respondent and give his opinion whether or not there had been intercourse. The co-respondent gave evidence to the same effect. The doctor was also a witness and said that he was asked to go and prove that sexual intercourse had not occurred. The doctor formed the view that an examination of the wife was not worth undertaking for the purpose of substantiating that intercourse had not taken place. He accordingly declined to go to the house. In his evidence in court he said that if an examination revealed fresh semen in the vagina there would then be evidence that intercourse had occurred but that if examination revealed no traces of semen in the vagina or elsewhere this would not amount to positive proof that intercourse had not occurred.

The notice of appeal against the dismissal of the husband's petition raises only one point. It is said that the learned commissioner

> "misdirected himself in law in admitting evidence of the contents of a telephone conversation between the [wife] and one Dr. Churcher in the early morning of Apr. 3, 1955, as part of the examination-in-chief of Dr. Churcher and of the [wife] and co-respondent."

In the notice of appeal the order which was sought was that the judgment dismissing the petition should be set aside and a decree pronounced; alternatively, a new trial was sought. On the hearing before us it was argued on behalf of the husband that there should be a new trial. Though counsel for the wife did not take the point (and counsel for the husband, being given the opportunity, did not wish to deal with the point) it would not seem, on the findings as recorded in the judgment, that the evidence against the wife and the co-respondent was sufficient to warrant a finding of adultery. The learned commissioner's view was that if the evidence to which objection was taken had been excluded further consideration would have been necessary whether adultery was or was not sufficiently proved.

At the hearing it in fact happened that the doctor gave evidence before the wife and co-respondent. That came about merely as the result of assisting the convenience of a medical man. Actually the evidence objected to was given in response to a question put by the learned commissioner. The doctor had earlier said that he had been telephoned by the wife. What then was asked was as follows: [His Lordship then read the extracts from the evidence-in-chief set out at p. 227, letters G and H, ante, and continued:] In view of the basis advanced to justify the questions I think that the learned commissioner was clearly right in not allowing the matter to be pursued. Later when the doctor was being cross-examined the learned commissioner put this question: [His Lordship then read the extracts from the cross-examination and the commissioner's ruling set out at p. 227, letter I, to p. 228, letter B, ante, and continued:] When later the wife gave evidence and said that she went to the telephone box and telephoned Dr. Churcher the question was put to her: " For what purpose did you telephone Dr. Churcher? " The substantial question raised in the appeal is whether she was entitled to answer the question.

One of the issues at the hearing was whether she had sexual intercourse at a particular time. The question now raised is whether she could prove that immediately after the time of the alleged intercourse she was willing to be examined and took steps to have herself examined by a medical man. It is said, in a case in which all surrounding circumstances may be examined to see whether any inferences of guilt may be drawn, that the wife and the co-respondent in defending themselves are precluded from informing the court as to the abovementioned feature of their conduct and attitude when accused. The case is not one in which attempt is merely being made to give evidence of some statement made by a party by way of an affirmation of innocence or in support of the party's case. If the wife had telephoned to a friend and had said that she had been accused of committing adultery and had said that the accusation was false it would clearly not be possible to allow her or the friend to give evidence of the conversation. The value of any such proffered evidence would be negligible even if some tenuous reason for its admissibility could be formulated. A court could not be assisted by being told that the wife, who at a hearing could give evidence on oath which would be subject to cross-examination, had in a conversation with a friend or even in dozens of conversations with dozens of friends made unsworn protestations of innocence. The accumulated experience of the past coupled with knowledge of the obvious possibilities of fabrication of any such evidence would direct the rejection of the evidence as lacking in the qualities which assist proof and so as being valueless and irrelevant (compare *Jones* v. *South Eastern & Chatham Ry. Co.'s Managing Committee* (2) (1918), 87 L.J.K.B. 775).

In my judgment the essential test as to the admissibility of evidence is the test of relevance. In dealing with a criminal case Viscount Simon in his speech in *Harris* v. *Public Prosecutions Director* (7) ([1952] 1 All E.R. 1044 at p. 1047) said:

> " The substance of the matter appears to me to be that the prosecution may adduce all proper evidence which tends to prove the charge."

To that Lord Simon added that regard must be had to a rule of judicial practice which is followed by judges when trying a charge of crime. The rule was expressed by Lord du Parcq in *Noor Mohamed* v. *R.* (8) ([1949] 1 All E.R. 365 at p. 370):

> ". . . the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically

> admissible. The decision must then be left to the discretion and the sense of fairness of the judge."

So later in his speech in *Harris* v. *Public Prosecutions Director* (7) LORD SIMON said ([1952] 1 All E.R. at p. 1050):

> " A criminal trial in this country is conducted for the purpose of deciding whether the prosecution has proved that the accused is guilty of the particular crime charged, and evidence of 'similar facts' should be excluded unless such evidence has a really material bearing on the issues to be decided."

The principle is therefore that all proper evidence may be given which tends to prove a charge; but when trying a charge of crime the essentials of justice are to be set above technical rule if a strict operation of the latter would operate unfairly against an accused.

In the present case the issue before the court was whether two people had had sexual intercourse at a particular time. Those who asserted that they had were entitled to put before the court all relevant evidence from which an inference of misconduct could fairly be drawn. Evidence could be given of the conduct of the parties " prior, contemporaneous or subsequent " if it justified an inference of strong mutual attachment. If the test of admissibility is the test of relevance to an issue to be tried, then in my judgment relevance is to be judged by applying a fair-minded common-sense approach. In the present case, just as all relevant evidence may be given to prove the charges asserted, so in my judgment all relevant evidence may be given to disprove them. If conduct which suggests guilt may be proved, so may conduct which suggests innocence. There are innumerable circumstances in which evidence is given which seem to prove a consciousness of guilt and which fair-minded persons deem relevant when considering whether guilt is proved. Thus it may be that in certain circumstances evidence would be admissible that an accused person had taken flight or concealed himself or assumed a false name or indulged in falsehood as by giving a false name or address or explanation or had fabricated evidence or suppressed it or had sought to suborn witnesses by bribery. Questions as to the admissibility of evidence have to be decided on a consideration of the facts of the situation in a particular case. In so many cases evidence of a person's conduct may be very relevant in regard to the issue to be tried.

In the present case, if the wife and the co-respondent genuinely believed that an immediate examination by a doctor could or might establish whether they had recently had intercourse, then in my judgment their willingness to submit to the independent examination of a professional man ought not to be regarded as irrelevant. The co-respondent in his evidence said:

> " I had the impression—I had the thought that if the doctor could examine both [the wife] and myself he would be able to decide whether any sexual intercourse had taken place or not. I did not know. It was in desperation. I wanted someone to come along and say that it did not happen. We have said it and everyone else says ' Oh, but it did ', but it did not and I knew if I could get a doctor with the medical evidence to say so that his word would be accepted. That is why I had the doctor phoned."

In my judgment evidence as to the conduct of the wife and co-respondent on being accused of adultery cannot be ruled out as irrelevant. The weight of it was for the trial judge. I cannot but think that, if a jury had been trying the case, the members of the jury would have regarded the evidence of the conduct of the wife and co-respondent as being evidence fit to be considered as being relevant to their inquiry. They would judge whether much or little weight should be given to it. The learned commissioner with his experience certainly found it helpful. In his judgment he said:

> " I regard the action of the wife at the co-respondent's instance in ringing

> up the doctor and endeavouring to get the doctor to come down and examine both her and the co-respondent, as a very strong point in her favour and his favour, which makes it quite impossible for me to say that I am satisfied beyond reasonable doubt that sexual intercourse took place that night."

The wife and the co-respondent were open to cross-examination as to their conduct. If it had been shown that they had no belief that an examination of them by a doctor would be of any value or no expectation that the doctor would come then their attempt to get the doctor might have been exposed as insincere humbug and might have recoiled against them as conduct tending to suggest or to confirm a guilty intrigue. Any such possibilities were for consideration by and for the assessment of the trial judge. If the doctor had in fact gone to the house and examined the two people he could have given evidence as to what was the result of his examination. I consider that the wife could have given evidence as to how it came about that the doctor had visited. I see no reason why in that situation the court should be uninformed and merely left to guess why the visit was made. It may be said that the wife would not have requested a visit unless she had thought that her innocence might as a result be proved and that in giving evidence that she asked for a visit she was inferentially protesting her innocence. But there is much more than an implied protestation. There is the willingness to submit to the examination of an independent professional man. If such willingness may fairly be regarded as an indication of innocence then the best of reasons exists for bringing it to the consideration of a court whose solemn duties include both clearing the innocent and convicting the guilty.

Professor WIGMORE in his TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (Vol. 1), p. 384, points out that a tendency to reject evidence of a consciousness of innocence is due to a distrust of the inference from conduct since conduct is often feigned and artificial. While referring to the circumstance that a majority of the courts have refused to allow conduct to be considered for the purpose of drawing an inference of consciousness of innocence he reasoned:

> "It is judicially conceded . . . that the inference of consciousness of guilt is a highly dubious one and that the evidence is never to be emphasised or treated as of much value. If this be so, why should we strain a doubt to admit a dubious inference against the accused, and yet refuse to admit in his favour a scarcely more dubious one? Such an attitude is wholly inconsistent with itself and is out of harmony with the spirit of our law. Let the accused's whole conduct come in: and whether it tells for consciousness of guilt or for consciousness of innocence, let us take it for what it is worth, remembering that in either case it is open to varying explanations and is not to be emphasised. Let us not deprive an innocent person, falsely accused, of the inference which common sense draws from a consciousness of innocence and its natural manifestations."

In my judgment, the test to be applied in deciding whether or not evidence was receivable of the telephone conversation was simply the test of relevancy. The substance of the matter was that the wife was asking the doctor to come to examine her and the co-respondent. It was not as though the wife was merely making some statement to someone else which she could equally well make at a later time in the witness-box. It was for the learned commissioner to consider whether the wife was indulging in some cunning play acting. If he thought that she was not and if he thought that she genuinely believed that she could establish her innocence, then the learned commissioner would give such weight to the question of her conduct and behaviour as seemed fitting. In my judgment, the learned commissioner was justified in admitting the evidence which he received because he was entitled to consider the conduct of the parties as being within the range of all the many facts and circumstances which he could review and have in mind when deciding the issue which was before him. I would dismiss the appeal.

SELLERS, L.J.: I agree with both of my Lords, and for the reasons they give, that the evidence adduced on behalf of the husband was insufficient to justify a finding of adultery by the wife and that the appeal must be dismissed on that ground. In those circumstances it will not avail the husband to establish that evidence which the learned commissioner thought told in favour of the wife was wrongly admitted. I do not therefore examine in detail the authorities which might throw light on the question of the admissibility of the wife's request over the telephone to the doctor to come and examine both her and the co-respondent and of the doctor's evidence of what the wife said on the telephone. The doctor did not go out and examine the wife or the co-respondent and one cannot assume or conjecture what he would have found if he had. Dr. Churcher's view at the time of the request and in his evidence was that an examination for the purpose of " substantiating that sexual intercourse had not taken place was not worth doing ". He added later:

> " If fresh semen is found in the vagina that is evidence that the act has occurred but to adduce evidence and say that it has not occurred is not evidence at all. The only evidence that is of value is positive evidence. Negative evidence has no value whatever."

If therefore he had conducted an examination of the wife in the early hours of the morning after the husband's unexpected call at the wife's house about midnight, the doctor would either have found some evidence of intercourse (in which case the wife would not have called him, one imagines, as a witness) or else would have found negative conditions of no value whatever. The wife had had three children and it is difficult to follow the learned commissioner's comparison with medical evidence in the criminal courts, which generally refers to positive findings indicating intercourse of male or female or negative findings in relation to very young girls or virgins. The commissioner found that the wife could not have known that an examination would not have been of assistance to the court. This seems to me to be unsustainable. It might have served to deceive the court. Intercourse might well have taken place in a manner which would leave no trace of spermatozoa. In 1952 the wife had been very worried about her third pregnancy which she had been most anxious to avoid. It was unlikely that she would willingly risk another in the circumstances in which she found herself. How bold a suspected wife could be to ring up her doctor—or indeed to go to her doctor—when she would know either that no trace of intercourse would be there or any that had occurred had been removed or even know, as she might, that the doctor would not undertake an examination when she was not ill or to seek to establish a negative condition of no value.

In my view not only is the evidence of what the wife did and said valueless and indeed possibly misleading to the court but it is not admissible. To what issue, it should be asked, does it go? It does nothing to prove the condition of either the female or male organ respectively of the parties alleged to be involved. It does nothing to disprove the intercourse the husband had alleged. The most that could be said is that the wife was showing a belief in her own story and adding some reason why the court should believe her. In the present case I do not think that the conduct and statement of the wife have that effect but it is clear that a skilful witness might well embark on circumstantial matters to bolster up his or her story. NEVILLE, J.'s statement in *Jones* v. *South Eastern & Chatham Ry. Co.'s Managing Committee* (2) ((1918), 87 L.J.K.B. 775 at p. 779), cited by HODSON, L.J.,

> " that you are not entitled to give evidence of statements on other occasions by the witness in confirmation of her testimony "

neatly and accurately, in my opinion, states the law which is applicable to the question raised by the husband. Whether or not this rule is strictly logical, it is one which keeps the evidence to the main issues in dispute and tends to avoid deception of the court by a resourceful witness. Evidence is not a matter of mere logic. Evidence which is hearsay might well be relevant to the issues and of probative value but is excluded and made inadmissible for practical considerations.

I agree entirely with the opinion of HODSON, L.J., that the evidence was inadmissible and with his citation of authorities in support thereof. The wife's conduct and statement cannot, in my view, be regarded as revealing consciousness of innocence. They reveal at the most a consciousness that the doctor would not find any physical proof of guilt. I apprehend that the dishonest may be resourceful in giving an air of innocence to their transactions. To say " You can take my fingerprints " would establish nothing unless fingerprints for comparison were available. If the wife's statement in question was not admissible in her favour, the doctor's evidence of what the wife said was even more clearly inadmissible. Were it to be held otherwise one wonders where ingenuity in bolstering up a witness's evidence would stop. The idea of telephoning the doctor originated in this case not from the wife but from the lodger, the co-respondent, and after some discussion the parties got dressed and went out to a telephone kiosk. There was abundant time to weigh up the advantages of such a course and to prepare, if necessary, for the requested examination.

I would hold that the husband should succeed on the legal point of the inadmissibility of evidence which was his sole ground of appeal and that the learned commissioner's first view that the evidence was inadmissible was correct. Nevertheless, the appeal as a whole should be dismissed.

Appeal dismissed.

Solicitors: *Haslewood, Hare, Shirley Woolmer & Co.*, agents for *Mayo & Perkins*, Eastbourne (for the husband); *Hart, Reade, Rippon, Dodd & Chatfield*, Eastbourne (for the wife).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

ISLAND TUG & BARGE, LTD. *v.* OWNERS OF THE S.S. MAKEDONIA.

[QUEEN'S BENCH DIVISION (Pilcher, J.), December 10, 19, 1957.]

Shipping—Salvage—Award—Amount—Tax liability—Award liable to taxation in hands of salvors—Whether taxation to be taken into account in assessing amount of award.

The claimants, a Canadian limited company, were the owners of a salvage vessel, which was maintained wholly at their own expense on salvage station, and which had rendered salvage services to the respondents' vessel. The claimants were professional salvors rendering salvage services for profit and were taxed under the law of Canada on their profits. On an appeal from an arbitrator's award they were awarded a sum of £60,000 for salvage services, together with a further sum of £15,000 by way of contribution towards the tax that would be payable on the profit to the claimants on the award of £60,000. The appeal arbitrator held himself bound by *The Telemachus* ([1957] 1 All E.R. 72) to make the additional award towards tax. On appeal by Special Case,

Held: the claimants were not entitled to be indemnified in respect of tax on the award of £60,000 for their salvage services, because (a) in *British Transport Commission* v. *Gourley* ([1955] 3 All E.R. 796) the award (in that case an award of damages) was not subject to income tax and in the present case the profit from the award for salvage services was liable to tax, and (b) although the decision in *The Telemachus* ([1957] 1 All E.R. 72) could not be distinguished, it was not binding on the court.

British Transport Commission v. *Gourley* ([1955] 3 All E.R. 796) distinguished.

The Telemachus ([1957] 1 All E.R. 72) not followed.

Dictum of LORD GODDARD, C.J., in *Huddersfield Police Authority* v. *Watson* ([1947] 2 All E.R. at p. 196), on the principle of stare decisis, applied.

[**Editorial Note.** The present case illustrates how the decision in *British Transport Commission* v. *Gourley* ([1955] 3 All E.R. 796) may be inapplicable, with the consequence that tax liability is not taken into account, in assessing awards where the amounts awarded will themselves be taxable. In this connexion it should be borne in mind that in certain circumstances awards of damages may themselves be taxable, although the particular award in *British Transport Commission* v. *Gourley* was not (compare [1955] 3 All E.R. 797, letter H).

As to the general principle for assessing salvage awards, see 30 HALSBURY'S LAWS (2nd Edn.) 900, para. 1209; and for cases on the subject, see 41 DIGEST 878, 879, *7571-7583*.]

Cases referred to:

(1) *The Telemachus. Tantalus (Owners, Master and Crew)* v. *Telemachus (Owners)*, [1957] 1 All E.R. 72; [1957] P. 47.

(2) *British Transport Commission* v. *Gourley*, [1955] 3 All E.R. 796; [1956] A.C. 185; 3rd Digest Supp.

(3) *Metropolitan Police District Receiver* v. *Croydon Corpn.*, [1956] 2 All E.R. 785; 120 J.P. 399; 3rd Digest Supp.

(4) *Huddersfield Police Authority* v. *Watson*, [1947] 2 All E.R. 193; [1947] K.B. 842; [1948] L.J.R. 182; 177 L.T. 114; 111 J.P. 463; 2nd Digest Supp.

(5) *Casson* v. *Churchley*, (1884), 53 L.J.Q.B. 335; 50 L.T. 568; 30 Digest (Repl.) 232, *789*.

(6) *The Vine*, (1825), 2 Hag. Adm. 1; 166 E.R. 145; 41 Digest 841, *7035*.

(7) *The Glengyle*, [1898] P. 97; 67 L.J.P. 48; 78 L.T. 139; *affd.* H.L., sub nom. *Glengyle (Owners), Cargo & Freight* v. *Neptune Salvage Co., The Glengyle*, [1898] A.C. 519; 41 Digest 866, *7375*.

Special Case.

This was an award in the form of a Special Case stated by an appeal arbitrator, Sir Alfred Bucknill, on July 19, 1957, under the Arbitration Act, 1950. The claimants, Island Tug & Barge, Ltd., of Vancouver, the owners of the vessel, the Sudbury, had appealed to the appeal arbitrator in accordance with Lloyd's Form of Salvage Agreement, against an award of £45,000 for salvage services rendered by them to the Makedonia, a vessel owned by the respondents. The agreed salved value of the Makedonia was £345,144.

On Oct. 31, 1955, the Makedonia, while bound in ballast from Japan to Vancouver, suffered trouble with her propeller which became loose on its shaft; the master, as a result of this, wirelessed to the respondents that he was unable to proceed and thereafter the Makedonia drifted about three hundred miles eastwards until, on Nov. 13, 1955, she was reached by the Sudbury. The Sudbury rendered salvage service to the Makedonia, by towing her to Vancouver, under a Lloyd's Standard Form of Salvage Agreement (No Cure—No Pay), dated Dec. 12, 1955, which was signed on behalf of the claimants and the respondents. The Sudbury was maintained on salvage station by the claimants, without a government subsidy, at an annual cost of about 131,000 dollars.

The appeal arbitrator was of opinion that in all the circumstances the original award was too small, and he awarded the claimants £60,000. Before the appeal arbitrator the claimants raised the further point (not raised before the original arbitrator) that an additional sum should be awarded to them in respect of the amount of tax they would have to pay on the award. The appeal arbitrator was of opinion that liability to pay tax on an award was not an expense properly A incurred in the performance of the salvage service, and assuming that it was an incident to be taken into account in fixing an award, it did not stand in a better position than such an expense. Further, he assumed that under Canadian law any tax payable by the claimants would be based on the profit made by them out of the award which he assessed at £39,000; on the evidence before him, the tax payable on £39,000 would be approximately £18,000. The appeal B arbitrator, considering himself bound by the decision of WILLMER, J., in *The Telemachus* (1) ([1957] 1 All E.R. 72), therefore awarded the claimants a sum of £15,000, in addition to the sum of £60,000, by way of contribution towards the tax payable by them on the award, and he ordered that, if the court decided that tax should be taken into account in making the award, the appeal would be allowed and an award made of £75,000, but that if the court decided that tax C should not be taken into account, the appeal would be allowed and an award made of £60,000.

The questions of law stated for the decision of the court were whether (a) in assessing the award for salvage services rendered by the owners of a salvage vessel under Lloyd's Form of Salvage Agreement (No Cure—No Pay) the arbitrator should take into account the fact (if it be a fact) that the owners will have to D pay tax on the award, and (b) if it was proper to take into account that fact, it was relevant to consider the amount of tax payable by the company in the year in which the salvage service was completed. Question (b) was not raised before the court.

Sir David Cairns, Q.C., *S. Knox Cunningham* and *B. C. Sheen* for the claimants. E
Kenneth Carpmael, Q.C., and *M. R. E. Kerr* for the respondents.

Cur. adv. vult.

Dec. 19. **PILCHER, J.**, having referred to the awards made by the original arbitrator and the appeal arbitrator, and having stated the questions raised for the decision of the court, continued: It seems reasonably clear that the appeal arbitrator dealt with the case in this way. He first considered F whether, apart from the incidence of tax, the original arbitrator's award was sufficient, taking into account all the circumstances of the case and all the special considerations which apply when the service is rendered by a salvage vessel maintained on station for the express purpose of rendering salvage services to vessels in distress. Taking these matters into consideration, he determined that the award was, as he states, " much too little ". He accordingly increased G it by 33⅓ per cent. to £60,000. It is not now disputed that if questions of tax are to be disregarded, £60,000 is a proper award. It is also common ground that if the argument put forward by the claimants in regard to the tax position is sound, the appeal arbitrator's award of £75,000 is a proper one.

The point which is submitted for the opinion of the court is simply this. Is it proper in law for the court or an arbitrator, when assessing the amount of H salvage to be awarded to the owners of a salvage vessel, having taken into account all the elements which have been laid down in countless cases as being matters for consideration, and arrived on this basis at an appropriate sum, to add to such sum a further sum representing or " on account of " the tax which the salvors, in this case the owners of the salvage vessel, will have to pay under the fiscal laws to which their company is subject, on the profit shown on the I particular service? Put in another way, is there any principle peculiar to the law of salvage which requires or enables the court, on grounds of public policy, after assessing the award due to a salvor on generous and well-established principles, to break new ground and further increase his award in such a fashion as to relieve him wholly or substantially from the tax burden on the profits which he derives from a salvage service?

It will be observed that the question propounded by the appeal arbitrator is confined to the case where the salvors are " the owners of a salvage vessel ".

A I draw attention to this fact because, on Dec. 7, 1956, WILLMER, J., gave judgment in *The Telemachus. Tantalus* (*Owners, Master and Crew*) v. *Telemachus* (*Owners*) (1) ([1957] 1 All E.R. 72). The original arbitrator had, as I understand it, on Dec. 7, 1956, heard the arbitration in the present case, but had not yet published his award. In *The Telemachus* (1) salvage services were rendered to the Telemachus by a sister ship, the Tantalus. There was, of course, no claim for B salvage by the owners of the Tantalus, who were also the owners of the Telemachus; but the master and crew of the Tantalus put forward a salvage claim. During the course of the argument WILLMER, J., himself raised the question of tax, asking whether any members of the crew of the Tantalus would have to pay tax on any award made. It was not in dispute before him that mariners were liable under the fiscal laws of this country to include in their income for tax C purposes any sums received by them in the form of salvage awards. In so far as the matter was material for my purposes, counsel before me were agreed that this was so, apparently on the ground that salvage is a payment for services rendered, and must under the law of this country be regarded as subject to tax if it derives, as it does when the services are rendered by seamen, from the seamen's service or employment.

D To return to *The Telemachus* (1), during the course of the argument WILLMER, J., suggested that the principle applied in *British Transport Commission* v. *Gourley* (2) ([1955] 3 All E.R. 796), might properly be applied in a case involving personal services for salvage; it is apparent ([1957] 1 All E.R. at p. 73) that the learned judge took the point himself, feeling that there was some principle in the decision in *British Transport Commission* v. *Gourley* (2) which might make it E proper for him to take tax into account in arriving at his award in the case before him. In the course of his judgment, having stated the facts, WILLMER, J., said this (ibid., at p. 73):

> " There is, however, I think, one other matter to be taken into consideration. Certainly the master of the Tantalus, and in all probability, all the F officers of the Tantalus and all the European members of her crew, will become liable to taxation as part of their earnings on such share of my award as they receive. I raised the question in argument whether that is an element which ought to be taken into consideration, and I raised that point more particularly having regard to the recent decision of the House of Lords in *British Transport Commission* v. *Gourley* (2). It appears to me G that in principle the same considerations as apply to an award of damages in favour of an injured plaintiff should properly also apply to an award of salvage in the case of a plaintiff who has performed personal services. More particularly is that so when one pays regard to the principles of public policy underlying the law relating to salvage awards. In modern conditions it seems to me that it would be quite unreal, when one is dealing with H personal services, to ignore the possible effect of taxation on the amount of the salvage award. If one were to ignore it, it seems to me that one would be cutting at one of the root principles on which salvage is awarded, namely, that of encouragement to mariners to perform services of a salvage nature. If allowance is not made for the fact of taxation, it simply means that the reality of the award made in cases of this sort is so much the less. In those circumstances I have thought it right to take that matter into consideration. I I have not sought to do so by way of any exact calculation. I think it must necessarily be dealt with in a rough and ready way, simply as an element to be considered. It appears to me that one is in very much the same position with regard to that as one is in relation to expenses necessarily incurred in the performance of a salvage service. For many years that has been regarded as an element which the court should take into consideration in awarding salvage, and for this reason, that if one ignores the expense which has to be incurred in rendering the service one may be left in the position

> that the salvage award is no reward at all and no encouragement to mariners A to perform salvage services. It appears to me that in the case of personal services one ought to pay just the same regard to the incidence of taxation as in the case of other services one pays to the incidence of expenses necessarily incurred. In the award which I propose to make, therefore, it is right to say that in the case of the master and in the case of such proportion of the crew as are of European extraction, I have thought the liability to B taxation is an element to be taken into consideration. Moreover, I will go further and say that the awards which I am about to pronounce are larger than they would have been if I had come to the conclusion that the tax element was to be wholly disregarded."

I have thought it right to read virtually the whole of the judgment of WILLMER, J., on this point because counsel for the respondents, in opening the case, made C two submissions to me. He submitted, in the first place, that the decision of WILLMER, J., in *The Telemachus* (1) was wrong; and, secondly, that, in any event, the principle of that decision should be confined to claims for personal services by members of the crew of a salving ship, and should not extend to the case where the services were rendered by professional salvors.

Counsel for the respondents submitted, rightly, in my view, that if I took the D view that the decision of WILLMER, J., was wrong, and was not distinguishable from the present case, I was not bound to follow it. The cases on this point are conveniently collected and reviewed by SLADE, J., in *Metropolitan Police District Receiver* v. *Croydon Corpn.* (3) ([1956] 2 All E.R. 785 at pp. 787, 788). SLADE, J. (ibid., at p. 788), refers to the following passage from the judgment of LORD GODDARD, C.J., in *Huddersfield Police Authority* v. *Watson* (4) ([1947] 2 All E.R. E 193 at p. 196):

> " 'We are considering a decision of this court. So far as the dictum of GROVE, J., [in *Casson* v. *Churchley* (5) ((1884), 53 L.J.Q.B. 335 at p. 336)] is concerned, I can only say for myself that I think the modern practice is that a judge of first instance, although, as a matter of judicial comity, he would usually follow the decision of another judge of first instance unless F he was convinced that that judgment was wrong, certainly is not bound to follow the decision of a judge of equal jurisdiction. A judge of first instance is only bound to follow the decisions of the Court of Appeal and the House of Lords and, it may be also, of the Divisional Court.' "

I accordingly approach the matter on the basis that, if in my view the case G before me cannot be distinguished on the facts or in principle from *The Telemachus* (1), I am nevertheless not bound to follow the principle applied by WILLMER, J., in that case in answering the question of law propounded to me by the appeal arbitrator.

In *The Telemachus* (1), WILLMER, J., decided that he ought to take questions of tax into consideration, but was careful to confine his observation to the case H before him, where the claims were, as he expressed it, for "personal services" by the master and crew of the Tantalus. The first matter, therefore, which I have to consider is whether the fact that the services in this case before me, which were rendered by a salvage vessel maintained on station for the express purposes of rendering salvage services and owned by a company whose principal business was that of professional salvors, suffices factually or in principle to distinguish I *The Telemachus* (1) from the case before me.

In the days of sail, salvage services were generally of a personal character, and only those who actually rendered the services were entitled to claim. I may perhaps refer to a well-known passage in the judgment of LORD STOWELL in *The Vine* (6) ((1825), 2 Hag. Adm. 1 at p. 2), which reads:

> "It is, I apprehend, a general rule that a party, not actually occupied in effecting a salvage service, is not entitled to share in a salvage remuneration. The exception to this rule that not infrequently occurs is in favour of

> owners of vessels, which, in rendering assistance, have either been diverted from their proper employment, or have experienced a special mischief, occasioning to the owners some inconvenience and loss, for which an equitable compensation may reasonably be claimed."

Now that passage is set out in the late LORD JUSTICE KENNEDY'S book on THE LAW OF CIVIL SALVAGE (2nd Edn.), p. 74, and the quotation is followed by these words, which I read from the book:

> " The right of the owner of the salving vessel to be rewarded as a salvor has received, especially in recent times, liberal recognition from the Court of Admiralty. Where the salving vessel is a steamship and is herself the chief instrument in the service, as now is commonly the case, it is the owner who gets the principal share in the reward. Even where the salvage has been performed entirely by the personal exertions of the crew of his vessel, he is usually held to be entitled to some, but, of course, to a smaller share."

With the advent of steam, when the steam vessel was herself the chief instrument in the service, it became recognised that the owner of the salving vessel, although not present at the time, was entitled to the principal share in the reward—as appears from the passage which I have read—inasmuch as his property had been put at risk, and had moreover been primarily instrumental in effecting the service.

It is, I think, common knowledge that for some sixty years or more companies incorporated in various countries, and whose names are household words in the shipping community, have carried on the business of professional salvors, maintaining salvage vessels and salvage equipment at strategic points. Such companies employ highly skilled personnel, and it has been recognised by the courts of this country, at least since 1898, when *The Glengyle* (7) ([1898] P. 97) was decided, that services rendered by salvage vessels of this character are deserving of and should receive a particularly generous award. Great stress was laid on this point by counsel for the claimants, and accordingly I propose to read two or three short passages from the judgments in *The Glengyle* (7). First, I want to read from the judgment of GORELL BARNES, J., in the Admiralty Court ([1898] P. at p. 102).

> " LORD STOWELL said, in the *William Beckford**: ' The principles upon which the Court of Admiralty proceeds, lead to a liberal remuneration in salvage cases; for they look not merely to the exact quantum of service performed in the case itself, but to the general interests of the navigation and commerce of the country, which are greatly protected by exertions of this nature '. These principles have been emphasised in many cases by different judges of the Admiralty Court. The remarks of SIR CHARLES BUTT in *The Envoy*†, in a case of salvage services rendered by steam tugs, are very appropriate to the present case. He said: ' To my mind, one of the most important functions of this court is to encourage the maintenance of powerful and efficient steam tugs around our coasts, to be in constant readiness to assist vessels in distress. Not only in the course of the year is a large amount of property saved by these means, but a considerable sacrifice of life is prevented. Therefore, the principle we go upon is not that of a quantum meruit, but of giving such an award as will encourage people to keep vessels of adequate size and dimensions ready to go out.' "

Then he turns to the facts of *The Glengyle* (7) and says (ibid., at p. 102):

> " The maintenance and establishment of salvage steamers such as the Hermes and the Newa are for the general benefit of owners and underwriters

---

* (1801), 3 C. Rob. 355.

† Not reported, but referred to in KENNEDY ON THE LAW OF CIVIL SALVAGE (2nd Edn.), p. 131.

> and others interested in seagoing vessels and their cargoes, and the crews and passengers of such vessels, and, guided by the principles above stated, the Admiralty Court will be liberal in its awards in respect of services rendered by salvage steamers, even though the awards may fall somewhat heavily on individual owners. The owners of salvage steamers invest a large amount of capital in them, and maintain them and their crews, divers, and appliances at great expense, and have no remuneration to look forward to except that which may be earned by occasional salvage services." A B

Then the case is reported in the Court of Appeal, where A. L. SMITH, L.J. ([1898] P. at p. 110), says:

> "What is the amount the plaintiffs are entitled to recover? If this had been an ordinary salvage case, either by tugs or by a passing ship, for myself I think that the run of the authorities show that this sum of £19,000 would be excessive. Counsel for the appellants have referred to a large body of cases, in only one of which—*The Thetis**—so large an amount has been given. But there is this material difference in this case, namely, that these two large salving vessels are kept at a very high expense for the purpose of salving ships; and one cannot shut one's eyes to this fact, that unless those ships had been kept where they were ready to proceed at once to sea, the owners of the Glengyle and of her cargo would have lost £76,596. Taking that into consideration as one factor in the case, as also the risks which the salving vessels and their crews ran, I cannot say that the sum of £19,000 which has been awarded by my brother GORELL BARNES is so excessive that this court ought to set it aside." C D E

I have only read those passages from the judgments in *The Glengyle* (7) because they were stressed, and properly stressed, by counsel on behalf of the claimants. They state a principle which is well-known in the Admiralty Court, and well-known to arbitrators who have to deal with salvage by arbitration, and it is always applied.

F Proceeding, therefore, on the basis, and recognising, that the claimants in the present case, who were professional salvors, had to have a particularly generous award, I bear in mind that they employ experienced service personnel, and it is well-known, although it is not stated by the learned appeal arbitrator in this case, that professional salvors who keep salvage tugs on station have special arrangements which they make for the remuneration of the master and crew of those salvage vessels. G But it is unusual, where a professional salvor is a plaintiff in an action or a claimant in an arbitration, for the master and crew of the salvage vessel involved to figure personally as plaintiffs or claimants. The award made, however, in every salvage case is in a sense a reward for personal services. The element of risk to the salving crew is the same whether they are on board a merchant ship or a salvage vessel. The responsibility undertaken by the master of the salving craft is the same whatever its nature. H The danger to the salved vessel does not differ whether the salvor is a merchant ship or a salvage vessel. All these are matters which are crucial when the amount of the salvage award has to be considered.

Having given the matter the most careful consideration, I find it quite impossible to distinguish *The Telemachus* (1) ([1957] 1 All E.R. 72) from the case now before me, either on its facts or in principle; I but for the fact that, in *The Telemachus* (1), the salving and the salved vessels were in the same ownership, the owners of the Tantalus would have figured with her master and crew as plaintiffs. If the incidence of personal taxation is to be taken into account when the claimants are individuals who have actually taken part in this service, it is difficult to see why the same concession should not be made to the owner of a ship, where he is an individual, whose property has been put at risk if his ship has been instrumental in performing the service. If the principle applies to a ship owned by an individual, then why should the same concession be refused to a ship owned by a corporation? If it applies to a merchant ship owned by a corporation, then why should it not apply to a salvage ship similarly owned?

---

* (1834), 2 Knapp 390.

Finding it impossible to distinguish between *The Telemachus* (1) and the case before me, either on the facts or in principle, I have to consider the submission made to me on behalf of the respondents that WILLMER, J., was wrong in law in taking into account, when he arrived at his award, the fact that the master and certain members of the crew of the Tantalus would have to pay tax on the sums awarded to them. It is quite clear that WILLMER, J., decided that, when personal salvage services are in question, the incidence of taxation should be taken into account because of the recent decision of the House of Lords in *British Transport Commission* v. *Gourley* (2) ([1955] 3 All E.R. 796). The appeal arbitrator, who clearly took the same view as I do myself, namely, that it was impossible to distinguish *The Telemachus* (1) from the present case, held himself bound by the decision of WILLMER, J., in *The Telemachus* (1). It is probably safe to say that, in spite of the very high rate at which individuals and companies have now been taxed for many years, it would never have occurred to anyone that salvors, personal, mercantile or professional, should, under any principle attaching to the law of salvage, be entitled to off-load all or some of their liability to tax on to the shoulders of the owners of the salved property. Does any principle laid down in *British Transport Commission* v. *Gourley* (2) require that this should be so? I recognise to the full that one of the reasons for awarding salvage services on a liberal scale is to encourage mariners to assist vessels in distress, and that this principle applies with particular force when professional salvors are concerned. It is moreover inevitable that the salvor may feel correspondingly discouraged when he finds that he has to pay tax at the appropriate rate on the profit element in the sum awarded to him. This, however, so far as I am aware, has always been the position.

Does any principle laid down in *British Transport Commission* v. *Gourley* (2) support the view expressed by WILLMER, J., in *The Telemachus* (1)? If I may express my own humble opinion, *British Transport Commission* v. *Gourley* (2) decides no more than this, namely, that in awarding damages for incapacity due to injury caused by the tortious act of another, such damages not being subject to tax, the court should have regard not to the gross sum which the injured person has been prevented from earning during the period of his incapacity, but to the net amount which would have remained in his hands after he had paid tax at the appropriate rate during such period. The same principle has been applied since *British Transport Commission* v. *Gourley* (2) in a case of wrongful dismissal*, when the plaintiff's case was founded on breach of contract. So far as I am aware, all cases, whether founded on tort or in contract, in which the incidence of taxation has been taken into account, have been cases in which the sum awarded by the court would not have been subject to tax. In all such cases consideration of the tax aspect has led the court to reduce the sum payable by way of damages or compensation by the amount which the plaintiff would have had to pay away in tax if he had not been the victim of the tort or breach of contract in respect of which his action is brought. *British Transport Commission* v. *Gourley* (2) was founded on tort. LORD REID says ([1955] 3 All E.R. at p. 808):

> " The general principle on which damages are assessed is not in doubt. A successful plaintiff is entitled to have awarded to him such a sum as will, so far as possible, make good to him the financial loss which he has suffered, and will probably suffer, as a result of the wrong done to him for which the defendant is responsible. It is sometimes said that he is entitled to restitutio in integrum, but I do not think that that is a very accurate or helpful

---

* See *Beach* v. *Reed Corrugated Cases, Ltd.* ([1956] 2 All E.R. 652), and compare *Re Houghton Main Colliery Co., Ltd.* ([1956] 3 All E.R. 300).

> A way of stating his right. He cannot in any real sense be restored, even financially, to his position before the accident. If he had not been injured he would have had the prospect of earning a continuing income, it may be for many years, but there can be no certainty as to what would have happened."

Then he concludes at the end of the paragraph (ibid., at p. 808), as follows: B

> " Yet damages must be assessed as a lump sum once and for all, not only in respect of loss accrued before the trial but also in respect of prospective loss. Such damages can only be an estimate, often a very rough estimate, of the present value of his prospective loss."

LORD REID is there stating the well-known principle on which damages in tort are assessed in cases of personal injury. The respondent in *British Transport* C *Commission* v. *Gourley* (2) was awarded an approximation of the net sum which he would have retained, after paying tax at a high rate, had he not been incapacitated.

The following distinctions between *British Transport Commission* v. *Gourley* (2) and the case with which I am concerned spring at once to the eye. Damages in tort and for breach of contract are in many cases not subject to tax, whereas D salvage awards, or at least such profit element as they may contain, attract tax. In *British Transport Commission* v. *Gourley* (2) the sum awarded was reduced by the introduction of tax considerations. In the present case it is sought to increase the award by bringing tax into consideration.

The claimants in the case before me are a company incorporated under the law of Canada. Their main revenue, as I understand it, is derived from salvage E awards earned by the skilful use of the salvage vessels and gear which they own. They are a business concern like any other business concern, whose object is to make profits. Whilst the work they perform is no doubt admirable and to be encouraged, they are not a charity. The company is subject to the fiscal laws of its country of incorporation or its residence, and for my part I can see no principle laid down in the speeches of the majority of the noble Lords in F *British Transport Commission* v. *Gourley* (2) which justifies the introduction into the ancient law of salvage of so startling and important an element as is contended for by the claimants in this case, and was held by WILLMER, J., to be present in *The Telemachus* (1).

It is not, I gather, in dispute that in increasing the award of the original arbitrator from £45,000 to £60,000, the appeal arbitrator took into account all G the elements which it was proper to consider on the decided cases, including the fact that the claimants, as professional salvors, were entitled to particularly generous treatment. Having done this, and feeling himself bound by the decision of WILLMER, J., in *The Telemachus* (1) the appeal arbitrator added £15,000 to his award to recompense the claimants for the £18,000 which they would have to pay away in tax. He thus " took the tax aspect into account " H in much the same way as the court and arbitrator " take into account " in arriving at salvage awards the proved expenses of salvors incurred in rendering the salvage services. This is what WILLMER, J., said he was doing in *The Telemachus* (1), although he did not indicate to what extent the awards he made had been increased by consideration of the tax position of the salvors. I need not say that it is only after the most anxious thought and careful consideration I that I have felt compelled to disagree with the views on this topic expressed by WILLMER, J., in *The Telemachus* (1). I do not feel, as he did, that any principle laid down in *British Transport Commission* v. *Gourley* (2) ([1955] 3 All E.R. 796) compels, or even inclines, me to take the view that a salvor who is already generously rewarded on well-known principles should have his award further increased so as to indemnify him wholly or in part for the fact that the fiscal law to which he is subject requires him to pay tax on the profit element in his salvage award. If it is right that awards made to salvors, which are already assessed on generous lines, should be exempted in whole or in part from liability to tax, this seems to me to be a matter for consideration by the legislature. In my humble opinion, it is not the business of the court to defeat or mitigate the effect of the fiscal laws of this or any other country, more especially where this can only be done at the expense of the owners of the salved property.

For these reasons, I regretfully find myself unable to agree with the judgment of WILLMER, J., in *The Telemachus* (1). Unlike the appeal arbitrator, I am not bound by his judgment. I accordingly direct that the order made by the appeal arbitrator in para. 14 (2)* of his award shall take effect, and that the claimants will pay to the respondents the costs of the argument of the Special Case before me.

Award of £60,000 in favour of claimants upheld; additional £15,000 disallowed.

Solicitors: *Constant & Constant* (for the claimants); *Ince & Co.* (for the respondents).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

NOTE.

Re SHAW (*deceased*).
PUBLIC TRUSTEE *v.* DAY AND OTHERS.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Ormerod, L.JJ.), December 19, 1957.]

Appeals by the Attorney-General and the plaintiff, the Public Trustee (the executor and trustee of the testator's will), from an order of HARMAN, J., dated Feb. 20, 1957, and reported [1957] 1 All E.R. 745, were dismissed by consent on terms agreed by the parties, other than the Attorney-General, but with the concurrence of the Attorney-General.

By his order HARMAN, J., had declared that the trusts contained in the testator's will in connexion with a proposed new alphabet were void because (i) the trusts were for purposes which in law were not charitable, and (ii) being impersonal trusts for a non-charitable purpose, and not trusts in favour of an ascertainable beneficiary, the court was not at liberty to give validity to the trusts by treating them as conferring on the trustee a power to carry out the testator's directions regarding a new alphabet. Under the agreed terms of compromise, a sum of money was to be devoted to the purposes which the testator had expressed in his will in regard to a new alphabet; there was an undertaking to carry out the trusts within twenty-one years from the date of the testator's death; and any sum left over would go to the residuary legatees (the British Museum, the Royal Academy of Dramatic Art and the National Gallery of Ireland). Counsel for the Public Trustee told the court that the Public Trustee, having taken advice, was satisfied, so far as it was possible, that the sum which he would receive under the terms of compromise would be adequate to carry out the main purposes expressed in the will, and that a practicable scheme had already been formulated.

---

* The order made in para. 14 (2) of the award was that the appeal be allowed, an award made of £60,000 and that the respondents pay to the claimants the said sum with interest thereon at five per cent. per annum from the expiration of fourteen days (exclusive of Sundays or other days observed as general holidays at Lloyds) after publication of the original award, viz., Jan. 8, 1957.

Robert S. Lazarus for the Public Trustee, the plaintiff.

P. W. E. Taylor for the British Museum and the Royal Academy of Dramatic Art, the third and fifth defendants, residuary legatees.

K. J. T. Elphinstone for the National Gallery of Ireland, the fourth defendant, a residuary legatee.

Denys B. Buckley for the Attorney-General.

Solicitors: *J. N. Mason & Co.* (for the Public Trustee); *Charles Russell & Co.* (for the British Museum and the Royal Academy of Dramatic Art); *Bentleys, Stokes & Lowless* (for the National Gallery of Ireland); *Treasury Solicitor.*

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

GREY AND ANOTHER *v.* INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Upjohn, J.), November 27, 28, December 3, 1957.]

Stamp Duty—Voluntary disposition—Inter vivos—Transfer of shares—Transfer by settlor to trustees of settlement—Subsequent oral direction to trustees on what trusts shares to be held—Deed of declaration by trustees executed subsequently confirming trusts—Whether direction a transfer by way of trust or assignment—Whether deeds of declaration liable to ad valorem duty—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *Sch.* 1—*Finance* (1909-10) *Act,* 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5 *c.* 8), *s.* 74 (1)—*Law of Property Act,* 1925 (15 *&* 16 *Geo.* 5 *c.* 20), *s.* 53 (1) (*c*).

Trust and Trustees—Declaration of trust—Transfer by way of declaration of trust—Personalty—Whether need for writing—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 20), *s.* 53 (1) (*c*).

On Feb. 1, 1955, a settlor transferred to trustees eighteen thousand shares belonging to him. On Feb. 18, 1955, he orally directed the trustees to hold six groups of three thousand of the shares each on the trusts of one of six several settlements in favour of his grandchildren, which he had executed in 1949 and 1950. On Mar. 25, 1955, the trustees executed six deeds of declaration of trust in which the settlor's direction was recited and the trustees declared, as regards each group of three thousand shares, that they were holding it on the trusts of the relevant settlement in addition to the trust fund subject to the settlement. Each deed of declaration was executed by the settlor to testify that he had given the direction, but he was not expressed to be a party to the deed. On the question whether the deeds of declaration attracted ad valorem stamp duty as voluntary dispositions inter vivos within s. 74 of the Finance (1909-10) Act, 1910,

Held: the deeds of declaration of trust did not attract ad valorem stamp duty for the following reasons—

(i) the direction of Feb. 18, 1955, was a parol disposition of an equitable interest in pure personalty operating by way of declaration of trust and, as such, was valid; it was not such a grant or assignment as would, before 1926, have been invalid under s. 9 of the Statute of Frauds if not in writing, and was not, therefore, a disposition that was invalidated for want of writing by s. 53 (1) (c) of the Law of Property Act, 1925.

(ii) the inference should not be drawn at this stage in this case that the oral direction and subsequent declarations of trust were one transaction of which the latter were the final operative acts.

Cohen and Moore v. *Inland Revenue Comrs.* ([1933] 2 K.B. 126) distinguished.

(iii) the settlor's equitable interest in the shares having passed from him on Feb. 18, 1955, the deeds of declaration of trust transferred no interest in the shares.

A Per Curiam: section 53 (1) (c) of the Law of Property Act, 1925, was directed at precisely the type of disposition which fell within s. 9 of the Statute of Frauds, viz., assignments in contradistinction to the transfer of equitable interests by way of declaration of trust. Dispositions by way of trust are not within the intendment of the section (see p. 251, letter G, post).

B Appeal allowed.

[**Editorial Note.** The decision in the present case should be compared with that in *Oughtred* v. *Inland Revenue Comrs.*, p. 252, post, where similar reasoning led to a like conclusion.

As to the stamp duty on voluntary dispositions inter vivos, see 28 Halsbury's Laws (2nd Edn.) 475-477, paras. 1004-1006, and for cases on the subject, see
C Digest Supp.

As to the need for writing on a transfer of an equitable interest, see 11 Halsbury's Laws (3rd Edn.) 336, 337, para. 542.

As to a trust being able to be constituted by parol, see 33 Halsbury's Laws (2nd Edn.) 93, para. 151.

For the Stamp Act, 1891, Sch. 1, and the Finance (1909-10) Act, 1910, s.
D 74 (1), see 21 Halsbury's Statutes (2nd Edn.) 652 and 770.

For the Law of Property Act, 1925, s. 53 (1), see 20 Halsbury's Statutes (2nd Edn.) 551.]

Cases referred to:

(1) *Cohen and Moore* v. *Inland Revenue Comrs.*, [1933] 2 K.B. 126; 102
E L.J.K.B. 696; 149 L.T. 252; Digest Supp.

(2) *Timpson's Executors* v. *Yerbury*, [1936] 1 All E.R. 186; [1936] 1 K.B. 645; 105 L.J.K.B. 749; 154 L.T. 283; 20 Tax Cas. 155; Digest Supp.

(3) *Milroy* v. *Lord*, (1862), 4 De G.F. & J. 264; 31 L.J.Ch. 798; 7 L.T. 178; 45 E.R. 1185; 40 Digest 533, *770*.

(4) *Re Chrimes, Locovich* v. *Chrimes*, [1917] 1 Ch. 30; 27 Digest (Repl.) 113,
F *840*.

(5) *Re Wale, Wale* v. *Harris*, [1956] 3 All E.R. 280; 3rd Digest Supp.

(6) *Tierney* v. *Wood*, (1854), 19 Beav. 330; 23 L.J.Ch. 895; 23 L.T.O.S. 266; 52 E.R. 377; 43 Digest 557, *79*.

(7) *M'Fadden* v. *Jenkyns*, (1842), 1 Ph. 153; 12 L.J.Ch. 146; 41 E.R. 589; 43 Digest 555, *54*.

G (8) *Bentley* v. *Mackay*, (1851), 15 Beav. 12; 51 E.R. 440; 40 Digest 533, *769*.

Case Stated.

The appellants sought the determination of the court of the amount of stamp duty chargeable on six instruments presented on their behalf to the Inland Revenue Commissioners under s. 12 of the Stamp Act, 1891, for the opinion of the commissioners as to the stamp duty chargeable thereon. The instruments
H were six deeds, each called a declaration of trust, dated Mar. 25, 1955, and executed by the appellants and by a Mr. E. W. Hunter. Mr. Hunter had made six settlements of which the appellants were the trustees, five being made in 1949 and one in 1950, directing the appellants to stand possessed of property comprised in the settlements for the benefit of Mr. Hunter's grandchildren and (any) possible future grandchildren. On Feb. 1, 1955, he transferred eighteen
I thousand ordinary shares of £1 each in Sun Engraving Co., Ltd. to the appellants as nominees for and to his order by an instrument of transfer which was stamped with 10s. duty following a certificate by the parties that no beneficial interest passed thereunder. On Feb. 18, 1955, he orally and irrevocably directed the appellants to hold three thousand of the shares and the income thereof on the trusts and with and subject to the powers and provisions declared by each of the six settlements to the intent that such direction should result in the entire exclusion of Mr. Hunter from all future right, title and benefit to or in the shares and income. On Mar. 25, 1955, Mr. Hunter and the appellants executed the

six deeds called declarations of trust. Each deed recited that the appellants were the holders of three thousand ordinary shares in Sun Engraving Co., Ltd., that on Feb. 18, 1955, Mr. Hunter gave the oral direction as to the holding of the shares on the trusts in the settlements, that the trustees accepted the trusts, and that the giving of such direction was testified by Mr. Hunter's execution of the deed. Each deed witnessed and the appellants acknowledged that they held the three thousand shares on the trusts and with and subject to the powers and the provisions declared in the relevant settlement concerning the trust fund, to the intent that the shares should since Feb. 18, 1955, form an addition to and be one fund with the trust fund for all purposes. The value of each ordinary share in the company was agreed to be £3 10s. on Mar. 25, 1955.

The commissioners were of opinion that each of the instruments was a conveyance or transfer by Mr. Hunter of his equitable interest in the shares, which operated as a voluntary disposition inter vivos within the meaning of s. 74 of the Finance (1909-10) Act, 1910, and was liable to ad valorem duty accordingly; and also that each instrument was a settlement of a definite and certain amount of stock within the meaning of the head of charge "settlement" in Sch. 1 to the Stamp Act, 1891, but in view of the provisions of s. 74 (4) of the Finance (1909-10) Act, 1910, the duty assessed was ad valorem "voluntary disposition" and not ad valorem "settlement" duty. They accordingly assessed the duty at the sum of £210 at the rate of £1 per £50 on the sum of £10,500 being the agreed value of the relevant shares. The appellants contended that each of the instruments was no more than a record under seal of what had already taken place, that it was not a conveyance or transfer operating as a voluntary disposition inter vivos and was chargeable with a fixed duty of 10s. only under the head of charge "declaration of any use or trust" in Sch. 1 to the Act of 1891.

Neville Gray, Q.C., and *W. T. Elverston* for the appellants.
R. O. Wilberforce, Q.C., and *E. Blanshard Stamp* for the Crown.

Cur. adv. vult.

Dec. 3. **UPJOHN, J.**, read the following judgment: This is an appeal by way of Case Stated under s. 13 of the Stamp Act, 1891, from an assessment of the Commissioners of Inland Revenue, who have assessed six declarations of trust all dated Mar. 25, 1955, by the appellants to ad valorem duty as voluntary dispositions within the meaning of s. 74 of the Finance (1909-10) Act, 1910. As the facts are fully set out in the Case Stated, I propose to recite them only briefly.

At all material times, a Mr. Hunter had five young grandchildren and during the year 1949 he made five settlements, one for each of his five grandchildren whereby he settled certain property on that particular grandchild if he should attain thirty-five years and with trusts over on failure to attain that age. In 1950 he made a sixth settlement on his then existing and certain possible after-born grandchildren. The appellants were and are the trustees of each of these settlements.

On Feb. 1, 1955, Mr. Hunter transferred to the appellants as his nominees eighteen thousand ordinary shares of £1 each in the Sun Engraving Co., Ltd. On Feb. 18, 1955, at the offices of the company (and not as stated in the Case in the offices of his solicitors) Mr. Hunter orally and irrevocably directed the appellants thenceforth to hold the shares transferred to them on Feb. 1 (putting it shortly) as to five blocks of three thousand shares each on the trusts respectively of the five settlements executed in 1949 in favour of his respective grandchildren and as to three thousand shares on the trusts of the 1950 settlement, to the intent that such direction should result in the entire exclusion of Mr. Hunter from all future right title and benefit to or in the said shares or any of them and the income thereof.

On Mar. 25, 1955, the appellants executed the six declarations of trust, the subject-matter of this appeal. Mr. Hunter, though not expressed to be a party, executed each of them. They were all in similar form, and each deed recited the transfer to the trustees and Mr. Hunter's oral declaration of trust on Feb. 18 (defining that as the date of inception). The deed then recited the acceptance by the trustees of the trust reposed in them by Mr. Hunter's direction and that the giving of the direction and the nature thereof were testified by the execution by Mr. Hunter of the deed. The operative part of each deed was in this form:

> "Now this deed witnesseth and the trustees hereby acknowledge and declare that they have been since the date of inception and are now holding the said shares specified in the said schedule hereto and the income thereof upon such trusts and with and subject to such powers and provisions as are by and in the said settlement declared and contained concerning the trust fund as therein defined or such of the same trusts powers and provisions as are now or may hereafter be subsisting or capable of taking effect to the intent that the said shares should since the date of inception form an addition to and be one fund with the said trust fund for all purposes."

The real point at issue between the parties may be very shortly stated. The appellants concede, of course, that the equitable interest in the eighteen thousand shares in the company remained in Mr. Hunter until Feb. 18, for the appellants were mere nominees for him, but they claim that, on the giving of the directions on that day, the equitable interest passed from Mr. Hunter and vested as to each block of three thousand shares on the trusts declared respectively by the six settlements executed in 1949 and 1950. The trusts, it was argued, were then completely declared and nothing remained to be done. Therefore, no property passed in and by the declarations of trust when they were executed on Mar. 25, 1955, and there was nothing to be stamped ad valorem.

The commissioners' reply to that argument is that nothing passed by virtue of the oral directions for the reason that, if an equitable owner gives directions to trustees in whom the legal estate is outstanding as to trusts concerning the equitable interest, that in terms is an equitable assignment and as such must be in writing having regard to s. 53 (1) (c) of the Law of Property Act, 1925. If that be right, then counsel for the appellants concedes that the subsequent declarations of trust did operate to pass the equitable interest and that he is liable to the full ad valorem duty under s. 74 of the Finance (1909-10) Act, 1910, and I have not been troubled with any arguments based on an alternative claim to settlement duty. The esssential question is whether the commissioners' view that the oral directions given by Mr. Hunter were ineffectual to transfer any equitable estate from him is correct.

If their primary argument is wrong, the commissioners have submitted an alternative argument to the effect that the oral directions on Feb. 18 and the subsequent declarations on Mar. 25 must be taken and read together. Thus it was said it was in effect all one transaction and the declarations must be stamped as the final operative documents as was done in *Cohen and Moore* v. *Inland Revenue Comrs.* (1) ([1933] 2 K.B. 126). This is primarily a question of fact. Whether without further evidence the commissioners could properly have drawn the inference that the oral directions and subsequent written declarations were all part of one transaction I do not decide, but apparently they did not do so, for there is no finding of fact to that effect in the Case Stated. I doubt whether in the absence of such a finding of fact it is open to me to draw any such inference, but even if it is I do not think that I ought to do so as the commissioners did not think fit to do so. Unlike *Cohen and Moore*'s case (1), there is no evidence that the six declarations were in draft at the time of the oral directions. It is at least possible that they were brought into existence as the result of second thoughts after Feb. 18 when it was realised that these trusts were for very young grandchildren and would last a long time and that some written record was desirable. At all events I do not think that I can draw the required inference.

I return to the main point. I propose to deal with the matter in the first place as though the relevant law concerning assignments was contained in s. 9 of the Statute of Frauds. The section is in these terms:

> " And be it further enacted, that all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be utterly void and of none effect."

I am dealing in this case with the voluntary transfer of an equitable interest in pure personalty where the legal estate is already outstanding in nominees, and my observations are confined to that type of transaction. In such a case the donor may effect a transfer of the equitable interest to the donee in one of three ways (see, if authority be wanted for that proposition, per ROMER, L.J., in *Timpson's Executors* v. *Yerbury* (2), [1936] 1 All E.R. 186 at p. 193):—(1) The donor may assign his equitable interest to the donee directly. However informal the language used, it must on its true interpretation amount to a transaction in essence of direct transfer of the equitable interest from donor to donee in contrast to a declaration of trust; that is something which in the ultimate analysis is of the nature " I hereby assign or give to you ". Having regard to the Statute of Frauds such an assignment to be effectual must be in writing. (2) The donor may declare himself a trustee of the equitable interest vested in him for the benefit of the donee. That operates to transfer the equitable interest from donor to donee but it is clear that it is not an assignment for the purposes of the Statute of Frauds and may be by parol or in writing. There are many authorities to that effect. Perhaps the best known is the classic judgment of TURNER, L.J., in *Milroy* v. *Lord* (3) ((1862), 4 De G.F. & J. 264). (3) The donor may direct the trustees to hold the whole or part of his equitable interest on trust for a third person. That, said SARGANT, J., in *Re Chrimes, Locovich* v. *Chrimes* (4) ([1917] 1 Ch. 30 at p. 36) " . . . operates as a complete and effectual transfer of the interest to which the direction extends ". Whichever of these methods of transfer is employed, the result is the same; the equitable interest is effectually transferred from donor to donee. If done by way of assignment, however, it must be in writing. If done by declaration of trust it may be by parol; and it is very familiar law that a purported assignment will not be construed as a declaration of trust to avoid the want of writing (*Milroy* v. *Lord* (3)).

On which side of the line does a direction to the trustees lie ? May it effectually be given by parol or not ? It has been strenuously urged on me that the words of SARGANT, J., in *Re Chrimes* (4), the classification of ROMER, L.J., in *Timpson's Executors* v. *Yerbury* (2), and some words of my own in *Re Wale, Wale* v. *Harris* (5) ([1956] 3 All E.R. 280 at p. 283), showed that a direction to trustees to hold on new trusts operated, not by way of trust, but by way of assignment; that such a direction was in fact an assignment. In none of those cases did the point that I have to consider arise and I am quite unable to accept the argument that those authorities indicate that a direction to trustees is not merely equivalent to, but is, an assignment for the purposes of the Statute of Frauds.

There are three different methods of effectuating the same result, i.e., a transfer of the equitable interest from donor to donee, and in that sense it is perfectly correct to say (where a precise analysis of each method is unnecessary as in the authorities I have just mentioned) that each method operates as an assignment from donor to donee. In fact, SARGANT, J., and ROMER, L.J., were both careful to employ rather different language, which lent no colour to the view that a direction to trustees *was* an assignment.

In my judgment a direction to trustees to hold trust property on trust for a donee operates as a transfer of the equitable interest to the donee by way of trust

A and not by way of assignment. In the first place the element of assignment, i.e., of direct passing of the equitable interest from donor to donee by appropriate words of assignment or gift, is lacking. Secondly, the only person who can effectively declare new trusts concerning the equitable interest is the donor himself: *Tierney* v. *Wood* (6) ((1854), 19 Beav. 330). For myself, I can see no real distinction between the two cases that may be put: (i) the donor says B "I declare myself a trustee of my equitable interest for the donee"; the legal effect of that is that the trustees become trustees of the equitable interest for the donee and the donor disappears from the picture; and (ii) the donor says "I direct you the trustees to hold on trust for the donee." Both seem to me to be really indistinguishable methods of operating to transfer the equitable title by way of declaration of trust in contrast to doing so by way of assignment. C By giving directions to trustees as to new trusts, it seems to me that the donor has deliberately chosen the path of declaring new trusts rather than the path of assignment. For these reasons in my judgment a direction to trustees operates by way of trust and not for the purposes of s. 9 of the Statute of Frauds by way of assignment. Accordingly such a direction may be by parol. No decision directly in point has been cited to me, but I think some support for the D view which I have expressed is to be found in the observations of LORD LYNDHURST, L.C., in *M'Fadden* v. *Jenkyns* (7) ((1842), 1 Ph. 153 at pp. 157, 158), and in *Bentley* v. *Mackay* (8) ((1851), 15 Beav. 12).

So far I have dealt with the matter on the footing that the law is contained in s. 9 of the Statute of Frauds. Of course, that section has been repealed and replaced by s. 53 (1) (c) of the Law of Property Act, 1925, in these terms:

E

> "a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will."

The section uses the word "disposition", normally a word of wide import, but, if it is to be given a wide meaning so as to include a disposition by direction F to trustees, then surely it must include a disposition by way of declaration of trust on the part of the equitable owner. If that be so, then for close on thirty-two years the law relating to the transfer of equitable interests by parol declaration of trust of equitable (as distinct from legal) interests was completely altered and no one has yet noticed it, and neither of those well-known books on trusts, LEWIN ON TRUSTS and UNDERHILL'S LAW OF TRUSTS AND TRUSTEES, have G thought the possibility that such a change in the law might have been occasioned by the change of language even worthy of comment. In fairness to the commissioners, this point was not pressed very hard. I am satisfied that s. 53 (1) (c) was directed at precisely the type of disposition which fell within the old s. 9 of the Statute of Frauds, viz., assignments in contradistinction to the transfer of equitable interests by way of declaration of trust. In my judgment, dispositions H by way of trust are not within the intendment of the section.

Accordingly, in my view, the equitable interest in the shares passed from Mr. Hunter on Feb. 18, 1955, and, there being nothing left to pass under the subsequent declarations of trust, no ad valorem duty was thereby attracted. The appeal is allowed, the ad valorem duty must be repaid and the commissioners must pay the appellants' costs of the appeal. I fix the duty at 10s.

Appeal allowed. Ad valorem duty fixed at 10s.

Solicitors: *Soames, Edwards & Jones* (for the appellants); *Solicitor of Inland Revenue.*

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

OUGHTRED *v.* INLAND REVENUE COMMISSIONERS.

[Chancery Division (Upjohn, J.), November 28, 29, December 3, 1957.]

Stamp Duty—Conveyance on sale—Transfer of shares—Shares subject to settlement—Oral agreement to exchange reversionary interest in settled shares, for shares owned by life tenant—Trustees' subsequent transfer of shares to life tenant—Whether conveyance of beneficial interest or legal estate only—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *s.* 54, *Sch.* 1—*Law of Property Act,* 1925 (15 *&* 16 *Geo.* 5 *c.* 20), *s.* 53 (1), (2).

Trust and Trustees—Constructive trust—Exchange of shares owned by life tenant for reversionary interest in settled shares—Oral agreement to transfer reversionary interest (*by exchange*) *to life tenant—Whether any need for writing—Law of Property Act,* 1925 (15 *&* 16 *Geo.* 5 *c.* 20), *s.* 53 (1), (2).

By an oral agreement made on June 18, 1956, the person absolutely entitled to shares subject to a life interest under a settlement agreed with the life tenant to exchange his interest in the shares for other shares in the company owned by the life tenant, to the intent that the life tenant's life interest in the settled shares should be enlarged into absolute ownership. On June 26, 1956, a deed of release between the life tenant, the person absolutely entitled to the reversionary interest and the trustees of the settlement gave a release to the trustees in respect of the settlement. On the same day the trustees executed a transfer of the settlement shares to the life tenant. The Commissioners of Inland Revenue held that the transfer was liable to ad valorem stamp duty on the value of the reversionary interest as a conveyance on sale of the equitable interest of the person entitled to the reversionary interest to the life tenant. On appeal,

Held: the transfer was not liable to ad valorem duty because—

(i) on the making of the oral agreement for the exchange the vendor had become a constructive trustee of his reversionary interest in the shares for the life tenant (there being no need for any written instrument for this purpose since s. 53 (2) of the Law of Property Act, 1925, did not apply to a trust arising by construction of law) and thus the subsequent transfer of the shares conveyed only the legal interest and no beneficial interest in the shares (*Grey* v. *Inland Revenue Comrs.*, ante, p. 246, applied); and

(ii) the transfer was not a conveyance on sale within the meaning of s. 54 of the Stamp Act, 1891, because it was a transfer, not on sale, but on the winding-up of the trust and on the release of the trustees.

Appeal allowed.

[**Editorial Note.** Repayment of the amount of the ad valorem duty paid was ordered, but without interest in respect of the period since it had been paid (see p. 256, letters C and D, post).

As to stamp duty on conveyances or transfers on sale, see 28 Halsbury's Laws (2nd Edn.) 458, para. 973; and for cases on the subject, see 39 Digest 278-281, *621-651.*

As to the need for writing on a transfer of an equitable interest, see 11 Halsbury's Laws (3rd Edn.) 336, 337, para. 542.

For the Stamp Act, 1891, s. 54, see 21 Halsbury's Statutes (2nd Edn.) 627.

For the Law of Property Act, 1925, s. 53, see 20 Halsbury's Statutes (2nd Edn.) 551.]

Cases referred to:

(1) *Grey* v. *Inland Revenue Comrs.*, ante, p. 246.

(2) *Inland Revenue Comrs.* v. *Angus, Same* v. *Lewis*, (1889), 23 Q.B.D. 579; 61 L.T. 832; 39 Digest 254, *378.*

Case Stated.

The appellant sought the determination by the court of the amount of stamp duty chargeable on an instrument of transfer of shares dated June 26, 1956, made by the trustees of a settlement to the appellant. Under the settlement one hundred thousand ordinary shares of 10s. each and one hundred thousand first preference shares of 10s. each in William Jackson & Son, Ltd., were settled on trust for the appellant during her life and after her death for her son Peter Oughtred under a deed of appointment made by the appellant under the terms of the settlement on June 18, 1956. A power of revocation reserved in the deed of appointment was released by a deed of release made by the appellant and dated the same day. By an oral agreement also made on June 18, 1956, between the appellant and Peter Oughtred, it was agreed that on June 26, 1956, Peter Oughtred would exchange his interest under the settlement, the power of appointment and the deed of release for 28,510 fully paid preference shares of 10s. each and 44,190 fully paid ordinary shares of 10s. each in William Jackson & Son, Ltd., owned by the appellant to the intent that the appellant's life interest in the trust fund of the settlement should be enlarged to absolute ownership thereof. A deed of release made on June 26, 1956, between the appellant, Peter Oughtred and the trustees, released and discharged the trustees from all actions, proceedings, claims and demands in respect of the execution of the settlement. On June 26, 1956, the trustees transferred the settlement shares to the appellant and on the same day, by the direction of Peter Oughtred, the appellant transferred the shares agreed to be exchanged to Donald Miller Jones and Noel Oughtred Till who held them as trustees for Peter Oughtred under a separate trust deed.

The Commissioners of Inland Revenue were of opinion that, for the purposes of the Stamp Act, 1891, and particularly of s. 55, the oral agreement made between the appellant and Peter Oughtred on June 18, 1956, was an agreement for the sale of Peter Oughtred's equitable reversionary interest in the settlement shares to the appellant in consideration of the shares agreed to be exchanged for them, and that, apart from the transfer, no instrument in writing transferring Peter Oughtred's equitable reversionary interest to the appellant having been produced to them, the transfer of the settlement shares was a conveyance on sale of the equitable interest and liable to ad valorem duty on £33,140, being the agreed value at the date of transfer of the shares transferred in exchange therefor; and it was a transfer not on sale to the appellant of the legal interest in the settlement shares. They assessed the ad valorem duty at £663 10s. plus 10s. fixed duty. The appellant contended that no ad valorem duty as a conveyance or transfer on sale was exigible on the transfer and that it was liable to the duty of 10s. only under the head of charge "conveyance or transfer of any kind not hereinbefore described" in Sch. 1 to the Stamp Act, 1891.

P. E. Whitworth for the appellant.

R. O. Wilberforce, Q.C., and *E. Blanshard Stamp* for the Crown.

Cur. adv. vult.

Dec. 3. **UPJOHN, J.**, read the following judgment: In this case the Inland Revenue claim ad valorem duty on a deed of transfer dated June 26, 1956 (which I shall call "the transfer"), whereby four transferors were expressed to transfer one hundred thousand preference shares of 10s. each and one hundred thousand ordinary shares of 10s. each in a company known as William Jackson & Son, Ltd. (which I shall call "the company"), to the appellant in consideration of 10s. The facts are fully set out in the Case Stated and only a brief recital of them is necessary. As in the case* in which I have just delivered judgment, the Crown relies in support of its claim principally on s. 53 of the Law of Property Act, 1925.

Under and by virtue of a settlement dated Jan. 1, 1924, an appointment dated June 18, 1956, and a release of the same date, the appellant was the tenant for life of the shares the subject-matter of the transfer and her son Peter was absolutely and indefeasibly entitled to the said shares subject to his mother's life interest therein. The trustees of the settlement were the transferors named in the transfer. By an oral agreement made on the same day, June 18, it was agreed between the appellant and Peter that Peter would on June 26, 1956, exchange his interests under the settlement and subsequent deeds for 28,510 fully paid preference shares of 10s. each and 44,190 fully paid ordinary shares of 10s. each in the company then owned by the appellant to the intent that the life interest of the appellant in the shares subject to the settlement should be enlarged into absolute ownership thereof.

On June 26 by a deed of release between the appellant of the first part, Peter of the second part and the trustees of the third part, the parties of the first and second part gave a release to the trustees. There were the usual ample recitals of the history of the trust and I need notice only recitals (F) and (G) and the consideration. Recital (F) of the release recited the oral agreement which I have mentioned, and continued:

> "' The trust fund which now consists of one hundred thousand fully paid preference shares of 10s. each in the capital of William Jackson & Son, Ltd., and one hundred thousand fully paid ordinary shares of 10s. each in the said company is accordingly now held by the trustees in trust for [the appellant] absolutely as the trustees hereby acknowledge and it is intended that the same shall forthwith be transferred to [the appellant] or as she shall direct (G) [the appellant] and Peter being satisfied with all matters and things relating to the execution of the trusts of the settlement have agreed to make the release hereinafter contained Now in consideration of the premises and of the transfer to be made as aforesaid this deed witnesseth . . .",

and then followed the usual common form words of release to the trustees on the termination of a trust.

On the same day the transfer was executed and the consideration moving from the appellant was satisfied. It is not disputed that it operated to convey or transfer the legal estate in the shares from the trustees to the appellant and as such must bear 10s. stamp duty, but the Inland Revenue Commissioners claim that it must be stamped ad valorem with the value of Peter's reversionary interest, which he orally agreed to sell to his mother on June 18, and on that footing a sum of £663 10s. has been exacted by them. The principal argument of the commissioners in support of their claim is to be found in para. 12 of the Case Stated and is to this effect. The agreement of exchange on June 18 (and for this purpose it is conceded on both sides that it is on all fours with an agreement of sale and purchase for a money consideration) was oral, and therefore, having regard to s. 53 (1) (c)†, no equitable interest passed to the appellant. As I have just dealt at length in *Grey* v. *Inland Revenue Comrs.* (1) (ante, p. 246) with that section, I do not read it again. Accordingly the recital in the deed of release that the trust fund was " accordingly now held by the trustees in trust for " the appellant was incorrect. Therefore, Peter's equitable interest in the reversion passed on the transfer, which was accordingly a conveyance on sale of such equitable interest.

---

* See *Grey* v. *Inland Revenue Comrs.*, p. 246, ante.

† The terms of s. 53 (1) (c) are printed at p. 251, letter E, ante.

In my judgment counsel for the appellant has provided a complete answer to that argument. It is to be found in s. 53 (2) of the Law of Property Act, 1925, which is in these terms:

> "This section does not affect the creation or operation of resulting, implied or constructive trusts."

This was an oral agreement for value, and, accordingly, on the making thereof Peter the vendor became a constructive trustee of his equitable reversionary interest in the trust funds for the appellant. No writing to achieve that result was necessary, for an agreement of sale and purchase of an equitable interest in personalty (other than chattels real) may be made orally, and s. 53 has no application to a trust arising by construction of law.

It was said that, if Peter became a trustee of the equitable interest for the appellant, that showed that something (some scintilla of something possibly) remained in Peter which had to be transferred to the appellant to complete her *equitable* title. I do not follow the argument. As I have been at pains to point out in *Grey* v. *Inland Revenue Comrs.* (1), there are several modes of transferring equitable estates. One is by the transferor declaring himself a trustee for the transferee. The same result must surely follow where the transferor becomes a trustee by construction of law. True an agreement to sell an equitable interest may not be precisely on all fours with a conveyance of it. In a conveyance, the transferee may have the benefit of covenants for title by the transferor; see *Inland Revenue Comrs.* v. *Angus* (2) ((1889), 23 Q.B.D. 579 at p. 595). But it cannot be doubted that, on the making of an agreement for sale, the equitable title to the property agreed to be sold passes to the purchaser and the recital in the deed of release to the effect that the trustees held the trust fund in trust for the appellant absolutely was in fact correct, for the exchange consideration was executed contemporaneously. I do not, therefore, propose to deal with the interesting arguments which I have heard that, even if the recital was erroneous, the doctrine of estoppel precludes the claim for stamp duty. In my judgment, nothing passed under the transfer except the legal estate, and the principal argument on the part of the commissioners falls to the ground.

Counsel for the Crown advanced a further point, not taken or at all events not clearly taken in the Case Stated, to this effect. Even if the deed of transfer passed nothing except the legal estate, yet the deed of transfer was a conveyance on sale within the meaning of s. 54 of the Stamp Act, 1891. Section 54 is in these terms:

> "For the purposes of this Act the expression 'conveyance on sale' includes every instrument, and every decree or order of any court or of any commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction."

The test was said to be: Was the deed of transfer a transfer on the sale; and it was argued that the appellant became owner by virtue of the sale and the transfer was a transfer on that sale. Regard must be had to the facts of each case. Plainly it is not essential that the vendor should be a party. For example, where shares are in the names of nominees, the transfer from such nominees is plainly a conveyance on sale, and, despite the submission to the contrary of counsel for the appellant, in such a case it is not necessary to mention expressly the equitable interest in the deed of transfer. In this case, however, the appellant could not call on the trustees to convey the shares to her merely on proof of the oral agreement. They were entitled to say, and in this case presumably did say: "Here is a subsisting trust, and we will not part with the trust assets except with the assent of everyone who is interested in them and on having a release in the usual way not only from you but from Peter. We are not concerned with dealings between beneficiaries".

Although the transfer was executed as a direct result of the agreement for sale, and really on the occasion thereof, still it remains in my judgment incorrect in the particular circumstances of this case to describe it as a conveyance on sale. The transfer was in my judgment a transfer not on sale but on the winding-up of the trust and on the release of the trustees. This point also fails. The appeal must be allowed. The ad valorem duty must be repaid. I fix the duty at 10s. The appellant is entitled to her costs of the appeal.

[Counsel for the appellant asked for an order for repayment of the duty paid with interest at the rate of five per cent. from the date of payment until repayment*, citing *Drages, Ltd.* v. *Inland Revenue Comrs.* ((1927), 6 A.T.C. 727), and stating that the ad valorem stamp duty had been paid in November, 1956. Counsel also referred to s. 3 of the Law Reform (Miscellaneous Provisions) Act, 1934, and s. 4 of the Crown Proceedings Act, 1947. Counsel for the Crown stated that he was informed that when the order was drawn up in *Drages, Ltd.* v. *Inland Revenue Comrs.*, supra, no provision for interest was made in it. On general principle, he submitted, the matter depended on the Stamp Act, 1891, in which there was no provision for the payment of interest. HIS LORDSHIP declined to make an order for the payment of interest.]

Appeal allowed.

Solicitors: *Moeran, Oughtred & Co.*, agents for *Robinson, Sheffield & Till*, Beverley, Yorkshire (for the appellant); *Solicitor of Inland Revenue.*

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

---

* See, on the question whether interest can be ordered, *Western United Investment Co., Ltd.* v. *Inland Revenue Comrs.* (p. 257, post).

A

WESTERN UNITED INVESTMENT CO., LTD. *v.* INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Upjohn, J.), December 6, 9, 20, 1957.]

Stamp Duty—Conveyance on sale—Periodical payments—Separate instrument B *securing payments—Execution of separate instrument prior to conveyance on sale—Whether ad valorem duty chargeable on separate instrument—Stamp Act,* 1891 (54 *&* 55 *Vict. c.* 39), *s.* 56 (4).

Stamp Duty—Conveyance on sale—Periodical payments—Payments for a definite period exceeding twenty years—Provision for payment of all instalments on default in paying any instalment in due time—Whether charge for stamp C *duty limited to the aggregate of instalments for twenty years—Stamp Act,* 1891 (54 *&* 55 *Vict. c.* 39), *s.* 56 (2).

Stamp Duty—Repayment—Interest on overpaid duty—Jurisdiction of court to order payment of interest—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *s.* 13 (1), (4)—*Law Reform* (*Miscellaneous Provisions*) *Act,* 1934 (24 *&* 25 *Geo.* 5 c. 41), *s.* 3.

D By an agreement dated May 9, 1956, E.H.V. agreed with a company to sell shares to the company for £5,500,000, to be paid without interest by 125 instalments of £44,000 each payable on June 1 in each year. By cl. 3 it was agreed that, if the company should make default in payment of any of the instalments or any part thereof for ninety days after the same had become due, the whole of the unpaid instalments should become immediately E payable. A deed of transfer of even date was executed. Ad valorem stamp duty was charged as follows: (a) £13,750 on the agreement, being duty charged under para. (1) of the head " Bond, Covenant . . . " in Sch. 1 to the Stamp Act, 1891, at 5s. per £100 on the total ultimately payable (£5,500,000) and (b) £110,000 on the transfer, being duty as on a conveyance on sale at £1 per £50 on £5,500,000, on the footing that by virtue of cl. 3 F of the agreement all instalments " may, according to the terms of sale, be payable during the period of twenty years " after May 9, 1956, within those words in s. 56 (2) of the Stamp Act, 1891. The company paid the duty and appealed under s. 13 (1) of the Act of 1891. It was conceded that for the purpose of assessing the agreement the transfer should be regarded as having been executed on June 1, 1956, when the first periodical payment was made, G and it was not disputed that the agreement was assessable as a security for periodical payments.

Held: (i) the stamp duty on the agreement was not limited by s. 56 (4) of the Stamp Act, 1891, to the fixed duty of 10s. thereby chargeable on a separate instrument made for securing periodical payments, because that limitation applied only when the instrument was executed contem- H poraneously with or after the conveyance; stamp duty on the agreement was therefore assessed at £13,750.

(ii) stamp duty chargeable under s. 56 (2) of the Stamp Act, 1891, on the transfer ought to be assessed on the footing that the terms of sale were performed, not broken, viz., on the footing that the instalments of £44,000 were duly paid; therefore ad valorem duty was chargeable on the instalments I payable over the next twenty years from the date of sale, viz., £880,000, and would be assessed at £17,600, the sum of £92,400 being ordered to be repaid by the Crown.

Dictum of LORD LINDLEY in *Underground Electric Rys.* v. *Inland Revenue Comrs.* ([1906] A.C. at p. 23) considered.

(iii) section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934, did not confer jurisdiction to order interest to be paid by the Crown on the sum of £92,400 while that sum had been in its hands, because an appeal under s. 13 (1) of the Stamp Act, 1891, did not make the sum in issue a debt and the Act of 1891 did not give jurisdiction to order interest to be paid when repayment was ordered on appeal.

Appeal allowed in part.

[**Editorial Note.** A similar question whether interest was payable on money ordered to be repaid was raised in *Oughtred* v. *Inland Revenue Comrs.* (see p. 256, letter C, ante) in which also an order for payment of interest was refused.

For the Stamp Act, 1891, s. 13 and s. 56, and Sch. 1, head " Bond, Covenant . . . ", see 21 HALSBURY'S STATUTES (2nd Edn.) 618, 627, 662.

For the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3, see 18 HALSBURY'S STATUTES (2nd Edn.) 525; for the Crown Proceedings Act, 1947, s. 24 (3), see 6 HALSBURY'S STATUTES (2nd Edn.) 64.]

Case referred to:

(1) *Underground Electric Rys.* v. *Inland Revenue Comrs.*, [1906] A.C. 21; 75 L.J.K.B. 117; 93 L.T. 819; 39 Digest 282, *655*.

Case Stated.

This Case was stated by the Commissioners of Inland Revenue pursuant to the Stamp Act, 1891, s. 13, for the determination by the court of the amount of stamp duty properly chargeable on two instruments, both dated May 9, 1956, being an agreement between Edmund Hoyle Vestey of the one part and the appellant company, Western United Investment Co., Ltd., of the other part, and a deed of transfer, also dated May 9, 1956, made between the same parties. The instruments had been presented to the commissioners on behalf of the appellant company under s. 12 of the Stamp Act, 1891, for the commissioners' opinion as to the stamp duty chargeable. The commissioners assessed the agreement as the only primary or principal security for the periodical payments therein referred to and they assessed it by reference to para. (1) of the heading " Bond, Covenant . . . " in Sch. 1 to the Stamp Act, 1891, at 5s. for each £100 of the total ultimately payable (£5,500,000), viz., £13,750. They were of opinion that it was not a " separate instrument " within s. 56 (4) of the Act of 1891. They assessed the transfer under s. 56 (2) of the Act of 1891 on the sum which, having regard to cl. 3 of the agreement, might be payable during the next twenty years, viz., the £5,500,000, at £1 for every £50, viz., a total charge for duty of £110,000.

Sir Andrew Clark, Q.C., and *E. I. Goulding* for the appellant, Western United Investment Co., Ltd.

R. O. Wilberforce, Q.C., and *E. Blanshard Stamp* for the Crown.

Cur. adv. vult.

Dec. 20. **UPJOHN, J.**, read the following judgment: This is an appeal by way of Case Stated under the Stamp Act, 1891, in relation to stamp duty on two documents both dated May 9, 1956, one being an agreement for sale of shares and the other a common form transfer on sale of those shares.

It appears from the Case that a Mr. E. H. Vestey was the owner of 35,058 five per cent. cumulative second preference shares of £10 each and 29,800 ordinary shares of £10 each in the capital of Frederick Leyland & Co., Ltd., which his accountants advised him were worth some £2,000,000. He was minded to sell these shares to the appellant company, who were to hold them as trustees of some settlement, in consideration of annual instalments over the very long period of 125 years. The accountants advised that a fair price to pay would be 125 annual instalments of £44,000 each amounting to a total of £5,500,000 spread over that period. Accordingly an agreement was executed on May 9, 1956, between Mr. Vestey therein described as the vendor and the appellant company therein described as the company. The operative part was in these terms:

> " The vendor shall sell and the company shall purchase for the sum of £5,500,000, [the shares]. 2. The purchase money shall be paid without interest by 125 yearly instalments namely an instalment of £44,000 on June 1 next and 124 equal instalments of £44,000 on the same day in each

> of the 124 years next following. 3. If the company shall make default in payment of any of the said instalments or any part thereof for ninety days after the same shall become due the whole of the unpaid instalments shall become immediately payable and shall carry interest at £4 per cent. per annum from the expiration of such ninety days until payment. 4. Upon payment of the first of the said instalments the vendor shall execute and the company shall accept a transfer of all the said shares And the vendor shall not be entitled to any charge or lien on the said shares or any of them for securing the unpaid instalments or any part thereof."

This was followed by the deed of transfer of the shares in question. The agreement and transfer both bore date May 9, 1956, because at that time Mr. Vestey was in Australia and he found it convenient to execute both together. Counsel for the company very fairly concedes, however, that the problem of stamping these documents must be approached on the footing that the agreement was executed on May 9, 1956, and the transfer on or after the payment of the first instalment on June 1, 1956.

Those are the facts and I now turn to the issues of law. First, as to the proper stamp duty on the agreement. The commissioners contend that the agreement ought to be stamped under the heading in Sch. 1 to the Stamp Act, 1891, " Bond, Covenant or Instrument of any kind whatsoever ", and under para. (1) thereof, " Being the only or principal or primary security for . . . any sum or sums of money at stated periods . . . " The duty under that heading would be 5s. per £100 on the total amount ultimately payable, i.e., £13,750. It was at one time suggested by the company that the agreement ought to be stamped under para. (2) of the heading as " a collateral or auxiliary or additional or substituted security " with the fixed duty of 10s., but, as it was plain that the only other document in the case was the transfer which was not (for the purposes of argument) in existence at the time and did not in any event operate as a security, that contention was abandoned by counsel in his reply.

It is clearly settled by at least two decisions of the Court of Appeal* that the agreement surprisingly enough ought prima facie to be stamped as a security under the heading in Sch. 1 which I have mentioned and that is not disputed. It is said, however, and this is the whole point on this part of the case, that the agreement is exempt under the provisions of the Stamp Act, 1891, s. 56 (4). If that section does so operate then it is clear from the terms of s. 1 of the Act of 1891 that it effectively overrules the provisions in the schedule. Section 56 (4) is in these terms:

> " Provided that no conveyance on sale chargeable with ad valorem duty in respect of any periodical payments, and containing also provision for securing the payments, is to be charged with any duty in respect of such provision, and no separate instrument made in that case for securing the payments is to be charged with any higher duty than 10s."

At first sight that seems to fit this case exactly. There is a conveyance on sale which admittedly must bear ad valorem duty, namely, the transfer, and there is a separate instrument, namely, the agreement, made for securing the payments. Counsel for the Crown, however, submits that the effect of the sub-section is to exempt the agreement only if it comes into existence after the conveyance on sale. He places much reliance on the rather curious words in the sub-section, " in that case ". He submits that one may find provision for securing the payments in the conveyance on sale itself or one may find a conveyance on sale and in that case a separate instrument for securing payments. But one must,

---

* See *National Telephone Co., Ltd.* v. *Inland Revenue Comrs.* ([1899] 1 Q.B. 250; [1900] A.C. 1) and *County of Durham Electrical Power Distribution Co.* v. *Inland Revenue Comrs.* ([1909] 2 K.B. 604). See also *British Italian Corpn., Ltd.* v. *Inland Revenue Comrs.*, reported in Sergeant on Stamp Duties (3rd Edn.), at p. 334.

he submits, first find a conveyance on sale so that the security must be either A
contemporaneous or subsequent in point of time, and therefore, it being agreed that for the purposes of stamp duty the transfer is to be taken as dated on or after June 1, the conditions of s. 56 (4) are not satisfied. He points out that, if the agreement had been submitted for stamping on its date of execution, the commissioners would not know whether in fact a conveyance on sale would be executed and, he submits, it would not be possible to say that the conditions of B
the sub-section were satisfied.

Counsel for the company submits that all the circumstances can be considered and that the phrase " in that case " merely indicates that the sub-section is to operate where the parties intend that the security is to be followed by a conveyance on sale.

On the whole, I have come to the conclusion that the submissions on behalf C
of the Crown are correct. In my judgment the exemption is to be granted only where there is first a conveyance on sale which is chargeable with duty and in that document or in a separate contemporaneous or subsequent instrument a security; and it is not sufficient to find that the parties have executed a security and are intending to execute a conveyance on sale hereafter. This part of the appeal fails and I assess the duty at £13,750. D

Secondly, as to the deed of transfer, no one doubts that this document has to be stamped ad valorem as a conveyance on sale and as the consideration is payable by instalments the relevant provision is s. 56 of the Act of 1891 which is concerned, as the sidenote indicates, with periodical payments. Sub-section (1) is concerned with periodical payments for a definite period not exceeding twenty years and the total amount payable is taxed. Sub-section (2) provides: E

> " Where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically for a definite period exceeding twenty years or in perpetuity, or for any indefinite period not terminable with life, the conveyance is to be charged in respect of that consideration with ad valorem duty on the total amount which will or may, F
> according to the terms of sale, be payable during the period of twenty years next after the day of the date of the instrument."

Sub-section (3) is concerned with payments during a life or lives and tax is paid on the instalments which may according to the terms of sale be payable during twelve years after the execution of the deed.

So in these cases the general policy of the legislature is to tax the instalments G
which may become due. It has been decided by the House of Lords in *Underground Electric Rys.* v. *Inland Revenue Comrs.* (1) ([1906] A.C. 21) that money payable under s. 56 includes money payable on a contingency, and LORD LINDLEY said (ibid., at p. 23):

> " But the words of s. 56 appear to me to be wide enough to cover all H
> moneys which may become payable, and the latter part of cl. 2 [that is clearly a reference to sub-s. (2)] certainly favours this construction."

The company says that duty should be levied in the terms of sub-s. (2) on twenty instalments of £44,000, i.e., that the proper amount of the duty is £17,600. On this question the Crown, however, presents this attractively simple argument I
on the terms of sub-s. (2). It is said that the terms of sale must be considered to see what will or may, according to those terms, be payable in the first twenty years. One of the terms is cl. 3. That " may " come into operation within the twenty years and thereupon the whole of the instalments will become payable. Accordingly, the whole number of instalments, aggregating £5,500,000, may become payable and ad valorem duty on that amounts to £110,000. The argument may be summarised thus, that in one contingency all the instalments may become payable; that is, if the contingency happens on which cl. 3 operates,

A then there is an acceleration so that all the instalments may become payable within the twenty years.

I do not agree with that argument. Clause 3 is in a literal sense a term of the sale in that it is an undoubted term of the contract of sale; but it is a term of the contract which only comes into operation if the terms of sale be broken. The terms of sale for the purposes of s. 56 in my judgment are the terms of sale B on which the parties contemplate that the property will be paid for, i.e., 125 annual instalments of £44,000. The terms of sale do not in my judgment comprehend terms of the contract of sale which come into operation if, but only if, the agreed terms of sale are broken. That may be called a contingency; I do not think that LORD LINDLEY, in the passage which I have quoted, had in mind for one moment, as a contingency, a provision of the contract that would only come C into operation if the agreed terms of sale were broken. It seems to me that the whole structure of s. 56 negatives the literal construction placed on it by the Crown. Each of the first three sub-sections seems to me to proceed on the footing that the contract is going to be carried out according to the primary intention of the parties. Instalments may be paid over a period not exceeding twenty years (sub-s. (1)), over twenty years or an indefinite period (sub-s. (2)), or for a life or D lives (sub-s. (3)). The Act contemplates that the payments will go on throughout the period, whatever it may be, in accordance with the tenor of the agreement and will not be brought to a sudden end by a breach of the terms of sale agreed and the operation of some provision wisely inserted to deal with such an eventuality.

I allow the appeal on this part of the case. I assess the duty at £17,600 and E order the return of the balance of £92,400, which has been paid.

The final question is whether I can order interest to be paid on the sum ordered to be repaid by the Crown. In contrast to the Income Tax Acts, there is no provision for payment of interest contained in the Stamp Act, 1891, s. 13, and the claim is based on the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3, which by the Crown Proceedings Act, 1947, s. 24 (3), binds the F Crown. Section 3 (1) of the Act of 1934 is in these terms so far as relevant:

> "In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose G and the date of the judgment."

The real question is whether this sum can be described as a debt, and these proceedings as proceedings for recovery of a debt. That must depend on the true construction of the Stamp Act, 1891, s. 13 (1) and (4), which I must now read:

> H "(1) Any person who is dissatisfied with the assessment of the commissioners may, within twenty-one days after the date of the assessment, and on payment of duty in conformity therewith, appeal against the assessment to the High Court of the part of the United Kingdom in which the case has arisen, and may for that purpose require the commissioners to state and sign a case, setting forth the question upon which their opinion was required, and the assessment made by them.
>
> I "(4) If it is decided by the court that the assessment of the commissioners is erroneous, any excess of duty which may have been paid in conformity with the erroneous assessment, together with any fine or penalty which may have been paid in consequence thereof, shall be ordered by the court to be repaid to the appellant . . ."

So as a condition precedent to an appeal the appellant has to pay the duty and the document is stamped accordingly. In my judgment that gives rise to no relation of debtor and creditor at all. Of course, sub-s. (4) in justice to the subject makes provision for repayment where there has been an overpayment in complying with sub-s. (1), but that cannot affect the fact that the original payment was a payment of stamp duty. In my judgment the payment under s. 13 cannot be brought in as a debt under the umbrella of the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3 (1), nor can these proceedings properly be described as proceedings for recovery of a debt. Accordingly there is in my judgment no jurisdiction to order payment of interest.

Appeal dismissed in part and allowed in part.

Solicitors: *Chas. H. Wright & Brown* (for the appellant); *Solicitor of Inland Revenue.*

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

MALAS AND ANOTHER (TRADING AS HAMZEH MALAS AND SONS) *v.* BRITISH IMEX INDUSTRIES, LTD.

[COURT OF APPEAL (Jenkins, Sellers and Pearce, L.JJ.), December 10, 1957.]

Bank—Letter of credit—Confirmed letter of credit—Established practice regarding payment irrespective of dispute as to the quality of goods sold.

Sale of Goods—Payment—Confirmed letter of credit—Injunction—Application for injunction restraining sellers dealing with second of two letters of credit—Dispute regarding quality of goods sold.

By a contract between the buyers, a Jordanian firm, and the sellers, an English company, the buyers agreed to buy a quantity of reinforced steel rods from the sellers. Delivery was to be in two instalments and payment was to be effected by the opening of a confirmed letter of credit in favour of the sellers with a bank in London in respect of each instalment. The two letters of credit were opened by the buyers and the sellers had realised the first. The buyers, on receiving the first instalment of the goods, considered that they were not of the quality specified in the contract, and they applied for an injunction restraining the sellers from dealing with the second letter of credit.

Held: in the exercise of the court's discretion the injunction would not be granted, because the opening of a confirmed letter of credit constituted a bargain between the banker and the seller of goods which imposed on the banker an absolute obligation to pay, irrespective of any dispute between the buyer and the seller in regard to the quality of the goods, and in the present case it would be wrong to interfere with the commercial practice established on that principle.

Appeal dismissed.

[**Editorial Note.** The proceedings by the sellers for enforcing payment from the confirmed credit are reported at p. 264, post.

As to the position between paying banker and beneficiary where there is a confirmed letter of credit (that is, an irrevocable credit which has been confirmed by the paying banker), see 2 HALSBURY'S LAWS (3rd Edn.) 214-218, paras. 398-402.]

Appeal.

The plaintiffs appealed from an order of DONOVAN, J., in chambers, made on Dec. 10, 1957, in an action for damages for breach of contract, whereby he refused to continue an interim interlocutory injunction granted by him ex parte on Dec. 9, 1957, on terms restraining the defendants from drawing on a confirmed letter of credit opened by the plaintiffs in favour of the defendants with the Arab Bank, Ltd., and confirmed by the Midland Bank, Ltd., in London, in payment of the second instalment of goods purchased by the plaintiffs from the defendants.

The facts are stated in the judgment of JENKINS, L.J.

Gerald Gardiner, Q.C., and *J. R. B. Fox-Andrews* for the plaintiffs, the buyers.
A. A. Mocatta, Q.C., and *Mark Littman* for the defendants, the sellers.

JENKINS, L.J.: In this case the plaintiffs are a Jordanian firm who agreed to buy from the defendants, a British company, a quantity of reinforced steel rods. These steel rods were to be delivered in two instalments and payment was to be effected by the opening in favour of the defendants of two confirmed letters of credit with the Midland Bank, Ltd., in London, one in respect of each instalment. The letters of credit were duly opened. The first has been realised by the defendant vendors, and they are on the point of realising the second. This application is concerned with the second letter of credit.

It appears that, when the first consignment of steel rods arrived, according to the plaintiffs, they were by no means up to contract quality and many criticisms were made on that score. That is a matter in issue between the parties. In the meantime the plaintiffs wish to secure themselves in respect of any damage to which they may be found to be entitled when this dispute is ultimately tried out, by preventing the defendants from dealing with this outstanding letter of credit. Counsel for the plaintiffs, in effect, treats this as no more than part of the price, a sum earmarked to pay for the goods bought under the contract, which the plaintiffs have become entitled to repudiate; and he says that, accordingly, the defendants ought to be restrained from dealing with the amount of this letter of credit. He points out that he is seeking an order against the defendants, not against the bank.

We were referred to several authorities, and it seems to be plain that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes on the banker an absolute obligation to pay, irrespective of any dispute which there may be between the parties on the question whether the goods are up to contract or not. An elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character, and, in my judgment, it would be wrong for this court in the present case to interfere with that established practice. It has also to be remembered that a vendor of goods selling against a confirmed letter of credit is selling under the assurance that nothing will prevent him from receiving the price. That is no mean advantage when goods manufactured in one country are being sold in another. Furthermore, vendors are often re-selling goods bought from third parties. When they are doing that, and when they are being paid by a confirmed letter of credit, their practice—and I think it was followed by the defendants in this case—is to finance the payments necessary to be made to their suppliers against the letter of credit. That system of financing these operations, as I see it, would break down completely if a dispute between the vendor and the purchaser were to have the effect of "freezing", if I may use the expression, the sum in respect of which the letter of credit was opened.

I agree with counsel for the plaintiffs that this is not a case where it can be said that the court has no jurisdiction to interfere. The court's jurisdiction to grant injunctions is wide, but, in my judgment, this is not a case in which, in the exercise of the court's discretion, it ought to grant an injunction. Accordingly, I think that this application should be refused.

SELLERS, L.J.: I agree, but I would repeat what my Lord has said on jurisdiction. I would not like it to be taken that I accept, or that the court accepts, the submission that the court has no jurisdiction. There may well be cases where the court would exercise jurisdiction, as, for example, where there is a fraudulent transaction.

A

PEARCE, L.J.: I also agree.

Appeal dismissed.

Solicitors: *Simmons & Simmons* (for the plaintiffs); *Menassé & Tobin* (for the defendants).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

B

BRITISH IMEX INDUSTRIES, LTD. *v.* MIDLAND BANK, LTD.

C

[QUEEN'S BENCH DIVISION (Salmon, J.), December 19, 20, 1957.]

Sale of Goods—Payment—Confirmed credit—Credit available on presentation inter alia of bills of lading—Bills presented must normally be clean bills of lading—Condition on back of bills of lading absolving shippers from liability if goods not marked and secured in accordance with condition—Whether acknowledgment of compliance with condition must be tendered before payment under letter of credit—Validity of condition—Carriage of Goods by Sea Act, 1924 (14 & 15 *Geo.* 5 *c.* 22), *Schedule, art. IV, r.* 2 (*n*) (*o*), *art. III, r.* 8.

D

Bank—Letter of credit—Confirmed credit—Credit available on presentation inter alia of bills of lading—Duty of bank in relation to evidence of fulfilment of conditions of bills of lading before payment under letter of credit.

E

By a confirmed letter of credit, the defendants, who were bankers, informed the plaintiffs, who were steel exporters, that an irrevocable credit to the extent of £23,000 was available for the plaintiffs' sight drafts accompanied by certain documents including shipped bills of lading of goods, 520 long tons reinforcing steel bars. The steel bars having been shipped, the plaintiffs presented the defendants with drafts amounting to £21,468 0s. 8d. together with all the documents which were required by the letter of credit, including two bills of lading. On the back of the bills were printed several conditions one of which, cl. B, relating to steel bars, provided that the shippers were not responsible for correct delivery unless every piece or bundle was distinctly and permanently marked with oil paint and every bundle was securely fastened and metal tagged. The marks, numbers and description of the goods were indicated on the face of the bills, but there was no acknowledgment that cl. B had been complied with. The Hague Rules applied to the shipment of the goods and by art. IV, r. 2 (n) (o) thereof the carrier was exempted from responsibility for loss or damage arising from " insufficiency of packing " and " insufficiency or inadequacy of marks ". By art. III, r. 8, of the Hague Rules any clause in a contract of carriage which lessened the liability of a carrier otherwise than provided by the rules was made null and void.

F

G

H

The defendants refused to pay the drafts presented by the plaintiffs, contending that, as the bills of lading did not contain evidence that cl. B had been complied with, the bills were not good tender under the letter of credit.

Held: the plaintiffs had complied with their obligations under the letter of credit because—

I

(i) the bills of lading tendered to the defendants were clean bills of lading and thus satisfied in the present case the stipulation in the letter of credit for payment against bills of lading without qualification as to their indorsement (dictum of BAILHACHE, J., in *National Bank of Egypt* v. *Hannevig's Bank, Ltd.* (1919), 1 Lloyd's Rep. 69, applied), and

(ii) in stipulating that the carrier should not be responsible for delivery unless the goods were marked in a particular manner (e.g., by oil paint)

A cl. B went further in lessening the carrier's liability than r. 2 (n) (o) of art. IV of the Hague Rules and to that extent was void.

Per CURIAM: according to the defendants' case it was their duty . . . to read through the multifarious clauses . . . on the back of these bills of lading and, having observed additional cl. B, to consider its legal effect and then to call for an acknowledgment that there had been compliance with B it . . . I doubt whether they are under any greater duty to their correspondents than to satisfy themselves that the correct documents are presented to them, and that the bills of lading bear no indorsement or clausing by the shipowners or shippers which could reasonably mean that there was, or might be, some defect in the goods or their packing (see p. 268, letter I, to p. 269, letter B, post).

C Dictum of SCRUTTON, L.J., in *National Bank of Egypt* v. *Hannevig's Bank, Ltd.* (1919), Vol. III, Legal Decisions Affecting Bankers, at p. 214 adopted.

[**Editorial Note.** The proceedings between the buyers and the sellers for an injunction are reported at p. 262, ante.

D As to the tender of documents under a letter of credit, see 2 HALSBURY'S LAWS (3rd Edn.) 217, para. 402; as to the obligation to tender clean bills of lading and what is a clean bill of lading, see ibid., p. 218, para. 403.

For the Hague Rules, art. IV, r. 2 (n) (o) and art. III, r. 8, see the Carriage of Goods by Sea Act, 1924, Sch.; 23 HALSBURY'S STATUTES (2nd Edn.) 890, 889.]

E Cases referred to:

(1) *National Bank of Egypt* v. *Hannevig's Bank, Ltd.*, (1919), 1 Lloyd's Rep. 69.

(2) *Walters* v. *Rank (Joseph), Ltd.*, (1923), 39 T.L.R. 255; 41 Digest 471, *3030*.

F (3) *Studebaker Distributors, Ltd.* v. *Charlton Steam Shipping Co., Ltd.*, [1937] 4 All E.R. 304; [1938] 1 K.B. 459; 107 L.J.K.B. 203; 157 L.T. 583; Digest Supp.

(4) *Holland Colombo Trading Society, Ltd.* v. *Segu Mohamed Khaya Alawadeen*, [1954] 2 Lloyd's Rep. 45.

Action.

In this action British Imex Industries, Ltd., the plaintiffs, claimed against G Midland Bank, Ltd., the defendants, £21,468 0s. 8d. which the plaintiffs alleged was payable to them under a letter of credit, received from the defendants, the extent of the credit being £23,000; the plaintiffs alternatively claimed damages for breach of contract.

On Nov. 6, 1957, the defendants received a telegram from Arab Bank, Ltd., Amman, Jordan, requesting them to open an irrevocable credit for £23,000 in H favour of the plaintiffs, on behalf of buyers, Hamzeh Malas & Sons, Amman, in order to cover the payment for and shipment of 520 long tons reinforcing steel bars. The credit was to be valid until Nov. 30, 1957. By a letter dated Nov. 6, 1957, the defendants wrote to the plaintiffs as follows:

> "Advice of Arab Bank, Ltd. Irrevocable credit. Dear Sirs, We have I to inform you that we have received advice from the Arab Bank, Ltd., Amman, that they have opened with us their irrevocable credit in favour of yourselves on account of Hamzeh Malass & Sons, Amman, to the extent of £23,000 valid at this office until Nov. 30, 1957, and available by your drafts on us at sight accompanied by triplicated commercial invoice, original certified by Chamber of Commerce. Invoice to show a deduction of three per cent. in respect of insurance. Shipped bills of lading in complete set issued to order and blank indorsed marked 'Aqaba, Jordan', evidencing current shipment by the S.S./M.V. latest 30.11.1957 from any European

> port. Transhipment prohibited . . . to Aqaba in one or several shipments of the undermentioned goods:—About 520 long tons reinforcing steel bars . . . C. & F. Aqaba . . . All drafts drawn under this credit must contain the clause:—‘ Drawn under D/C No. 150228 ’. We are requested to advise you of the terms of a credit which is irrevocable on the part of Arab Bank, Ltd., Amman, but we are not asked to add our confirmation, and therefore this advice is given for your guidance only, and does not involve any undertaking on our part.”

In a further letter, dated Nov. 13, 1957, the defendants wrote to the plaintiffs:

> “ Credit No. 150228. Beneficiary: yourselves. Account: Hamzeh Malass & Sons, Amman. Dated Nov. 6, 1957. We have been advised by our principals of the following alterations in the above-mentioned documentary credit, of which kindly take note: Validity is extended until Dec. 10, 1957. (The latest date for shipment remains unchanged.) This credit now bears our confirmation, and we hereby undertake to honour all drafts on presentation provided they are drawn and presented in accordance with the terms of the credit. It is a condition of this amendment that our confirmation commission amounting to £18 is for your account. We understand from our telephone conversation that you agree to pay this commission, and we await your remittance in due course. All other conditions of this credit remain unchanged.”

The plaintiffs having confirmed that they were willing to pay the commission, and having paid it, the defendants, thereafter, became liable to pay the plaintiffs in accordance with the terms of the credit. The goods in question were shipped on Nov. 27, 1957. On Dec. 5, 1957, documents covering 228,146 tons of steel bars, value £10,078 19s. 8d., per S.S. Nordstern, were presented to the defendants on behalf of the plaintiffs, but the defendants, being dissatisfied with discrepancies in the description of the goods in the invoice and in the bill of lading, returned the documents, unpaid; the documents were re-presented later on Dec. 5 together with a further set of documents of the value of £11,715 18s. 7d., covering 263,200 tons of steel bars. The bills of lading presented to the defendants were both bills of “ Hansa ” Lines; the first bill showed that shipment of the goods was made from Antwerp on Nov. 27, 1957, and provided:

> “ Shipped at Antwerp in apparent good order and condition, weight, measure, marks, numbers, quality, contents and value unknown, by British Imex Industries London on board the good vessel called the Nordstern for carriage to Aqaba . . . the following goods.”

Then followed the marks and number of the packages, the description of the packages and goods, and their gross weight; on the face of the bill was written “ Freight prepaid ”. The face of the second bill of lading was in the same form except that the colour of the markings on the packages was not specified. On the back of both bills of lading there were printed, in very small type, a number of conditions of carriage and under the heading “ Additional clauses ” there was the following provision:

> “ B. Iron and Steel, Angles, Bars, Channels, etc., . . . Vessel not responsible for correct delivery and all expenses incurred at ports of discharge consequent upon insufficient securing or marking will be payable by consignees unless: (a) every piece is distinctly and permanently marked with oil paint; (b) every bundle is securely fastened, distinctly and permanently marked with oil paint and metal tagged, so that each piece or bundle can be distinguished at port of discharge.”

The defendants again returned, unpaid, the documents, including the bills, stating as their reasons for doing so, inter alia, that the bills of lading contained no evidence that the requirements of additional cl. B were complied with. On Dec. 10, 1957, revised documents, including the bills of lading, were again presented to the defendants on behalf of the plaintiffs; the revised sight drafts were for £9,927 16s. 11d. and £11,540 3s. 9d., making together £21,468 0s. 8d. The point raised by the defendants concerning additional cl. B had not, however, been dealt with and, accordingly, both sets of documents were again returned, unpaid, for that reason.

The defendants contended that as neither of the bills of lading contained any acknowledgment that additional cl. B had been performed, the bills were not good tender under the defendants' letter of credit.

A. A. Mocatta, Q.C., and *Mark Littman* for the plaintiffs.
Maurice Lyell, Q.C., and *H. A. P. Fisher* for the defendants.

SALMON, J.: The writ in this action was issued on Wednesday of last week. The action came on for hearing yesterday, and judgment is now being delivered just eleven days after the issue of the writ. This case illustrates very well the speed and convenience with which the commercial community can have its disputes determined in this court when it chooses to resort to it.

[HIS LORDSHIP, having referred to the letters which were written by the defendants to the plaintiffs informing the plaintiffs of the irrevocable credit opened in their favour, and confirming the credit, continued:] It is to be observed that the only remuneration that the defendants received was £18. The £23,000 referred to in the credit would have to be paid to the plaintiffs if they complied with the terms of the credit, or, if they did not, presumably would be repaid to Arab Bank, Ltd., or to Hamzeh Malas & Sons at Amman. If, as seems not unlikely, the defendants' customers took the point that the defendants were not entitled to pay on this credit, it is perhaps not at all surprising that the defendants would feel obliged, for their own protection, to resist the plaintiffs' claim so that they should be protected by an order of this court.

The goods in question were shipped on Nov. 27, 1957. On Dec. 10, 1957, the plaintiffs presented all the documents referred to in the letter of credit together with sight drafts amounting to £21,468 0s. 8d. The plaintiffs contend that in presenting these documents to the defendants, they have complied with the terms of the letter of credit which forms the basis of the contract between them and the defendants. The defendants refuse to pay the plaintiffs on the ground that the bills of lading contain no evidence that the requirements of additional cl. B. on the back of the bills of lading have been complied with. [HIS LORDSHIP then referred to the bills of lading, read cl. B (printed at p. 266, letter I, ante) and continued:] The defendants say that since the bills of lading contain no express acknowledgment by the shipowners that the goods have been marked and secured in the manner prescribed in cl. B of the bills, the defendants are excused from what would otherwise be their obligation to pay the plaintiffs under the irrevocable credit which the defendants confirmed, and for which they accordingly accepted liability to the plaintiffs.

The point raised in this case is both novel and important, namely: Is it necessary for bills of lading in this form to contain an acknowledgment that the printed terms as to marking and securing have been complied with, or is the bill of lading acceptable so long as it contains no indorsement or clausing to the effect that this printed clause has not been complied with?

The plaintiffs have called before me a witness, Mr. Donald, of the widest experience in the exporting and importing business, including the exporting and importing of iron and steel. I understand that he has thirty years' experience; that he is on the council of the London Chamber of Commerce; that he is deputy chairman of its exporting and importing section, and on the trade terms committee. He tells me that a clause in similar terms to cl. B is not unusual in bills of lading. A great many bills of lading contain no such clause, but a great many bills of lading do contain such a clause. This witness had never heard of a bill of lading containing the clause in question being objected to on the ground that it did not contain a statement that there had been compliance with such a clause. He told me that in his experience such bills of lading were invariably accepted as good without such a statement. Indeed, there has been produced to me such a bill of lading accepted by the defendants themselves without any such acknowledgment as they now argue is indispensable; it may be that in that particular case, special circumstances were applicable. Mr. Donald's evidence was wholly uncontradicted, and not very seriously challenged. I unhesitatingly accept it.

It follows that if the defendants are right in their present contention, it will be necessary for those concerned with the exporting and importing of iron and steel to revolutionise their present practice when using bills of lading which contain a clause similar to additional cl. B. There may also be a good many disappointed sellers of iron and steel who have already parted with their goods on the faith of confirmed irrevocable credits relying on the practice of banks to accept bills of lading in this form, that is to say, without any express statement that the terms relating to marking and securing of the goods have been complied with.

The letter of credit stipulated that payment would be made against bills of lading without qualification. The plaintiffs suggest that this does not necessarily mean clean bills of lading. In my judgment, when a credit calls for bills of lading, in normal circumstances it means clean bills of lading. I think that in normal circumstances the ordinary business man who undertakes to pay against the presentation of bills of lading means clean bills of lading; and he would probably consider that that was so obvious to any other business man that it was hardly necessary to state it. That seems to have been the view taken by BAILHACHE, J., in *National Bank of Egypt* v. *Hannevig's Bank, Ltd.* (1) ((1919), 1 Lloyd's Rep. 69). I entirely agree with it. No doubt, as was pointed out by the Court of Appeal in that case (ibid., at p. 70), there may be circumstances when, for instance, business has been disorganised by war, in which a credit against bills of lading is not necessarily a credit against clean bills of lading. That is a point which it is unnecessary to decide in this case, for in this case there are no special circumstances, and I read " bills of lading " in the letter of credit as meaning clean bills of lading. A " clean bill of lading " has never been exhaustively defined, and I certainly do not propose to attempt that task now. I incline to the view, however, that a clean bill of lading is one that does not contain any reservation as to the apparent good order or condition of the goods or the packing. In my judgment, the bills of lading in this case are plainly clean bills of lading. They contain no reservation by way of indorsement, clausing or otherwise, to suggest that the goods or the packing are or may be defective in any respect.

The defendants contend that inasmuch as the bills of lading do not contain on their face an express acknowledgment that the goods have been marked in accordance with the provisions of additional cl. B, then either they are not clean bills of lading—I have dealt with that point—or they are so seriously defective that the defendants are entitled to refuse payment. It is to be observed that the letter of credit did not call for bills of lading to be indorsed with any acknowledgment that the provisions of the additional cl. B had been complied with. I do not consider that the defendants have any right to insist on such an acknowledgment before payment. According to their case it was their duty for the remuneration of £18 to read through the multifarious clauses in minute print on the back of these bills of lading, and having observed additional cl. B, to consider its legal effect and then to call for an acknowledgment that there had been compliance with it. I respectfully share the doubt that SCRUTTON, L.J., expressed in *National Bank of Egypt* v. *Hannevig's Bank, Ltd.* (1)* whether any such duty is cast on a bank. I doubt whether they are under any greater duty to their correspondents than to satisfy themselves that the correct documents are presented to them, and that the bills of lading bear no indorsement or clausing by the shipowners or shippers which could reasonably mean that there was, or might be, some defect in the goods, or their packing.

Assuming, however, that the defendants are concerned with the clauses printed on the back of the bill of lading and their legal implications, cl. B does not, in my judgment, require the bill of lading to contain an acknowledgment by the shipowner that it has been complied with. This shipment being from Antwerp, the Hague Rules are compulsorily applied to it. Article IV, r. 2 of the Hague Rules provides:

> " Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from . . . (n) Insufficiency of packing; (o) Insufficiency or inadequacy of marks."

It has never heretofore been suggested (and indeed the defendants do not now suggest) that whenever these provisions of the Hague Rules are impliedly written into a bill of lading, the bill of lading should contain some acknowledgment that these provisions have been complied with.

The plaintiffs contend that (1) if the additional cl. B goes no further than art. IV, r. 2, paras. (n) and (o) of the Hague Rules, it cannot be necessary for the bill of lading to contain any acknowledgment that the clause has been complied with; and (2) if the clause goes further than art. IV, r. 2, and lessens the liability of the carrier and the vessel otherwise than as provided in the rules, then it is null and void under art. III, r. 8, which reads as follows:

> " Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connexion with goods arising from negligence, fault or failure in the duties and obligations provided in this article, or lessening such liability otherwise than as provided in these rules, shall be null and void and of no effect."

These contentions of the plaintiffs are, in my judgment, sound. Additional cl. B is perhaps not very felicitously drafted. Counsel for the defendants, however, contends (rightly in my view) that it does go further than art. IV, r. 2, paras. (n) and (o). He says that on its true construction it means that the vessel is not liable for delivery unless every piece is distinctly and permanently marked with oil paint, and every bundle is securely fastened, distinctly and permanently marked with oil paint and with metal tag, so that each piece or bundle can be distinguished at the port of discharge. He has to concede that, even if the goods are adequately marked by branding, for example, yet if they were not marked with oil paint, the vessel would not be liable for delivery. It may be that the parties can agree what shall be deemed to be adequate marking. In my judgment, however, it is not open to the parties to agree that the goods shall be deemed in certain circumstances to be inadequately marked so as to relieve the vessel or the shippers from liability on that account if in fact and in truth the goods are adequately marked; see *Walters* v. *Joseph Rank, Ltd.* (2) ((1923), 39 T.L.R. 255); *Studebaker Distributors, Ltd.* v. *Charlton Steam Shipping Co., Ltd.* (3) ([1937] 4 All E.R. 304); *Holland Colombo Trading Society, Ltd.* v. *Segu Mohamed Khaya Alawadeen* (4) ([1954] 2 Lloyd's Rep. 45). Accordingly, in so far as the additional cl. B goes beyond art. IV, r. 2 of the Hague Rules, it is null and void.

For these reasons, I have come to the conclusion that the plaintiffs have complied with their obligations under the confirmed irrevocable credit, and that

---

*The passage referred to is not reported in (1919), 1 Lloyd's Rep. 69, but will be found in a report of *National Bank of Egypt* v. *Hannevig's Bank, Ltd.*, in LEGAL DECISIONS AFFECTING BANKERS, Vol. III, 213 at p. 214.

the bills of lading in cases such as these need contain no express statement or acknowledgment that the printed clause dealing with marking or securing the goods has been complied with. Accordingly, in my judgment, the plaintiffs are entitled to succeed in this action, and I give judgment for the plaintiffs for the sum of £21,468 0s. 8d.*

Judgment for the plaintiffs.

Solicitors: *Menassé & Tobin* (for the plaintiffs); *Coward, Chance & Co.* (for the defendants).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

FYNN *v.* INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Upjohn, J.), December 10, 11, 1957.]

Income Tax—Avoidance—Transfer of assets abroad—Associated operations—Transfer of assets to company in Republic of Ireland—Company charging assets to bank—Subsequent unsecured loan of cash by transferor to company—Payment into company's banking account—Whether income of company to be deemed that of transferor—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *s.* 412 (2), (4).

In 1947 the taxpayer caused a company to be incorporated in the Republic of Ireland and in 1948 he sold to it securities worth some £35,000, permitting the purchase money to remain unpaid. In 1949 the company issued shares to the taxpayer in satisfaction of the debt, and these were settled by the taxpayer on the trusts of a settlement governed by Irish law. Subsequently, the company purchased investments in the open market with money borrowed from its bankers. The bank overdraft was limited by the bank to £35,000, secured by a charge on the securities which the taxpayer had transferred to the company. In January, 1952, the taxpayer lent to the company £12,000 without security and free of interest repayable on demand, and that sum was paid to the company's bankers. At the date of the loan the company's overdraft was near the permitted limit and may have exceeded the limit. There was no evidence that the company was being pressed by the bank to reduce the overdraft, and the loan enabled the company to make further investments. The Crown claimed that by making the loan of £12,000, the taxpayer became entitled to receive a capital sum (viz., repayment of the loan) the payment whereof was connected, within the Income Tax Act, 1952, s. 412 (2)†, with "an associated operation" as defined in s. 412 (4)† of the Act of 1952 (viz., the charge by the company to its bankers of the securities transferred to it in 1948) and accordingly that the income of the company by virtue or in consequence of the transfer of securities in 1948 must be deemed, for the purposes of income tax, to be income of the taxpayer. It was conceded that the charge by the company to secure its overdraft was an operation associated (within s. 412 (4)) with the transfer of the securities by the taxpayer to the company in 1948.

Held: the company's income by virtue of the transfer of securities was not deemed by s. 412 of the Income Tax Act, 1952, to be the taxpayer's because

(i) neither the unsecured loan of £12,000 nor the right to receive repayment of it was, on the facts, connected with the transfer of assets in 1948

---

*After discussion the court awarded also interest which, in view of the present state of the money market, was granted at the rate of 5 per cent. per annum.

† These provisions, so far as relevant, are printed at p. 272, post.

A or its associated operation, viz., the charge given by the company to secure its overdraft; and

(ii) the loan was not itself an associated operation within s. 412 (4), because it was not an operation "in relation to" any of the securities transferred by the taxpayer in 1948 or to the charge given by the company to the bank.

B Appeal allowed.

[As to liability for income tax where assets have been transferred abroad and there is a right to receive a capital sum, see 20 HALSBURY'S LAWS (3rd Edn.) 591, para. 1159; as to the meaning of associated operations, see ibid., p. 589, para. 1156.

C For the Income Tax Act, 1952, s. 412, see 31 HALSBURY'S STATUTES (2nd Edn.) 390.]

Case Stated.

This Case was stated by the Special Commissioners of Income Tax under the Income Tax Act, 1952, s. 64 and s. 413 (4). The taxpayer appealed against assessments to income tax under Case VI of Sch. D for 1951-52, in the sum of D £4,005, and for 1952-53, in the sum of £1,769, made on him in respect of sums, being income of Crescent Investments, Ltd., a company which he had caused to be incorporated in and which was resident and domiciled in the Republic of Ireland, on the footing that this income was deemed to be his income by virtue of s. 18 of the Finance Act, 1936, and s. 412 of the Income Tax Act, 1952. The facts are stated in the judgment.

E *C. N. Beattie* for the taxpayer.

Sir Lynn Ungoed-Thomas, Q.C., E. Blanshard Stamp and *A. S. Orr* for the Crown.

UPJOHN, J.: This is an appeal by way of Case Stated from two assessments made by the Special Commissioners on the taxpayer, Mr. Lindsay Fynn, F for 1951-52 under the Finance Act, 1936, s. 18, as amended by the Finance Act, 1938, s. 28, and for 1952-53 under the Income Tax Act, 1952, s. 412. The Income Tax Act, 1952, s. 412, substantially re-enacted the earlier sections which were repealed, and before the commissioners, and before me, the matter has been treated as arising entirely in both years under s. 412. That section, as appears from the sidenote, is designed to prevent the avoidance of income tax G by transactions resulting in the transfer of income to persons abroad.

In 1947 the taxpayer caused a company known as Crescent Investments, Ltd. (which I shall refer to as "Crescent") to be incorporated in the Republic of Ireland, and shares were issued to him. In March, 1948, the taxpayer sold some £35,000 worth of securities to Crescent, the amount due to the taxpayer being left outstanding. It is not disputed that that transfer of H securities was a transfer of assets within s. 412, and it is also admitted that one of the objects of the transfer was to avoid liability to English taxation. I shall refer to these securities as "the transferred assets". In 1949 twenty-five thousand shares were issued to the taxpayer in satisfaction of Crescent's indebtedness to him in respect of the transfer of assets, and in 1949 the taxpayer settled the shares then vested in him on the trusts of a settlement, which was governed in all I respects by the law of the Republic of Ireland. Later Crescent purchased further investments in the open market, which were financed by borrowing from its own bankers; and the position in September, 1951, was apparently that Crescent held investments to the extent of about £81,000, and the bank overdraft, secured by a charge on the transferred assets, stood at some £33,000, the limit permitted by the bank being apparently £35,000.

In January, 1952, the transaction took place with which this appeal is concerned. The taxpayer, being possessed of some surplus funds, lent £12,000, as an interest-free unsecured loan, to Crescent, repayable on demand, and caused that sum of £12,000 to be paid to Crescent's bankers. No doubt the immediate effect was to reduce the overdraft (for which the transferred assets were security) by that amount, but, as is stated in the Case

> " At the time when the [taxpayer] made this loan of £12,000 to Crescent, Crescent's overdraft was near the limit and may have exceeded the limit; the [taxpayer] happened to have cash available; there was no evidence that Crescent was being pressed by the bank to reduce the overdraft, and the loan enabled Crescent to make further purchases of investments."

The inference I draw from that is that Crescent, had it wanted to, could have forthwith withdrawn that £12,000 and used it for any purpose that it cared to. Nothing further happened that is relevant to this case, but, as a matter of history, in March, 1954, the taxpayer in fact released Crescent from its obligation to repay the loan of £12,000. The substantive effect of that was to increase the value of the settled shares by that amount.

Section 412 of the Act of 1952 begins:

> " For the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfers of assets by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the United Kingdom, it is hereby enacted as follows . . ."

It is common ground that that part of the section is entirely satisfied, that is to say, the individual, the taxpayer, is ordinarily resident in the United Kingdom and he has transferred assets whereby income becomes payable to a person (i.e., Crescent) who is resident or domiciled out of the United Kingdom, and it was done with the avowed object of avoiding income tax. On that matter I need say no more than that the taxpayer is perfectly entitled to avoid income tax if he properly can. If, on the other hand, he finds himself in difficulties with a penal section such as this, then one has no sympathy with him if, to use the language of the late LORD GREENE, M.R., he finds that his fingers have been burnt. The relevant sub-section of s. 412 is sub-s. (2), which is in these terms:

> " Where, whether before or after any such transfer, such an individual receives or is entitled to receive any capital sum the payment whereof is in any way connected with the transfer or any associated operation, any income which, by virtue or in consequence of the transfer, either alone or in conjunction with associated operations, has become the income of a person resident or domiciled out of the United Kingdom shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be the income of that individual for all the purposes of this Act. In this sub-section, 'capital sum' means—(a) any sum paid or payable by way of loan or repayment of a loan."

Sub-section (4) is in these terms:

> " For the purposes of this section, ' an associated operation ' means, in relation to any transfer, an operation of any kind effected by any person in relation to any of the assets transferred or any assets representing, whether directly or indirectly, any of the assets transferred, or to the income arising from any such assets, or to any assets representing, whether directly or indirectly, the accumulations of income arising from any such assets."

Sub-section (5), so far as relevant, provides:

> " An individual shall, for the purposes of this section, be deemed to have power to enjoy income of a person resident or domiciled out of the United Kingdom if . . . (b) the receipt or accrual of the income operates to increase the value to the individual of any assets held by him or for his benefit."

After the transfer the taxpayer was entitled to receive a capital sum, i.e., repayment of the £12,000 lent by him to Crescent. The question which I have to consider is whether it is proper to say that, within the terms of s. 412 (2), the taxpayer was entitled to receive a capital sum "the payment whereof is in any way connected with the transfer or any associated operation". Having regard to the definition of "an associated operation" in sub-s. (4), it is conceded that the charge by Crescent of the transferred assets to secure its overdraft is an operation which can properly be described as associated with the transfer of assets. We do not know exactly when that charge was created, but it is common ground that it was so created. The Special Commissioners have held that the right to receive the capital is connected with the associated operation of the charge of assets, and they put it in this way, in para. 7 of the Case:

> "We, the commissioners who heard the appeal, held that the charging of the transferred securities to Crescent's bankers was an associated operation in relation to the transfer of the transferred securities. We held that on Jan. 3, 1952, when the [taxpayer] lent £12,000 to Crescent, he became entitled to receive a capital sum the payment whereof was connected with the said associated operation; in coming to this conclusion we were of the opinion that if (as we held to be the case) the loan itself was in any way connected with the charge which secured Crescent's overdraft, then the [taxpayer's] right to demand repayment of the loan was equally so connected; further, in coming to this conclusion, we held that on the true construction of sub-s. (2) of s. 412, the fact that no capital sum was ever paid or will ever be paid was immaterial, so long as the [taxpayer] was entitled to demand payment."

I am not going to attempt any definition of what meaning should be given to the phrase "the payment whereof is in any way connected with the transfer"; or in particular to attempt any definition of the vital word "connected" except to say that it must receive its ordinary meaning. Every case must be dependent on its own facts, but I look at those facts and ask myself whether it can be said that the right to receive repayment of the £12,000 is in any way connected with the original transfer or with the charging of the transferred assets by Crescent. It is said that it is so connected because the payment of the £12,000 reduced the overdraft secured on the transferred assets. I can see no connexion whatever between the charge of transferred assets on the one hand and either the lending of the money or the right to receive payment on the other. They do not seem to me to have any connexion at all one with the other on the facts of this case.

Then it is said that the actual loan itself is an associated operation, and attention is drawn to the words in s. 412 (4), "an operation of any kind effected by any person". So far so good. Is it an operation effected in relation to any of the transferred assets? It is said that it is because the loan reduced the overdraft. There again I propose not to attempt any definition of the phrase "in relation to any of the assets transferred". I cannot see that the making of the unsecured loan can be said in any ordinary use of language to have any relation to the previously created charge. It was an unsecured loan made on the facts of this case not for the purpose of reducing the overdraft because the bank were pressing for payment; nor for the purpose of freeing the assets from the charge. It was made to Crescent as an interest-free unsecured loan and Crescent could have used it in any way that it pleased. I cannot see that it bears any relation to any of the transferred assets or to the charge.

A further argument was addressed to me. It was said that the operation was in relation to the transferred assets even if the assets had not been charged, because the assets are available for repayment of the loan. I do not follow this argument.

An argument was also addressed to me on sub-s. (5). It was said that the taxpayer had power to enjoy income because he fell within para. (b) of that sub-section. That may or may not be so. There is some authority* on that, but in my judgment sub-s. (5) is linked up with sub-s. (1) where the phrase is used " power to enjoy income ", and in my judgment sub-s. (5) cannot be used to enlarge the definition in sub-s. (4).

In my judgment, the Special Commissioners have misdirected themselves, and the appeal must be allowed and the assessment discharged.

Order accordingly.

Solicitors: *Allen & Overy* (for the taxpayer); *Solicitor of Inland Revenue.*

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

RACECOURSE BETTING CONTROL BOARD *v.* YOUNG (INSPECTOR OF TAXES).
RACECOURSE BETTING CONTROL BOARD *v.* INLAND REVENUE COMMISSIONERS.
YOUNG (INSPECTOR OF TAXES) *v.* RACECOURSE BETTING CONTROL BOARD.
INLAND REVENUE COMMISSIONERS *v.* RACECOURSE BETTING CONTROL BOARD.

[CHANCERY DIVISION (Upjohn, J.), December 3, 5, 6, 1957.]

Income Tax—Deduction in computing profits—Expenses—Distribution by statutory body pursuant to statute from moneys available after deduction of working expenses—Distribution benefiting trading activity of statutory body—Whether deductible as expense for income tax purposes—Racecourse Betting Act, 1928 (18 *&* 19 *Geo.* 5 *c.* 41), *s.* 3 (6)—*Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *s.* 137 (*a*).

The Racecourse Betting Control Board was constituted by the Racecourse Betting Act, 1928, and carried on a trade of running totalisators at racecourses. By s. 3 (4) of that Act, it was provided that the board should establish a fund known as the totalisator fund, into which it was to pay a percentage of moneys staked by means of the totalisator, and any other moneys received by the board. By s. 3 (6) it was provided that the board should (subject to the payment out of the totalisator fund of all taxes, rates, charges, and working expenses, and to the retention of such sums as it thought fit to meet contingencies, and to the payment out of the said fund of such sums as it thought fit to charitable purposes) apply the moneys comprised in the totalisator fund in accordance with a scheme prepared by the board and approved by the Secretary of State for purposes conducive to the improvement of breeds of horses or the sport of horse racing. In each relevant year, over £500,000 was available for application in accordance with schemes prepared under s. 3 (6), and in 1952, 1953 and 1954, under such schemes, about £250,000 was allocated to a " racecourse fund " which was divided among racecourses, generally for improvement to them. In 1953 £168,000 was expended in travelling allowances to owners and trainers. In 1952 £60,000 was paid towards the administrative expenses of the Jockey Club, the National Hunt Committee and the Race Finish Recording Camera. Money was also paid for the benefit of point-to-point meetings. It was not disputed that all these payments were conducive to

---

*See, possibly, *Ramsden* v. *Inland Revenue Comrs.* ((1957), 59 Taxation 389), and *Howard de Walden (Lord)* v. *Inland Revenue Comrs.* ([1942] 1 All E.R. 287).

increasing the profits of the board. The board claimed to deduct the amounts so expended in accordance with schemes under s. 3 (6) in arriving at its profits for the purposes of income tax under Sch. D. In order to test the matter further, the board began to treat as an expense of operation in its accounts a runners' allowance, viz., a payment of £1 to the owner of each horse running in a race, which it began to pay in 1954 and which it considered would provide an inducement to racehorse owners to run their horses in races and so help to promote the totalisator turnover.

Held: in computing the board's profits for income tax purposes (and also for the profits tax) the board was not entitled to deduct amounts applied by it pursuant to schemes under s. 3 (6) of the Racecourse Betting Act, 1928, for the following reasons—

(i) appropriations under s. 3 (6) of the Act of 1928 were statutory trust distributions of a fund ascertained after working expenses, etc., had been deducted from the surplus of the board's trading activities and were not trade expenses within s. 137 (a) of the Income Tax Act, 1952 (see p. 286, letter E, post).

Inland Revenue Comrs. v. *Dowdall, O'Mahoney & Co., Ltd.* ([1952] 1 All E.R. 531) considered.

(ii) such payments as, e.g., the runners' allowances, were not " working expenses " (within s. 3 (6) of the Act of 1928) deductible before ascertainment of the funds available for appropriation, and the inclusion of them in the board's accounts as such working expenses was ultra vires (see p. 286, letter H, post).

(iii) even if such payments had been " working expenses " they would not have been deductible expenses within s. 137 (a) of the Income Tax Act, 1952, as they were incurred for the benefit of racing, or of the racegoing public or racecourse executives, rather than for the benefit of the board (see p. 287, letter A, post).

Semble: appropriations under s. 3 (6) of the Racecourse Betting Act, 1928, towards installations constituting improvements at racecourses belonging to others were not expenditure of a capital, as opposed to a revenue, nature for income tax purposes (see p. 288, letter D, post).

British Insulated & Helsby Cables v. *Atherton* ([1926] A.C. 205) considered.

Appeals allowed; cross-appeals dismissed.

[As to deducting expenditure to earn future profits and not deducting expenses unconnected with trade for income tax purposes, see 20 HALSBURY'S LAWS (3rd Edn.) 169, 170, paras. 290, 291; and as regards expenses not incurred for commercial reasons, see ibid., p. 170, para. 292; for cases on the subject of the deduction of expenses for income tax purposes, see 28 DIGEST 42-45, *215-226*.

For the Income Tax Act, 1952, s. 137 (a), see 31 HALSBURY'S STATUTES (2nd Edn.) 134.

For the Racecourse Betting Act, 1928, s. 3, see 10 HALSBURY'S STATUTES (2nd Edn.) 783, 784.]

Cases referred to:

(1) *Inland Revenue Comrs.* v. *Stonehaven Recreation Ground Trustees,* 1930 S.C. 206; 15 Tax Cas. 419; Digest Supp.

(2) *Harris* v. *Irvine Corpn.*, (1900), 2 F. (Ct. of Sess.) 1080; 65 J.P. 663; 28 Digest 21*n*.

(3) *Mersey Docks & Harbour Board* v. *Lucas*, (1883), 8 App. Cas. 891; 53 L.J.Q.B. 4; 49 L.T. 781; 48 J.P. 212; 2 Tax Cas. 25; 28 Digest 21, *104*.

(4) *Inland Revenue Comrs.* v. *Dowdall, O'Mahoney & Co., Ltd.*, [1952] 1 All E.R. 531; [1952] A.C. 401; 33 Tax Cas. 259; 3rd Digest Supp.

(5) *Strong & Co., Ltd.* v. *Woodifield*, [1906] A.C. 448; 75 L.J.K.B. 864; 95 L.T. 241; 5 Tax Cas. 215; 28 Digest 57, *290*.

(6) *Smith's Potato Estates, Ltd.* v. *Bolland. Smith's Potato Crisps (1929), Ltd.* v. *Inland Revenue Comrs.*, [1948] 2 All E.R. 367; [1948] A.C. 508; [1948] L.J.R. 1557; 30 Tax Cas. 267; 2nd Digest Supp.

(7) *Boyce* v. *Whitwick Colliery Co., Ltd. Coalville Urban District Council* v. *Boyce*, [1934] All E.R. Rep. 706; 151 L.T. 464; 18 Tax Cas. 655; Digest Supp.

(8) *British Insulated & Helsby Cables* v. *Atherton*, [1926] A.C. 205; 95 L.J.K.B. 336; 134 L.T. 289; 28 Digest 52, *264*.

(9) *Anglo-Persian Oil Co., Ltd.* v. *Dale*, [1932] 1 K.B. 124; 100 L.J.K.B. 504; 145 L.T. 529; 16 Tax Cas. 253; Digest Supp.

(10) *Mallett* v. *Staveley Coal & Iron Co., Ltd.*, [1928] 2 K.B. 405 ; 97 L.J.K.B. 475; 139 L.T. 241; 13 Tax Cas. 772; Digest Supp.

(11) *Bolam* v. *Regent Oil Co.*, [1956] T.R. 403.

Case Stated.

These were two appeals and cross-appeals. Of the two appeals one was brought by the Commissioners of Inland Revenue and the other was brought by one of H.M. Inspectors of Taxes, by Cases stated under the Finance Act, 1937, Sch. 5, Part 2, para. 4, and the Income Tax Act, 1952, s. 64, against decisions of the Commissioners for the Special Purposes of the Income Tax Acts allowing the appeals of the Racecourse Betting Control Board against assessments to income tax and the profits tax for the years 1953-54 and 1954-55 in respect of its trade as totalisator operator. The two appeals raised precisely the same point and were treated by His Lordship (UPJOHN, J.) as one appeal. Of the two cross-appeals, one related to income tax and the other related to the profits tax; both were brought by the board and raised the question whether certain expenditure was of enduring capital benefit which ought to be treated as capital and not as revenue expenditure. The two cross-appeals raised but one question and were treated by His Lordship as one.

The following is taken or summarised from the Case stated for the purposes of the income tax appeal. For the purposes of the appeal it was admitted on behalf of the board that it carried on a trade as totalisator operator, and the question for the decision of the commissioners was whether it was entitled in computing its profits of such trade, to deduct as expenses certain payments, details of which were thereinafter set out. The answer to that question depended on two issues: (a) whether such payments were wholly and exclusively laid out or expended for the purposes of the trade, within the meaning of s. 137 (a) of the Income Tax Act, 1952, and (b) whether such payments or any of them were of a capital nature whose deduction would be prohibited by para. (f) or (g) of the same section. The following facts were proved or admitted. The board was established as a body corporate under s. 2 of the Racecourse Betting Act, 1928, and under s. 1 the board was empowered to operate a totalisator on racecourses when horse races took place. Since the board was established it had operated totalisators on many racecourses each year. Briefly stated, the operation of a totalisator consisted in the acceptance of bets at a building on the course from members of the public. When the race was decided the whole of the money staked was, in accordance with s. 3 (3) of the Act of 1928, distributed to persons who had won their bets on that race, after deducting such percentage of the money staked as the board might determine. In practice the board only deducted a percentage from the money staked on losing horses except as to special pools accounting for some 17 per cent. of all money staked when the percentage deduction was calculated on the whole pool. The board had thus left in its hands the percentage of the bets made. That percentage was termed the totalisator fund (s. 3 (4) of the Act of 1928). Out of the fund the board paid the working expenses of running the totalisator and such other administration expenses as were necessary. For the purpose of setting up buildings on racecourses in which the totalisator was to operate, the board entered into agreements with racecourse owners providing, among other things, for the demise to the board of the sites of such buildings. From time to time, and in particular during the years material to this appeal, the board had made certain voluntary payments to the owners of racecourses, to the owners of race horses entered for races, to the Jockey Club and the National Hunt Committee, to the Pony Turf Club, and to the organisers of point-to-point meetings. It was those payments which the board sought to deduct in computing its profits. Details of the amounts of these payments were incorporated with the Case stated. Facts relating to each payment, exemplified in relation to the items for the year ended Dec. 31, 1953, are hereinafter set out; facts relating to payments in the years ended Dec. 31, 1952, and 1954, were similar.

The following were the facts relating to the payments—

(i) Payments to racecourse executives from the racecourse fund—£230,977. In 1947 the board established a fund, then termed the Central Racing Reserve Fund but now termed the Racecourse Fund, and allocated each year a round sum to the fund. Each of the seventy-three racecourses at which the board operated totalisators was allocated a proportion of this sum, the proportion being determined by the post-war cost of maintenance of each racecourse as a fraction of the total cost of maintaining all the racecourses. The owner of each racecourse was invited to put forward proposals to the board as to how it was proposed to expend the amount allotted. Such proposals were considered first by the Jockey Club or the National Hunt Committee, as the authority concerned with horse racing, and then were considered by the board and finally were approved by the Home Secretary. When the racecourse owner had paid the sum in question he applied for reimbursement out of the Racecourse Fund. Further details of the scheme had been set out in a circular issued on Oct. 31, 1947, to the owners of racecourses. For the first few years the amount allotted was normally used by the racecourse concerned to rehabilitate its buildings and amenities consequent on their deterioration due to the war, and for the provision of further amenities, such as a new stand or restaurant. In 1952, however, the board, impressed by the difficulty of getting owners to run horses in races, gave a general authority to the racecourses to use up to 25 per cent. of the total amount appropriated to each racecourse to augment the prize money which was provided for the races. The prize money for a race was constituted in part by funds made available by the racecourse proprietors, and in part out of the entrance moneys paid by the owners of horses running in the races. In 1954 the amount which could be so used for prize money was increased to 50 per cent. of the grant to each racecourse from the Racecourse Fund. Analyses of payments to racecourses, their expenditure, and a detailed illustration how one sum was expended were annexed to the Case stated.

(ii) Payments to owners and trainers in reduction of the cost of travelling racehorses to race meetings—£168,555. The cost of maintaining a racehorse had, even before the war, largely exceeded any amount that on an average was obtained by an owner in prize money, and the excess of the cost over the prize money had very largely increased in the years with which the appeal was concerned. In order to assist racehorse owners in meeting the expenses of bringing their horses to racecourses, the board made grants to the owners. A contribution towards such expenditure was also made by the racecourse owners. The amount contributed by a racecourse owner varied with each course, but the amount paid by the board was based entirely on mileage. It was hoped by this means to increase the number of runners in the various races, since it was felt that owners would be prevented by the heavy expenditure involved from taking their horses to racecourses some distance from where the horse was kept.

(iii) Runners' allowance, amount attributable to 1954—£3,087. In 1954 the board introduced an additional allowance to owners of horses who ran their horses in any race, the amount being a fixed one of £1 per runner. The object of this allowance was the same as that of the travelling allowance mentioned in para. (ii), viz., to induce owners to enter and run their horses in races.

(iv) Payments towards the administrative expenses of the Jockey Club and National Hunt Committee, and the cost of the Race Finish Recording Camera —£62,050. These payments were made by the board to the Jockey Club and the National Hunt Committee. They were used to meet the salaries of racing officials, starters, judges and clerks of the course, who were provided by the Jockey Club or the National Hunt Committee to supervise the racing at flat races and point-to-point meetings respectively. If this amount had not been paid by the board, it would have had to have been paid by the racecourse owners, or the hunt which organised the point-to-point meetings. The supervision by officials of the Jockey Club and the National Hunt Committee ensured that the racing was properly conducted.

(v) Payments for assistance in 1953 of point-to-point meetings—£24,233. The board operated totalisators at some point-to-point meetings, and these payments, which amounted to 5 per cent. of the turnover of the totalisator at such meetings, were made to the hunt which ran the meetings, usually once a year, because without such a subvention the hunt might not have been able to have run meetings at all. Some of the meetings were profitable to the board, and others were not.

(vi) Payments for the assistance of racing under the rules of the Pony Turf Club—£1,975. The Pony Turf Club ran only two meetings in the years under consideration, and neither meeting was a financial success. The board operated totalisators at these two meetings and gave the subvention in question to the club to try to ensure that such meetings should not be discontinued, but in fact pony-racing thereafter ceased, so that the board lost the receipts from totalisators at the pony club meetings.

It was the experience of the board that the amount of money staked with the totalisator on any race increased with the number of runners in the race. For example, the board's average revenue from a race with only two runners was £76, but from a race with ten runners was £827. It was thus very much in the interests of the board, considered as a trader, that the number of horses running in any race should be as high as possible. It was also in the board's interests as a trader that as many members of the public as possible should attend a race-meeting, since the receipts of the totalisator would usually be increased thereby. The board obtained its funds principally from the large racecourses and racecourses near populous areas, particularly round London. Approximately two-thirds of the total bets laid with the totalisator were made " on course ", and one-third were made " off-course " through Tote Investors, Ltd., and London and Provincial Sporting News Agency (1928), Ltd., which companies carried on the business of relaying bets made off the course to the totalisators on the course and were remunerated for this service by commission paid by the board. It was in the board's interests that the buildings and other amenities of a racecourse should be as attractive as possible, and that the racing public should have confidence in the fair and proper conduct of the racing, and in the accuracy of the official results of races. Supervision of racing by officials of the Jockey Club, the National Hunt Committee and the Pony Turf Club, and the provision of a Race Finish Recording Camera, ensured, so far as was possible, such fair and proper conduct and such accuracy. In these respects the interests of the board coincided with the interests of the bookmakers, who also benefited by increased attendances, improvements of amenities and proper supervision of racing.

All the payments in question, details of which have been given at p. 277, letter C, to p. 278, letter E, ante, were included in schemes prepared by the board in accordance with s. 3 (6) of the Racecourse Betting Act, 1928, as modified by the Betting and Lotteries Act, 1934, s. 18 (5), and had been approved by the Secretary of State, with the exception of the runners' allowances referred to at (iii), pp. 277, 278, ante. The runners' allowances were included by the board in its accounts as working expenses and were not included in any scheme prepared under s. 3 (6), in order to test the question whether inclusion in such a scheme was material for tax purposes. The amounts included in such schemes were the amounts set aside for each year for that purpose out of the totalisator fund, whereas the amounts now claimed as deductions were (except as regards assistance to point-to-point meetings) the amounts actually expended in succeeding years.

If the board had not made contributions (as previously indicated) to the prize-money paid by the racecourses, and had not paid rent and admission fees for its staff to enter the racecourse (as the board did), the total profits for the year 1954 made by seventy-two racecourses would have dropped from £275,130 to £58,062, the total profits of nine racecourses where profits exceeded £10,000 would have dropped from £159,800 to £108,850, and the total profits of the sixty-three racecourses whose profits were below £10,000 would have been turned into losses totalling £50,788. The average attendances at race-meetings had dropped from 10,219 per day in 1948 to 8,425 per day in 1953 and the net amount received by racecourses (viz., the admission fee less entertainment tax) had only increased between 2d. and 9d. On the other hand the expenses of racecourses were estimated to have increased by two or three hundred per cent.

The commissioners were satisfied on the evidence that the payments referred to (viz., the voluntary payments to the owners of racecourses, to the owners of racehorses entered for races, to the Jockey Club and the National Hunt Committee, to the Pony Turf Club, and to the organisers of point-to-point meetings) were made by the board with the object of increasing the receipts of its totalisators, although the payments might and in all cases did (in the words of s. 3 (6) of the Act of 1928) improve the breed of horses or the sport of horse-racing and although the increase in such receipts was not in all cases expected to be exactly proportionate to the expenditure.

By a deed of covenant and trust made on Sept. 1, 1950, the board covenanted to pay to certain trustees annually sums which, after deduction of tax, would be equal to 8 per cent. of the totalisator fund after paying expenses, rates and taxes (including income tax) and providing for contingencies and repaying borrowed moneys. The trustees were to stand possessed of the moneys so paid to them to apply the same for such charitable purposes and in such amounts and manner as might be prescribed by resolution of the board. The board had in each year directed the application of the trust fund for purposes conducive to the improvement of the breeds of horses, for the advancement of veterinary science and education, and for various other charitable purposes; but the societies to which donations were made concerned themselves with the breeding of horses other than racehorses.

It was contended on behalf of the board that all the items of expenditure previously referred to were proper deductions in computing the profits of its trade. It was contended on behalf of the inspector of taxes that none of such items of expenditure was so deductible because none of them was wholly and exclusively expended for the purposes of the trade; and such of them as resulted in the creation of enduring assets, e.g., new buildings on racecourses, were of a capital nature.

The Special Commissioners gave their decision in writing. They determined that all items of expenditure under head (i)-(vi), pp. 277, 278, ante, were paid wholly and exclusively for the purposes of the board's trade and that the assessments should be reduced by allowing deductions in the computing of profits accordingly. They found, on the other hand, that certain of the payments in question were reimbursements of expenditure on the provision of certain physical installations on racecourses (examples of these were given in an exhibit annexed to the Case stated and included work on new stands, paving in stand enclosures, staircase to a club stand, coach and car parks improvements and number board improvements, etc.). Such installations, the commissioners found, were of enduring advantage to the board and they therefore held that such payments were of a capital nature and were not proper deductions in arriving at the board's profits.

F. N. Bucher, Q.C., A. S. Orr and *J. G. Monroe* for the Crown.

Heyworth Talbot, Q.C., and *D. C. Miller* for the taxpayers, the Racecourse Betting Control Board.

UPJOHN, J.: I shall deal first with the appeals by the Crown.

The Racecourse Betting Control Board, as is well-known, carries on a trade of running totalisators at a large number (some seventy-two or seventy-three) racecourses in England. The board was set up in 1928 by the Racecourse Betting Act, 1928, and much will depend on that Act. Its title is:

> " An Act to amend the Betting Act, 1853, to legalise the use of totalisators on certain racecourses, and to make further provision with regard to betting thereon."

Section 1 relaxed the provisions of the Betting Act, 1853, in relation to approved racecourses, and it provided that on such an approved racecourse the Racecourse Betting Control Board might set up a totalisator and operate it with regard to the public attending the horse-race. The operation of a totalisator now being so well-known, I need not describe it in any way. Section 2 set up and incorporated the board and provided for the board's constitution and procedures. The important section, s. 3, provides:

> " The Racecourse Betting Control Board—
>
> " (1) may for the purposes of this Act issue (subject to such conditions as they may impose) and at any time revoke certificates of approval in respect of racecourses and ground adjacent thereto;
>
> " (2) shall make it a condition of the grant of a certificate of approval of any racecourse that the persons having the management of such racecourse shall provide a place, whether in a building or not, where bookmakers may carry on their business and to which the public may resort for the purpose of betting, and that the charge to a bookmaker and to any assistant accompanying him, for admission to an enclosure on the racecourse for the purpose of the bookmaker's business shall, in the case of a bookmaker, not exceed five times the amount, and in the case of an assistant not exceed the amount of the highest charge made to members of the public for admission to the enclosure;
>
> " (3) shall distribute or cause to be distributed the whole of the moneys staked by means of a totalisator on any race among the persons winning bets made by means of the totalisator on that race, after deducting or causing to be deducted such percentage of those moneys as the board may from time to time determine either generally or with respect to any particular racecourse;
>
> " (4) shall establish a fund known as the totalisator fund, into which shall be paid the percentage deducted as aforesaid of moneys staked by means of the totalisator, and any other moneys received by the board;
>
> " (5) may, for the purposes of this Act, borrow money upon the security of such fund or otherwise, and lend money for the purpose of setting up or operating totalisators in accordance with the provisions of this Act;

> "(6) shall (subject to the payment out of the totalisator fund of all taxes, rates, charges, and working expenses, and to the retention of such sums as they think fit to meet contingencies, and to the payment out of the said fund of such sums as they think fit to charitable purposes) apply the moneys from time to time comprised in the totalisator fund in accordance with a scheme prepared by the board and approved by the Secretary of State for purposes conducive to the improvement of breeds of horses or the sport of horse racing;
>
> "(7) may do all such things as are incidental to the foregoing matters;
>
> "(8) shall submit annually to the Secretary of State a report of their proceedings, together with an account, in such form as may be prescribed by the Secretary of State, of the moneys received and expended by them during the year, and such report and account shall be laid by the Secretary of State before both Houses of Parliament."

An amendment was made to that Act in 1934 by s. 18 (5) of the Betting and Lotteries Act, 1934, to this extent, that the purposes for which a scheme might be prepared and approved by the Secretary of State might include purposes conducive to the advancement and encouragement of veterinary science and education.

The general scheme of s. 3 is clear enough. The board might issue certificates of approval of racecourses and set up totalisators thereon, but it was to be a provision or a condition of any certificate of approval that there should be a place where bookmakers might carry on their business, though they might have to pay higher charges than were formerly permissible; and then there are the provisions as to what is to happen to the fund created by the deduction of a percentage from the proceeds of a totalisator stake. From its inception until 1954, the general method of procedure was this. The totalisator fund was, each year, very substantial, and in each year with which I am concerned the total amounts invested with the totalisator were, broadly speaking, about £25 million and the dividends paid out were £22 or £23 million. Then there were the expenses of management and so forth, and that left for application each year in accordance with schemes prepared by the board and approved by the Secretary of State, something over £500,000.

Those schemes have been set out very fully in the Case Stated*, and I do not think that I need do more than attempt a very brief recital of them. In each of the years ending 1952, 1953 and 1954, the surplus went in this way. About £250,000 went to a fund set up by the board called the Racecourse Fund and that sum was divided amongst the racecourses, approximately speaking, in proportion to the cost of maintenance of each racecourse as a fraction of the total cost of maintaining all racecourses. That fund could only be expended by the racecourses in accordance with proposals which were approved by the board, and that was normally for improvements to the racecourse itself—buying additional land, improving the grandstands and many other ways of improvement which were set out in the Case. In 1952 such were economic difficulties that it was difficult to get owners to run horses in races, and so the board gave a general authority to racecourses to use up to twenty-five per cent. of the total amount appropriated to each racecourse for the purpose of augmenting prize money, to attract more entries and, no doubt, of a better quality. Another class of expenditure in view of economic difficulties was that travelling allowances were made to owners and trainers to meet the cost of taking racehorses to race meetings; and in 1952 some £168,000 was so expended. The scheme was expanded in 1954 by a runners' allowance, and it was then decided to give every owner whose horse ran in a race £1 for doing so. With a view to testing the legal position provision of £42,000 under the heading of operating expenses was made in the accounts for 1954 for this allowance.

*** See pp. 277, 278, ante, for the details stated in the Case.**

A further class of expenditure was towards the administrative expenses of the Jockey Club and the National Hunt Committee and of the Race Finish Recording Camera. In 1952 those apparently amounted to some £60,000, and the sums so applied were used to meet the salaries of racing officials, starters, judges, clerks of the course and others, expenses which, had they not been contributed to by the board, would have had to be paid by the racecourse owners or hunts which organised point-to-point meetings. About £25,000 was paid for the benefit of point-to-point meetings, and, finally, a small sum was devoted to the Pony Turf Club, but that seems to have come to an end, because they have ceased to have pony racing.

It is fair to say that the board has been a great benefactor to the sport of racing. There is no doubt that, at any rate, one of the reasons why those payments were made was that it was in the interests of the board as a trader, for the very simple reason that the more people that can be persuaded to attend a race meeting, the more people are likely to come and bet on the tote. Some of them, of course, will bet with the rivals who have to be accommodated, the bookmakers. Others of them will bet on the tote, and so, to increase the turnover of the tote, increased attendance is needed at race meetings; and one way of increasing attendance is to improve the racecourse so that it is more attractive to members of the public. Another way of doing that is to try to increase the number of horses running and the quality of the horses running. That is done by making travelling allowances and by increasing the prize money; for this was established without a shadow of doubt, that the more horses that there are in any given race, the more money is placed on the tote in respect of that race. So these payments were in fact very much to the benefit of the board itself, and, as was pointed out in the Case, in these respects the interests of the board coincide with the interests of the bookmakers, who also benefit by increased attendances, improvements of amenities and proper supervision of racing.

Until 1954 those appropriations were made by way of schemes approved by the Secretary of State, and the totalisator fund was operated in this way. The fund, after paying the dividends to winners of races, was paid to an account and, out of that, the operating expenses and headquarters expenses were deducted. Then the balance was ascertained. On that, income tax was paid in the usual way.. The surplus, amounting as I have said to something over £500,000 for each of the relevant years, was then dealt with by way of scheme in the manner I have described. In 1954, however, a different attitude was adopted, quite properly, by the board. I can best deal with that by reading an extract from the report of the board to the Secretary of State for 1954, and I can begin reading at para. 3 (ii):

> " Shortly after their establishment in 1928 the board took up with the authorities, at the highest level, the question of their liability to tax and took advice on the matter. The outcome was that up to the present, the board have been treated as carrying on a trade for taxation purposes and, on the basis of the advice tendered to them, have accepted this treatment. On this footing, the board's taxable profits have been regarded, by the Inland Revenue, as being the balance in the totalisator fund after meeting rates and working expenses (interpreting the words ' working expenses ' in their narrowest sense) with the result that *all* expenditure incorporated in schemes approved by the Secretary of State under the Act, has been treated as having been paid out of taxed profits. (iii) The board have now been advised by counsel that—if a trade is indeed carried on—this treatment is wrong in law and that disbursements genuinely made by the board for the purposes of their trade or business are not rendered ineligible as deductions in arriving at the taxable profits on the ground, simply, that they are made, have been made or could equally be made, under a statutory scheme approved by the

> Secretary of State . . . (v) In view of the very definite advice received by them, the board, in these circumstances, have decided that it is their duty to contest the taxation issues in the courts. The board have also, during the past year, incurred expense of a kind analogous to that heretofore made under statutory schemes."

Then the report sets out the runners' allowance at £1 per starter. The board had done that perfectly fairly and openly with the view of seeing whether that was a proper way of dealing with the matter in the accounts.

The question which I have to determine is whether that view which has been expressed by the board is correct or not, or whether the former procedure is indeed the proper procedure that should be followed from an income tax point of view.

On behalf of the board counsel has put the case in this way. He submits that the board is not really a trader at all. It is a statutory administrator which has statutory obligations to fulfil; but he concedes that for the purposes of income tax the activities of the board are in the nature of trade and are taxable if a surplus be shown as such. He submits, however, that the expenses of making provisions for the improvements of stands and so forth which I have already enumerated are the expenses of carrying on that trade and ought to be allowed before a balance for the purposes of income tax is ascertained. He submits that one must look at the activities of the board as a whole for the purpose of income tax. Every penny that it disburses, he points out, should be a disbursement out of the totalisator fund, and he says you must regard the board, if it is to be regarded as a trader at all, as a trader throughout its activities. That does not necessarily mean, as he fairly concedes, that all expenses are necessarily deductible for the purposes of income tax. The only expenses that can be deducted are those which fall within the Income Tax Act, 1952, s. 137 (a). The words are very well known:

> " Subject to the provisions of this Act, in computing the amount of the profits or gains to be charged under Case I or Case II of Sch. D, no sum shall be deducted in respect of—(a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession or vocation."

He concedes that he has to establish that these expenses are " wholly and exclusively laid out or expended for the purposes of the trade." He submits that at the end of each accounting year the board has a surplus to deal with, and it can consider how that surplus should be dealt with, just like any ordinary trading concern. A trading concern finds it has a surplus at the end of a year's trading. It may decide to apply it in a dividend; but it may not. The board may, for instance, decide to apply it in paying a bonus wage or in undertaking some advertising activity. Then next year, when it is found that profit has been applied in paying a bonus wage, that obviously is an expense allowable for income tax, and, if some of it has been applied as an ordinary trade advertising expenditure, it, too, will be allowed for the purposes of tax. So, he says, here you find that the board has a surplus. It then decides to apply it to matters which he submits are wholly and exclusively laid out for the purpose of the trade; that is to say, for the improvement of racecourses or the increase of prize money and all the other matters which I have discussed, because that is an expenditure which has to be incurred to earn more profits, and he relies on the well-known passage in *Inland Revenue Comrs.* v. *Stonehaven Recreation Ground Trustees* (1) ((1930), 15 Tax Cas. 419), in the judgment of the Lord President (LORD CLYDE) who says (ibid., at p. 426):

> ". . . it is trite law that, as Lord President KINROSS observed in *Harris* v. *Irvine Corpn.* (2) ((1900), 2 F. (Ct. of Sess.) 1080 at p. 1084), ' the term

> " profits " prima facie means all the net proceeds of a concern or adventure, after deducting the necessary outgoings without which these proceeds could not be earned, but when the proceeds have been so ascertained, income tax is leviable on the full balance of them, to whatever purpose,—whether to the payment of debt or any other purpose,—they are applied after they have been earned—*Mersey Docks & Harbour Board* v. *Lucas* (3) ((1883), 8 App. Cas. 891) '."

That, he submits, is the case here. It must be asked for what purpose, for example in 1954, were these payments or appropriations made. The answer he submits, must be that, if for the relevant purpose, that of collecting tax, the board is to be regarded as a trader, those sums were expended wholly for the purpose of the trade with the object and for the purpose of increasing the trade and increasing the profits in future years; and in para. 7 of the Case the commissioners accept that view. They say:

> " We were satisfied on the evidence that all the payments set out in exhibits B, B1 and B2 were made by the board with the object of increasing the receipts of its totalisators, although such payments might and in all cases did (in the words of s. 3 (6) of the Act of 1928) improve the breed of horses or the sport of horse-racing, and although the increase in such receipts was not in all cases expected to be exactly proportionate to the expenditure."

They came to the conclusion which they set out in para. 12 (2):

> " We are concerned with certain items of expenditure by the board details of which are set out in exhibits 2, 2 (a) and 2 (b) (hereto annexed as exhibits B, B1 and B2) which it claims are proper deductions in computing the profits of such trade for the purpose of income tax. For this claim to succeed it must be shown firstly that such expenditure was made wholly and exclusively for the purposes of the trade and secondly was not of a capital nature. (3) We do not consider that the terms of the two Acts setting up the board and regulating its activities, and in particular s. 3 (6) of the Act of 1928, are at all conclusive in determining the two questions at issue; nor do we think it proper to conclude that the balance of the totalisator fund after deduction of the items set out in brackets in that sub-section corresponds with the profit of the trade which is to be taxed. The Act does not purport to be concerned with taxable profits, and one of the items in the bracket, namely payment to charitable purposes, would only in exceptional circumstances form a proper deduction in computing the profits of a trade. (4) We consider that in this as in other cases we have to determine whether the disputed payments were made wholly and exclusively for the purposes of the board's trade upon the evidence of the witnesses called before us, and an examination of the documents placed before us. Upon a full consideration of such evidence and documents we find that all the items set out in exhibit 2, 2 (a) and 2 (b) were paid wholly and exclusively for the purposes of such trade."

The question is whether that is a right conclusion, and before going back to the Racecourse Betting Act, 1928, there are one or two passages which I can usefully refer to in the speech of Lord Reid in *Inland Revenue Comrs.* v. *Dowdall, O'Mahoney & Co., Ltd.* (4) ([1952] 1 All E.R. 531). He quotes (ibid., at p. 539) a passage in the speech of Lord Davey in *Strong & Co., Ltd.* v. *Woodifield* (5) ([1906] A.C. 448 at p. 453):

> " He said, of the words in the rule ' for the purposes of the trade ', that these words ' . . . appear to me to mean for the purpose of enabling a person

> to carry on and earn profits in the trade, etc. I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits '."

Lord Reid continued ([1952] 1 All E.R. at p. 539):

> " This explanation has always been regarded as authoritative and is difficult to reconcile with the respondent's contention . . . But I cannot reconcile the respondents' contention with the opinions expressed by the majority in *Smith's Potato Crisps* (*1929*), *Ltd.* v. *Inland Revenue Comrs.* (6) ([1948] 2 All E.R. 367). Lord Porter said (ibid., at p. 371) with reference to the expense of an appeal for the purpose of discovering the true measure of profits for tax purposes : ' Such expenditure is incurred directly for tax purposes and for nothing else, though it may indirectly affect both the amount available for distribution to the proprietors of the business and that proper to be put to reserve '."

A little later on in Lord Porter's speech (quoted by Lord Reid, [1952] 1 All E.R. at p. 540) he refers to the observations of Lord Selborne, L.C., in *Mersey Docks & Harbour Board* v. *Lucas* (3) (8 App. Cas. at p. 905):

> " ' it is reasonably plain that the gains of a trade are that which is gained by the trading, for whatever purposes it is used ' and, therefore, what your Lordships have to determine is whether the expense is incurred . . . to earn gain or is the application or distribution of that gain when earned ",

and the matter is summed up by Lord Reid ([1952] 1 All E.R. at p. 540):

> " My Lords, I trust that I have not misrepresented the speeches of noble Lords by giving these short extracts from them. I have read and re-read those speeches, and they appear to me to establish conclusively (i) the distinction between money spent to earn profits and money spent out of profits which have been earned . . . "

I return to the Racecourse Betting Act, 1928, s. 3. It is quite plain that, although the word " trade " is not used, the activities which the board, exercising its statutory duties, is to carry out are activities in the nature of a trade; that is, by running totalisators at racecourse meetings where the public can come and bet on the results of races; and the board is to make a deduction as a percentage, and the Act lays down how that percentage is to be dealt with. It is to be paid into a fund known as the totalisator fund, and then there is an express direction as to how it is to be applied (in sub-s. (6)). The question is whether it is right to consider that the Racecourse Betting Control Board, in making payments in accordance with s. 3 (6), is making payments wholly and exclusively for the purpose of making gains.

The Act of 1928 constituted this body and created a legal entity, and its powers and duties must, therefore, be ascertained from the terms of the Act itself. Two main questions arise. First, is it proper to look on the appropriation pursuant to a scheme prepared by the board and approved by the Secretary of State as money laid out for the purposes of s. 137 of the Income Tax Act, 1952 ? Secondly, is it right to consider whether the same result could be achieved by a debit in the accounts of the board before making an appropriation for the approval of the Secretary of State, and is it proper to debit, by way of example, the sum of £42,000 for runners' allowances ?

With regard to the first point, the scheme of the Act is this. The board engages in trade or something in the nature of trade. From that it makes a surplus. From that surplus certain deductions are to be made. They are set out in the brackets in s. 3 (6): the payment out of the fund of all taxes, rates, charges, and working expenses, and the retention of such sums as they think fit to meet contingencies, and the payment of sums to charitable purposes. It seems to me that, after that has been done, the trading activities of the board have come to an end possibly indeed before payments are made to charitable purposes. Its trading activities have resulted in the creation of a fund. That fund is to be held in accordance with the trusts pointed out in sub-s. (6). It is a fund from which the working expenses of carrying on the trade have been deducted. It is a fund from which tax has been deducted. If a claim to income tax cannot be resisted, that includes the deduction of income tax: rates, charges and other working expenses are all to come out of the fund before it is held on the trust of sub-s. (6), and accordingly, in my judgment, this fund at that stage has finished with trading activities, and appropriations thereout have no longer any reference to trading activities of the board. The appropriations are made only for the reason that they have to be so made pursuant to s. 3 (6) of the Act. They are made not for the purposes of trade but for public purposes conducive to the improvement of breeding of horses, the sport of horse racing and the advancement of veterinary science. The board is under a duty to prepare a scheme. The Secretary of State is the person to approve it. It is a statutory distribution of a fund in the hands of the board, and, with all respect to the argument, in my judgment it has nothing whatever to do with the trading activities of the board. True enough, the appropriations made coincide with the trading desires of the board. That is very fortunate for the board, but it cannot turn what is, in essence, a statutory distribution in accordance with an Act of Parliament of a surplus of a fund into a trading activity. Accordingly, when the Secretary of State approves an appropriation, that is something which has nothing to do with the trading activities of the board, and cannot in my judgment form proper subject-matter of a deduction under s. 137 of the Income Tax Act, 1952.

As to the second point, is it proper to regard the runners' allowances as being proper deductions for the purpose of income tax ? The first question is, is it proper to deduct that sum from the fund which is to be dealt with in accordance with s. 3 (6) ? It can only be deducted if it is permitted by the terms of the sub-section as a charge, or a working expense, or a deduction to meet contingencies. Plainly it is not a charitable payment. If any of those, it can only be a working expense. Is it proper to regard a runners' allowance as a working expense ? That seems to me entirely a question of construction of this Act of Parliament. The board is not a commercial concern. I have to construe the words "working expenses" as I find them in this Act. In my judgment "working expenses" there means what one ordinarily thinks of as a working expense in connexion with the operation of the totalisators. It has nothing whatever to do with paying money to attract more horses, which, it is hoped, will attract more of the public, some of whom, it is hoped, will place more money with the totalisator. That does not seem to me to be a proper description of an outlay as a working expense. Accordingly, it seems to me that the deduction of this expense of £42,000 was in fact ultra vires the board. It could not make it except by way of a scheme approved by the Secretary of State. As, therefore, it could not deduct it in its accounts, it cannot deduct it for the purposes of income tax. The matter does not rest there, however, because, even if it could be treated as a working expense, the question still arises whether it is a proper deduction for the purposes of s. 137 of the Income Tax Act, 1952. I do not think that it is, because, with all respect to the Special Commissioners, I do not see how this sum of runners' allowances can be described as a sum wholly and exclusively laid out for the purposes of the trade. It is laid out to attract more horses and more public quite generally to racecourses. It is really an outlay which is as much, in the long run, for the benefit of the public, of racecourse executives and for the benefit of bookmakers, or generally for the sport of racing as it is for the benefit of the board: and, in my judgment, it would not in any event be a proper deduction for the purposes of income tax, even if it were a working expense, which in my judgment it is not.

In my judgment the Special Commissioners have failed entirely to give proper weight to the construction and meaning of the Act of 1928. It is in that Act that one finds the powers and duties and obligations of the board set out. Accordingly the appeal must be allowed, and the matter must be remitted to the commissioners to adjust the figures in accordance with my judgment.

That brings me to the second group, the cross-appeals. That proceeded on the footing that, if these appropriations were proper deductions for income tax, a subsidiary point arose which I find set out in para. 12 (5) of the Special Case:

> " We find, on the other hand, that certain of the payments in question were reimbursements of expenditure upon the provision of certain physical installations on racecourses. [They then refer to exhibit E.] Such installations were of enduring advantage to the board and we therefore hold that such payments were of a capital nature and not proper deductions in arriving at the board's profits, see *Boyce* v. *Whitwick Colliery Co., Ltd. Coalville Urban District Council* v. *Boyce* (7) ([1934] All E.R. Rep. 706)."

I need not read exhibit E, but the installations referred to are improvements of all sorts* on the racecourses.

As I am reversing the commissioners on the main appeals, that question does not now arise, but, as the matter has been fully argued, I will deal with the point quite shortly. The expenditure was not allowed because it was of enduring advantage to the company. The principle was stated by Lord Cave in *British Insulated & Helsby Cables* v. *Atherton* (8) ([1926] A.C. 205). The relevant passage is sufficiently set out in the later case of *Anglo-Persian Oil Co., Ltd.* v. *Dale* (9) ([1932] 1 K.B. 124). In that case Romer, L.J., said (ibid., at p. 145):

> " It was pointed out by Lord Cave in *Atherton's* case (8) that an expenditure, though made once and for all, may nevertheless be treated as a revenue expenditure, and he then added this: ' But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital '. It should be remembered, in connexion with this passage, that the expenditure is to be attributed to capital if it be made ' with a view ' to bringing an asset or advantage into existence. It is not necessary that it should have that result. It is also to be observed that the asset or advantage is to be for the ' enduring ' benefit of the trade. I agree with Rowlatt, J., that by ' enduring ' is

---

* An indication of the sort of improvements concerned is at p. 280, letter A, ante.

> meant 'enduring in the way that fixed capital endures'. An expenditure on acquiring floating capital is not made with a view to acquiring an enduring asset. It is made with a view to acquiring an asset that may be turned over in the course of trade at a comparatively early date. Nor, of course, need the advantage be of a positive character. The advantage may consist in the getting rid of an item of fixed capital that is of an onerous character, as was pointed out by this court in *Mallett* v. *Staveley Coal & Iron Co., Ltd.* (10) ([1928] 2 K.B. 405)." A B

Each case depends on its own facts, and of *Coalville Urban District Council* v. *Boyce* (7), referred to in the Case, I desire only to say that that was a very special case which turned on its own particular facts and, although it is interesting as an example of the application of the principle, it does not seem to me that it can in any way govern the case before me. *Bolam* v. *Regent Oil Co.* (11) ([1956] T.R. 403) was relied on. That is another example of the principle; in that case it was not applied. There again, however, the facts were so very different from this case that it does not afford any guidance to me. C

The question which I have to consider is whether the making of this expenditure on the property of other persons can be described to be of an enduring advantage to the board. In one sense, it is, because the board hopes to attract more persons to its totalisator windows. Not every advertising expenditure, however, comes within the principle and (though it is not necessary to come to a final conclusion for the reason which I have already given), I find much difficulty in thinking that this expenditure can be treated as being an expenditure of the type envisaged by LORD CAVE in *Atherton's* case (8). However, in the event, these two cross-appeals must be dismissed. D E

Appeals allowed. Cross-appeals dismissed.

Solicitors: *Solicitor of Inland Revenue*; *Simmons & Simmons* (for the taxpayers).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

NOTE.

CHIEF KOFI FORFIE *v.* BARIMA KWABENA SEIFAH.

[Privy Council (Lord Reid, Lord Somervell of Harrow and Mr. L. M. D. de Silva), October 29, 30, December 9, 1957.]

Privy Council—West Africa—Judgment—Judgment without jurisdiction—Inherent power of court to set aside.

Judgment—Judgment without jurisdiction—Inherent power of court to set aside.

[As to setting aside an order which is a nullity and as to the position where there have been irregularities, see 22 Halsbury's Laws (3rd Edn.), 785, 786, para. 1665.]

Case referred to:

(1) *Craig* v. *Kanssen*, [1943] 1 All E.R. 108; [1943] K.B. 256; 112 L.J.K.B. 228; 168 L.T. 38; 2nd Digest Supp.

Appeal.

Appeal by Chief Kofi Forfie, Odikro of Marban, from an order of the West African Court of Appeal (Verity, Acting President, Lewey, J. A., and Morgan, J.), dated June 28, 1951, setting aside as nullities two judgments delivered by Mr. A. C. Spooner, president of the Chief Commissioner's Court of Ashanti on May 10, 1949, and June 29, 1949, respectively.

The following facts are taken from the judgment of the Board. The original parties to the action were the predecessors in title of the present appellant and the present respondent. No question had arisen from the substitution of the parties.

On Oct. 6, 1936, the respondent instituted this action against the appellant in Divisional Native Court B of Kumasi to recover a tract of land. That court found in favour of the appellant and dismissed the respondent's claim. On appeal to the Asantehenes Court A2, the judgment was reversed. The appellant lodged an appeal to the Chief Commissioner's Court, which was heard by Mr. A. C. Spooner, then president of the court, who, on May 10, 1949, delivered judgment in favour of the appellant. There was an appeal from that judgment to the West African Court of Appeal. Two dates relating to this appeal were relevant. On May 27, 1949, the respondent obtained conditional leave to appeal and on July 15, 1949, final leave to appeal was granted. His appeal was based on the contention that Mr. Spooner, on May 10, 1949, had had no power to exercise judicial functions as, on that day, his appointment to preside over the Chief Commissioner's Court stood rescinded. It appeared from the record that Mr. Spooner had also been of this opinion and that, as a result, certain steps were taken. Appointments to preside over the Chief Commissioner's Court could be, and were, made by orders signed by the Colonial Secretary and published in the Gazette. When Mr. Spooner heard the case, he held office under Order No. 84 of 1948. By Order No. 32 of 1949, signed on May 10, 1949, by the acting Colonial Secretary, one Mr. Allen was appointed to preside over the Chief Commissioner's Court and Order No. 84 of 1948 was rescinded. By a further Order, No. 42 of 1949 of June 21, 1949, Mr. Spooner was appointed Commissioner for the period June 23 to June 30, 1949. On June 29, 1949, acting under a power to review a judgment conferred by Ord. 41, r. 1*, contained in Sch. 3 to c. 4 of the Laws of the Gold Coast, 1936, Mr. Spooner reviewed his judgment of May 10, 1949. He said that he had had no jurisdiction on May 10, 1949, to deliver that judgment and, stating that he was acting under his power to review, he delivered a judgment identical in terms with his original judgment. There was an appeal from that judgment also to the West African Court of Appeal. The West African Court of Appeal held that the judgment delivered on review on June 29, 1949, must be held to be also a nullity as the judgment of May 10, 1949, was a nullity.

---

* By Ord. 41, r. 1. "Any judge, magistrate, or other judicial officer, may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal, or a reference shall have been made upon a special case, and such appeal or reference is not withdrawn), and upon such review it shall be lawful for him to open and re-hear the case wholly or in part, and to take fresh evidence, and to reverse, vary, or confirm his previous judgment or decision, or to order a non-suit."

The Board reached the conclusion that the judgment of June 29, 1949, was not a nullity on two separate and independent grounds. The first ground was that the term " judgment " in Ord. 41 meant nothing more than an adjudication by a judge on the rights of parties. If made without jurisdiction it would be ineffectual but the effectiveness or otherwise of the judgment was not relevant to the question whether it was a judgment. Consequently a judge might, under the order, review a judgment delivered by him at a time when he had no jurisdiction and, on such review, give a second judgment. If, at the time the second judgment was delivered, the judge had jurisdiction, then that second judgment was not a nullity. The second ground is the subject of this Note.

H. S. J. Hughes, Q.C., and *J. T. Woodhouse* for the appellant.

J. G. Le Quesne for the respondent.

MR. L. M. D. DE SILVA said that their Lordships would now proceed to the second ground on which they had come to the conclusion that the judgment of June 29, 1949, was not a nullity. A court had inherent power to set aside a judgment which it had delivered without jurisdiction. Lord Greene, M.R., in *Craig* v. *Kanssen* (1) ([1943] 1 All E.R. 108 at p. 113), after referring to several decisions, had said:

> "Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled ex debito justitiae to have set aside. So far as the procedure for having it set aside is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order; and that an appeal from the order is not necessary."

Their Lordships were of the same opinion. Assuming that the judge had no power on June 29, 1949, to review his judgment of May 10, 1949, he nevertheless had power to declare it a nullity and proceed to give a fresh judgment. This, in fact, he had done, and the only criticism of the proceedings of June 29 that could be made was that, on a question of procedure, he attributed the authority to do the thing he did to a source from which it did not flow. But, although the source named was, on the assumption made, incorrect, he undoubtedly had had power to do the thing he had done. No other error could be said to have been committed. Such an error did not, in their Lordships' opinion, vitiate the act done. It followed that the judgment of June 29, 1949, was not a nullity.

[The Board humbly advised Her Majesty that the appeal should be allowed and the case sent back to the Court of Appeal of Ghana to deal with such other points as arose on the appeal from the judgment of June 29, 1949, on the basis that that judgment was not a nullity.]

Appeal allowed.

Solicitors: *A. L. Bryden & Williams* (for the appellant); *Waterhouse & Co.* (for the respondent).

[*Reported by* G. A. Kidner, Esq., *Barrister-at-Law.*]

A

MANNING *v.* MANNING.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Mr. Commissioner Latey, Q.C.), July 12, 15, 22, December 19, 20, 1957.]

Divorce—Foreign decree—Decree granted to wife in Norway—Residence of wife B *in territory of foreign court for more than three years preceding application for divorce there—Irrelevance of ground of foreign decree if not contrary to natural justice—Decree recognised by English court.*

The English courts will recognise a decree of divorce granted to a wife by a foreign court (i) if she has resided in the territory of the foreign court for at least three years immediately preceding the commencement by her of the C proceedings in the foreign court, and (ii) even though the ground of the divorce was one not recognised by English law as, e.g., mutual separation so long as it does not offend against natural justice (see p. 295, letter F, and p. 296, letter F, post).

The husband, who was at all times domiciled in England, was married in 1948 in England to the wife whose domicil of origin was Norwegian. In 1948 D the parties went to Norway where the husband obtained employment, but in 1951 the husband returned to England on the understanding that the wife would join him in due course. The wife, however, did not do so. On July 24, 1952, the husband having gone to see the wife in Norway, signed at her request a document written in Norwegian which was an application for a certificate of separation. The application was also signed by the wife. E The husband returned to England and on Aug. 6, 1952, the Norwegian court issued a certificate of separation. The parties never resumed cohabitation and at the end of two years after the date of the certificate of separation the wife, as she was entitled to do by Norwegian law, applied for a decree of divorce on the ground of mutual separation. The decree was granted on Feb. 17, 1955. On the question whether or not that decree would be F recognised as valid by English law,

Held: the decree would be recognised by the English courts since the fact that the wife had been continuously resident in Norway for more than five years immediately preceding her application for divorce, would have entitled the English court, if her residence had been in England, to assume jurisdiction under s. 18 (1) (b) of the Matrimonial Causes Act, 1950, and the G fact that the ground of the divorce was not a ground recognised by English law was irrelevant.

Travers v. *Holley & Holley* ([1953] 2 All E.R. 794) applied.

Robinson-Scott v. *Robinson-Scott* ([1957] 3 All E.R. 473) and *Arnold* v. *Arnold* ([1957] 1 All E.R. 570) followed; dictum ([1957] 1 All E.R. at p. 576) qualified (see p. 295, letters C to G, post).

H Per CURIAM: I am content to follow the principle which KARMINSKI, J., laid down in *Robinson-Scott* v. *Robinson-Scott* that where the claim for jurisdiction is founded on the wife's residence there must be at least three years' residence wherever the action is brought.

[As to the recognition by English courts of foreign decrees of divorce, see 7 HALSBURY'S LAWS (3rd Edn.) 113, para. 200, note (u); and for cases on the I subject, see 11 DIGEST (Repl.) 481-483, *1079-1097*.

For the Matrimonial Causes Act, 1950, s. 18 (1) (b), see 29 HALSBURY'S STATUTES (2nd Edn.) 405.]

Cases referred to:

(1) *Travers* v. *Holley & Holley*, [1953] 2 All E.R. 794; [1953] P. 246; 3rd Digest Supp.

(2) *Arnold* v. *Arnold*, [1957] 1 All E.R. 570; [1957] P. 237.

(3) *Robinson-Scott* v. *Robinson-Scott*, [1957] 3 All E.R. 473.

(4) *Dunne* v. *Saban* (*formerly Dunne*), [1954] 3 All E.R. 586; [1955] P. 178; 3rd Digest Supp. A

(5) *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517; 64 L.J.P.C. 97; 72 L.T. 873; 11 Digest (Repl.) 468, *1011*.

(6) *Fenton* v. *Fenton*, [1957] V.L.R. 17.

Petition.

In the husband's petition in this case it was stated that he was married to the B
wife in England on June 22, 1948, that there were no children, that the husband lived and was domiciled in England and that the wife lived in Norway, that she had deserted him in July, 1952, in Norway, and that in February, 1955, he had been served with a document dated Feb. 17, 1955, described as a final decree of divorce issued by the county governor of Bergen and Hordaland counties, and stating that a decree of divorce was thereby granted to the parties. The C
husband prayed for a declaration that the " marriage was validly dissolved on. and has no longer subsisted since Feb. 17, 1955 ", alternatively for a declaration that the husband was no longer married to the wife, and in the further alternative for a decree of divorce. The suit was undefended and came before Mr. Commissioner LATEY, Q.C., on July 12, 1957. After having heard the evidence and argument on behalf of the husband on July 15 and 22, the commissioner D
adjourned the suit for argument by the Queen's Proctor.

H. S. Law for the husband.

Colin Duncan for the Queen's Proctor.

Cur. adv. vult.

Dec. 20. **MR. COMMISSIONER LATEY, Q.C.,** read the following E
judgment: This is one of those petitions for a declaration of status presented in pursuance of R.S.C., Ord. 25, r. 5, and of the decision in *Travers* v. *Holley & Holley* (1) ([1953] 2 All E.R. 794) which was to the effect that it would be contrary to principle if the English courts refused to recognise a jurisdiction which mutatis mutandis they claimed for themselves. It is a petition dated Apr. 3, 1957, formulated on alternative grounds (i) for a direct declaration of the validity F
of a Norwegian decree of divorce, or (ii) for an English decree of divorce because of desertion of upwards of three years by the wife. In his final address counsel for the husband abandoned this latter plea.

The petitioner, who has always been domiciled in England, was married on June 22, 1948, at the Cambridge register office, to a Norwegian girl, Elna Nilsen. There has been no issue of the marriage. In September, 1948, the wife went to G
Norway. The husband followed her in December of that year and in May, 1949, he obtained employment in that country at a place some fifty miles from Ervik where she was living. He saw her at regular intervals, but gave up his job in the summer of 1950 and returned to England in February, 1951, on the basis that she should join him after he had obtained employment and suitable accommodation in England. When he had done so he wrote several times to her asking H
her to join him but she did not come. In July, 1952, he went over to see her and met her at Bergen. She said that she did not want to live with him any more and wanted a divorce, and they stayed at separate hotels. He demurred to her proposal and for several days tried to persuade her to change her mind, which she refused to do. The husband has told me that she had told him that she would not live in England. At her request he saw a Norwegian lawyer and I
signed a document written in Norwegian dated July 24, 1952, which he understood was a declaration that he and his wife were living apart. He did not understand that it was an agreement to live apart. This document, which has been put in, was in fact an application for a certificate of separation, which is a usual preliminary to a suit for divorce in Norway. That document was signed by both parties, and the last paragraph reads:

> " We are applying for the separation certificate in accordance with the law of May 31, 1918, No. 2, para. 41."

The next day the husband returned to England, and since that time he has not seen his wife or had any letter from her. About three weeks later he received a copy of the certificate of separation dated Aug. 6, 1952. Translated that reads as follows:

> "Separation Certificate. The Sheriff of Bergen and Hordaland County makes known: That Derrick Ernest John Manning, laboratory assistant and Elna Manning (housewife), nee Nilsen, both of Aasane, have applied for a separation certificate and that mediation as required by law has taken place according to the certificate issued by Johannes Gulbranson (Vicar) Bergen, July 24, 1952. In accordance with the law of May 31, 1918, No. 2, para. 41 and the law of June 25, 1937, such a certificate is hereby granted . . . This certificate does not give the right to enter into a new marriage."

Then there is the name of the sheriff and the witness.

Apparently the husband did nothing for many months until in 1954 he became anxious about his legal position, and on Sept. 27, 1954, he wrote to the Norwegian legal authorities as follows:

> "On Aug. 6, 1952, you granted a [then followed the Norwegian word for 'separation'] to my wife Elna Manning of Ervik i Aasane and to myself . . . I would like to know whether this order is still valid and if so can I withdraw my consent?"

Of course, he was referring to the certificate. On Oct. 1 a reply was sent to him saying:

> "The separation certificate dated Aug. 6, 1952, is still valid provided that both parties have since lived apart. The certificate only becomes null and void if and when both parties are in agreement to live together again."

On Nov. 17, 1954, he received a letter from the Norwegian Consul-General at London that an application had been made by the wife in Norway for a divorce. The date of the wife's application does not appear from the Norwegian court papers but for reasons explained hereafter it could not have been made before the expiry of two years after the date of the certificate of separation, that is not before Aug. 6, 1954. By that time the wife had been continuously resident in Norway since 1948, about five or six years.

The consul-general invited the husband to attend at his office. The husband replied that he was not agreeable to the proposed divorce and did not accept the invitation. The consul-general wrote to him on Dec. 14, 1954, as follows:

> "When such a legal separation has been in force for one year without cohabitation having been resumed, Norwegian law provides that *both* parties, if in agreement, can apply for divorce."

The consul-general added that the wife required the husband's signature to the petition. On Apr. 28, 1955, following a further inquiry by the husband, the consul-general sent him a copy of a decree of divorce granted by the county governor of Bergen, dated Feb. 17, 1955. Translated this reads:

> "In accordance with the Matrimonial Law of May 31, 1918, para. 43, first section second period, decree of divorce is hereby granted to [and then the husband and wife are mentioned by name]. The decree of divorce is final. Signed at Bergen, Feb. 17, 1955."

In fact, this judgment, as was indicated in another document attached to the decree, could be made the subject of appeal within three weeks, but that period had expired long before the husband became aware of the decree.

From those facts two issues arose; first, was this document which the husband signed a consensual agreement for separation which would have terminated any desertion on the part of the wife? That would affect the alternative plea of the husband in this case if this court were to find that the Norwegian decree was invalid for want of jurisdiction. The second issue was this: the husband being always domiciled in England according to English law, was the Norwegian decree of divorce valid? If the answer to this second question is in the affirmative, the first point does not arise. Mr. A. D. Hald, a Norwegian lawyer, gave expert evidence that in Norwegian law the decree in Norway is valid. The last common residence of the spouses (in this case Norway) was sufficient to found jurisdiction in that country. If spouses were separated and a certificate of separation were issued by the competent legal authority and separation continued for two years thereafter the Norwegian court could grant either party a divorce. He told me that this was laid down by a sub-section of the Norwegian Matrimonial Law of May 31, 1918, para. 43, which was actually referred to in the decree. That sub-section when translated reads:

> "If the separation has existed for at least two years then either of the parties can demand a divorce."

Mr. Hald made it clear that at least two years of continuous separation must follow the date of the certificate of separation to qualify one of the parties only to petition. He told me that in Norwegian law the English conception of domicil to found jurisdiction did not operate—it was the last common residence of the spouses—and moreover if a Norwegian woman married an Englishman she would lose her Norwegian citizenship but if she stayed in Norway she would still be domiciled there. By that I have assumed that Mr. Hald was saying that she would not lose the jurisdiction of the Norwegian tribunal in a divorce suit. He further informed me with regard to a hypothetical converse position, that if a man were domiciled according to the English conception in Norway and his wife came to England and if she had lived here for three years or more, and she satisfied the English court that her husband had deserted her for upwards of three years, and she was granted a divorce here, that in such case the Norwegian court would recognise the English decree as valid. Mr. Hald also stated that there was another ground of divorce in Norway, malicious desertion for two years or more, but it was rarely employed, as ninety-nine per cent. of the cases were based on three years' separation. Having examined the documents in connexion with the Norwegian divorce in this case, Mr. Hald also expressed the opinion that in the circumstances surrounding the signature of the husband of the application for the certificate of separation the Norwegian court was undoubtedly justified in regarding it as an assent by him to the agreement to separate, and the only point there is that one has to see if the Norwegian court exercised its jurisdiction in accordance with its own procedure as laid down by law.

On those facts, including the Norwegian law, counsel for the husband has submitted that this Norwegian decree of divorce should be accepted as valid according to the principle laid down in *Travers* v. *Holley & Holley* (1) ([1953] 2 All E.R. 794), where the Court of Appeal laid down a principle which hitherto was unknown in English law. It is unnecessary to review in detail the cases implementing or declining to apply that decision, because they have been cited in previous judgments of this court, for example in *Arnold* v. *Arnold* (2) ([1957] 1 All E.R. 570) wherein a Finnish decree of divorce was recognised in the case of a petitioner domiciled in England, and in the very recent case of *Robinson-Scott* v. *Robinson-Scott* (3) ([1957] 3 All E.R. 473). In that last case KARMINSKI, J., recognised the validity of a Swiss decree of divorce at Zurich granted to a Swiss wife married to an Englishman domiciled in England, and the decree was granted on the basis of the wife's having a separate domicil for the purposes of divorce according to the Swiss Code, she having been resident for five years within the jurisdiction. The Zurich court in 1953 pronounced a decree of divorce on the ground that the matrimonial relations between the parties were deeply and irreparably disrupted. Thus neither the basis of jurisdiction nor the ground of divorce had their actual equivalent in English law. KARMINSKI, J., held that

A where in fact there has been three years' residence by a wife in the territory of the foreign court assuming jurisdiction in a suit for dissolution, the English courts will accept that as a ground for exercising jurisdiction, because it would itself accept jurisdiction on proof of similar residence in England. He said (ibid., at p. 478):

> B "It is not essential for recognition by this court that the foreign court should assume jurisdiction on the grounds laid down by s. 18 of the Matrimonial Causes Act, 1950. It is sufficient that facts exist which would enable the English courts to assume jurisdiction. I find that the Zurich court in the present case had jurisdiction, and that the decree pronounced by that court in favour of the wife in this suit on July 3, 1953, was valid. Accordingly C I declare that the marriage between the husband and the wife was validly dissolved on July 3, 1953, by the decree and judgment of the district court of Zurich."

Incidentally, KARMINSKI, J., referred (ibid.) to an obiter dictum of mine in *Arnold* v. *Arnold* (2) ([1957] 1 All E.R. at p. 576) in which I suggested that even less than three years' residence might be held to confer jurisdiction if such a length of D time founded jurisdiction in some other country according to the law of that country. KARMINSKI, J., in *Robinson-Scott* v. *Robinson-Scott* (3) said on that point ([1957] 3 All E.R. at p. 478):

> "Whatever may have been the motive of the legislature in insisting on three years' residence under s. 18 (1) (b) of the Matrimonial Causes Act, 1950, I cannot agree with Mr. Commissioner LATEY that the period of residence E demanded by the law of a foreign court to found jurisdiction is immaterial. If similarity is the basis of recognition, there must be similarity in fact though not in terminology. There seems to me to be a profound difference between the two years' residence in Florida found in *Dunne* v. *Saban* (*formerly Dunne*) (4) ([1954] 3 All E.R. 586) and the residence of five years and upwards in Zurich in the present case."

F I am content to follow the principle which KARMINSKI, J., had laid down, that is, that there must be at least three years' residence to found jurisdiction wherever the action is brought. Like his Lordship in that case, I have had the benefit of the argument of counsel for the Queen's Proctor, and in substance he has submitted that the present case comes within the decision in *Robinson-Scott* v. G *Robinson-Scott* (3) and the principle of *Travers* v. *Holley* (1); and he has made it clear that in supporting that view he has accepted, as of course the court must, the decision of KARMINSKI, J., in *Robinson-Scott* v. *Robinson-Scott* (3).

Counsel for the Queen's Proctor, with his usual thorough method, took me through all the authorities, beginning with *Le Mesurier* v. *Le Mesurier* (5) ([1895] A.C. 517), and the various cases following *Travers* v. *Holley* (1). He pointed out H the drastic inroad made into the rigid rule of domicil as the sole test of jurisdiction effected by what is now s. 18 (1) (b) of the Matrimonial Causes Act, 1950, by which three years' ordinary residence by a wife in England enables her to present a petition here although her husband is domiciled abroad. Counsel for the Queen's Proctor referred me to *Fenton* v. *Fenton* (6) ([1957] V.L.R. 17) in which the full Supreme Court of Victoria, a tribunal whose decisions command the greatest I respect in this country, has refused to accept the principle in *Travers* v. *Holley* (1), on the ground that the old decisions in *Le Mesurier* v. *Le Mesurier* (5) and subsequent cases in the House of Lords have established a principle of sole jurisdiction, namely, the domicil of the husband, from which no court can depart unless there be legislation to the contrary.

Counsel for the Queen's Proctor pointed out that this court here is no more bound by a decision of the Victorian court than that court is bound by a decision of the English Court of Appeal. I would venture to say, however, that the decision in *Le Mesurier* v. *Le Mesurier* (5) made by the Judicial Committee of the Privy Council so as to set the seal on a doctrine which had never before been so clearly laid down, that is to say, that domicil was the sole test of jurisdiction in divorce, was judge-made law. So was the Court of Appeal's decision in *Travers* v. *Holley* (1), which actually sprang from the statutory jurisdiction laid down in s. 18 of the Matrimonial Causes Act, 1950. When I say sprang from that section, I mean that the court took into account the changed circumstances brought about by that section.

One of the matters which gave me serious food for thought in the present case was the fact that although all the early decisions in connexion with *Travers* v. *Holley* (1) deal with a ground of divorce common to all the countries concerned, that is, desertion, in the present case the Norwegian court granted a divorce on the ground of mutual separation, a ground unknown to the English law. I ventured to suggest in *Arnold* v. *Arnold* (2) ([1957] 1 All E.R. at p. 575) that once jurisdiction was established the particular ground of divorce was beside the point. I am encouraged in that view by the decision of Karminski, J., in *Robinson-Scott* v. *Robinson-Scott* (3) that the Swiss decree was valid though the ground of the divorce was unknown to the English law. He also very succinctly put the point in a sentence that I think I have already quoted ([1957] 3 All E.R. at p. 478):

> " It is not essential for recognition by this court that the foreign court should assume jurisdiction on the grounds laid down by s. 18 of the Matrimonial Causes Act, 1950."

Section 18 (1) (b) provides that:

> " in the case of proceedings for divorce or nullity of marriage, if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man "

the wife may petition in this country. Therefore on this question of grounds for divorce it should be taken as an established principle that the ground of a divorce in the lex fori need not be taken into consideration in cases of this kind, so long as it does not offend against natural justice as conceived in the English court.

In the present case, therefore, we find the reciprocity of jurisdiction contemplated by the Court of Appeal in *Travers* v. *Holley* (1), and that principle should be applied, the wife having continuously resided in Norway for well over five years before the application for divorce. I therefore make the declaration sought, that the marriage of the husband with the wife was validly dissolved by the Norwegian decree in 1955. This marriage having been dissolved in 1955 the plea for divorce falls by the way, and it is unnecessary for me to pass judgment on the issue of desertion.

Declaration accordingly.

Solicitors: *Vizard, Oldham, Crowder & Cash*, agents for *Wild & Hewitson*, Cambridge (for the husband); *Queen's Proctor*.

[*Reported by* A. T. Hoolahan, Esq., *Barrister-at-Law.*]

BLAKELEY *v.* C. & H. CLOTHING CO. (A FIRM) AND ANOTHER.

[MANCHESTER ASSIZES (Lynskey, J.), December 16, 17, 1957.]

Factory—Lift—Gates—Obligation to provide gates which, when shut, would prevent persons coming into contact with any moving part of lift—Injury to person putting hand through gates in order to close inner gate properly—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 22 (3).

The plaintiff was employed by a firm of manufacturers who occupied part of premises in which there was a lift. The lift was under the control of the owners of the building and was supplied by them for the use of, among other persons, the plaintiff's employers and the employers' workmen. After having gone up in the lift to the top floor of the premises, the plaintiff got out of the lift, shut the gates of the lift, and, thinking that the inner gate was not properly shut, put his hand through the outer gate on to the inner gate to close it properly. As he was doing this, the lift began to move and the plaintiff's hand was severely injured. The plaintiff claimed damages against the owners of the premises, alleging that they were in breach of their statutory duty under s. 22 (3)* of the Factories Act, 1937, that the liftway should be efficiently protected " by . . . such an enclosure as to prevent, when the gates are shut, any person . . . coming into contact with any moving part of the . . . lift."

Held: the owners of the premises were liable in damages for breach of statutory duty under s. 22 (3) of the Act of 1937 because (a) the obligation under the sub-section was absolute, and (b) even if the test of foreseeability was applicable the plaintiff's behaviour had been reasonably foreseeable.

[**Editorial Note.** The obligation under s. 22 (1) of the Factories Act, 1937, had previously been held to be absolute (see *Galashiels Gas Co., Ltd.* v. *O'Donnell*, [1949] 1 All E.R. 319; *Whitehead* v. *James Stott, Ltd.*, [1949] 1 All E.R. 245).

For the Factories Act, 1937, s. 22 (3), see 9 HALSBURY'S STATUTES (2nd Edn.) 1014.]

Case referred to:

(1) *Walker* v. *Bletchley Flettons, Ltd.*, [1937] 1 All E.R. 170; Digest Supp.

Action.

The plaintiff, Derek Blakeley, an infant suing through his mother as next friend, claimed damages against C. & H. Clothing Co., a firm (referred to hereinafter as " the first defendants "), who were his employers, and J. G. Needham, Ltd. (referred to hereinafter as " the second defendants "), the owners of the premises where the plaintiff was employed, in respect of injuries received by the plaintiff on Aug. 23, 1951, in connexion with a lift on the premises. The first defendants, who were clothing manufacturers, occupied two floors of the premises for their business. The lift was under the control of the second defendants and was supplied by them for the use of the first defendants, the first defendants' employees, and other persons visiting the upper floors of the premises.

The plaintiff entered the first defendants' employment some three days before the date of the accident and was shown how to work the lift by other employees of the first defendants. The plaintiff was then about fifteen years old and had just left school. At about 5.45 p.m. on Aug. 23 he was told by the first defendants to go down in the lift and lock the gate at the bottom of the lift. After doing this, he went up again in the lift to the third floor (the top floor of the premises), and got out of the lift, closing the gates behind him. Thinking that the inner gate was not properly shut, he put his hand through the outer gate on to the inner gate in order to try to push the inner gate, so as to close it firmly. While he had his hand on the inner gate, the lift started to move and caught his hand, which was severely mangled. Eventually, the hand had to be amputated.

---

* The terms of the sub-section are printed at p. 298, letter E, post.

The plaintiff contended that the first defendants were in breach of their duty to him at common law in having failed to warn him that it was dangerous to put his hand through the inside gate. The claim against the second defendants was based on a breach of their statutory duty under s. 22 (3) of the Factories Act, 1937.

His Lordship (Lynskey, J.) found that the plaintiff had not established a breach by the first defendants of their duty at common law to take reasonable care for the safety of the plaintiff as an infant employed by them, because the risk of the lift moving as a result of someone pressing the button on one of the lower floors was an obvious danger which did not require warning even to a boy fifteen years old.

Alexander Karmel, Q.C., and *A. Logan Petch* for the plaintiff.
Fenton Atkinson, Q.C., and *W. G. Morris* for the first defendants.
J. D. Cantley, Q.C., and *W. D. T. Hodgson* for the second defendants.

LYNSKEY, J., after reviewing the evidence, and adding that negligence on the part of the first defendants had not been established, continued: The next question is in regard to the liability of the second defendants. It is agreed that the statutory duty imposed by s. 22 of the Factories Act, 1937, in relation to hoists and lifts is on the second defendants alone. The plaintiff relies on s. 22 (3), which reads:

> " Every hoistway or liftway shall be efficiently protected by a substantial enclosure fitted with gates, being such an enclosure as to prevent, when the gates are shut, any person falling down the way or coming into contact with any moving part of the hoist or lift."

It was submitted on behalf of the second defendants, first, that s. 22 (3) was dealing primarily with hoistways or liftways, and not with gates at all, and that I ought to construe the sub-section on the basis that what had to be provided was some form of construction holding the lift which, of itself plus the gates, would prevent people falling down or coming into contact with moving machinery. My difficulty in doing that is because of the wording of the sub-section itself:

> " . . . being such an enclosure as to prevent, when the gates are shut, any person falling down the way or coming into contact with any moving part of the hoist or lift."

That seems to me to mean that these hoists or lifts must be provided with gates of a character which will prevent people from coming into contact with the lift when moving, or with any moving part of the lift including the inner gates which move up and down with the lift. It seems to me that the obligation imposed by s. 22 (3) is an absolute one. The hoist, in conjunction with the gate, must be of the character so as to prevent anyone coming into contact with any moving part of the hoist or lift. That, on the face of it, seems to me to be the ordinary meaning of the words, and there is nothing to qualify it. My own view is that that is the meaning of the sub-section, and that there is an absolute obligation on persons responsible for complying with that statutory duty in relation to lifts.

It was then submitted on behalf of the second defendants that, in construing an absolute obligation, one ought to have regard to what has been said in relation to other sections of the Act where the obligation is to make secure or securely fence, and matters of that sort. In *Walker* v. *Bletchley Flettons, Ltd.* (1) ([1937] 1 All E.R. 170), du Parcq, J., said (ibid., at p. 175):

> " . . . a part of machinery is dangerous if it is a possible cause of injury to anybody acting in a way in which a human being may be reasonably

A expected to act in circumstances which may be reasonably expected to occur."

Without deciding whether that is the proper test to be applied in the construction of s. 22 (3), but adopting it for the purpose of this case and applying the principle to the facts as found by me, it seems to me clear that what the plaintiff did in this case is something which could have been reasonably anticipated, or which was B reasonably to be expected to occur. This is a case where a boy came out of the lift and knew that both gates must be closed; he thought that he had closed them both, he found that one was not properly closed, and put his hand inside the gates to try to push the inner gate to, to close it properly. I do not say that it was a wise or good thing to do. It is obviously one of those things which any person, thinking about the matter, might say that people might be reasonably C expected to do in the circumstances which existed with regard to the plaintiff, or in other circumstances, and that people, in general, sometimes fail to take care of themselves.

I am satisfied that, whether one adopts the strict interpretation or the more lenient interpretation of foreseeability, in either event there has been a breach by the second defendants of their statutory duty. This type of lift is, I believe, a D type generally adopted and the type of lift still in use in many business premises. We are dealing, not with the common law duty, but with the statutory liability. There has been a breach of statutory duty in spite of regular inspection and the adoption by other people of similar types of lifts, and the plaintiff is entitled to recover against the second defendants.

One other question arises before I deal with the actual award, namely: Was E there any evidence of contributory negligence? I think that there was. It seems to me that a boy, even though he is only fifteen years of age, knows—and the plaintiff agreed that he knew—that the outside gate is placed there for the purpose of guarding and protecting persons from the inside gate, and also that the lift may be operated on other floors from outside. In spite of that, the plaintiff put his hand in what was clearly a position of danger, and, although he may have had F no warning from his employers (the first defendants), he was in part to blame for the accident.

[HIS LORDSHIP assessed the damages to which the plaintiff would have been entitled if there had been no negligence on his part at £5,001 and, having apportioned the blame as to two-thirds to the second defendants and as to one-third to the plaintiff, gave judgment for the plaintiff for £3,334, with costs, against G the second defendants.]

Judgment for the plaintiff against the second defendants. Judgment for the first defendants against the plaintiff.

Solicitors: *Leslie M. Lever & Co.*, Manchester (for the plaintiff); *John Whittle, Robinson & Bailey*, Manchester (for the first defendants); *A. W. Mawer & Co.*, Manchester (for the second defendants).

[*Reported by* M. DENISE CHORLTON, *Barrister-at-Law.*]

R. *v.* SPRIGGS.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Salmon, JJ.), January 13, 14, 1958.]

Criminal Law—Capital murder—Diminished responsibility—Abnormality of mind—Medical evidence showing accused suffering from emotional abnormality—Whether jury should be directed on the meaning of abnormality of mind—Homicide Act, 1957 (5 *&* 6 *Eliz.* 2 *c.* 11), *s.* 2 (1).

In summing-up where a defence of diminished responsibility is raised to a charge of capital murder it is not necessary for the trial judge to define what constitutes " abnormality of mind " or " mental responsibility " for the purposes of s. 2 (1) of the Homicide Act, 1957, further than the enactment itself does.

The accused, having been turned out of a public house by a barman for interfering with some barrels and fittings, returned after closing time and shot the barman. At the trial of the accused on a charge of capital murder he raised a defence of diminished responsibility (s. 2 of the Homicide Act, 1957), viz., that " he was suffering from such abnormality of mind . . . as substantially impaired his mental responsibility for his acts . . . in doing . . . the killing ". Medical evidence for the accused showed that he was emotionally unstable, and, e.g., one description of his case was " psychopathic personality with emotional abnormality ". Counsel for the prosecution in his final speech drew attention to the words " mind " and " mental responsibility " in s. 2 (1) and to the absence of any reference to emotional instability. The judge in his summing-up read to the jury the terms of s. 2 (1), directed them on the onus and standard of proof, reviewed fully the evidence relevant to the defence of diminished responsibility, and left to the jury the question whether at the time of the crime the accused was suffering from such abnormality of mind as substantially impaired his mental responsibility for killing the barman. The judge did not direct the jury on the meaning of " abnormality of mind " or " mental responsibility ". When the jury retired, they were given copies of the terms of s. 2. The accused was convicted of capital murder. He appealed against conviction on the ground that the trial judge should have directed the jury whether conditions of emotional instability, such as the medical evidence on his behalf had described, might amount to " abnormality of mind " and might impair " mental responsibility " within s. 2 (1).

Held: the question of abnormality of mind was rightly left to the jury and the judge was under no duty to enter into metaphysical distinctions between emotion and intellect.

Summing-up of LORD COOPER (Lord Justice-Clerk) in *H.M. Advocate* v. *Braithwaite* (1945 S.C. (J.) at p. 57) considered.

Appeal dismissed.

[**Editorial Note.** In the present case the jury were fully directed on the onus and standard of proof in relation to the defence of diminished responsibility. Although the terms of s. 2 (2) enact that " it shall be for the defence to prove . . . " the defence of diminished responsibility, it has been held that it is not sufficient merely to leave to the jury the terms of the section on that matter (see *R.* v. *Dunbar*, [1957] 2 All E.R. at p. 739, letters D-F).]

Cases referred to:

(1) *R.* v. *Dunbar*, [1957] 2 All E.R. 737.

(2) *H.M. Advocate* v. *Braithwaite*, 1945 S.C. (J.) 55; 2nd Digest Supp.

(3) *M'Naghten's Case*, (1843), 10 Cl. & Fin. 200; 8 E.R. 718; sub nom. *McNaughton's Case*, 4 State Tr. N.S. 847 ; 14 Digest (Repl.) 60. 246.

Appeal.

The appellant, John Francis Spriggs, was convicted at Birmingham Assizes on Dec. 19, 1957, before JONES, J., sitting with a jury, of capital murder under s. 5 (1) (b) of the Homicide Act, 1957, and was sentenced to death. The facts of the crime were as follows. On Nov. 14, 1957, the appellant went to a public house but, because he was interfering with some of the barrels and fittings, he was turned out of the public house by the deceased, Harold Cunningham, who was the barman. Later, after the public house had closed, the appellant returned and knocked at the door and when the barman who had turned him out opened it, the appellant drew a revolver and shot him and fired two further bullets into the barman when he lay on the ground. The appellant then ran away. On the following morning, when police officers went to the appellant's house, they found him lying unconscious in a chair, and he was taken to a hospital where he was found to be suffering from an overdose of a barbiturate. When the appellant had recovered from the effects of the overdose he said to the police officers who were watching him in the hospital, " It was the way he shoved me about. I was mad. I collected my gun and let him have it ".

At the trial the appellant raised the defence of diminished responsibility, under s. 2 of the Homicide Act, 1957*. The medical evidence called for the appellant at the trial showed that the appellant had frequently visited his doctor for treatment for acute mental depression, headaches and sleeplessness; that a medical report from the Royal Air Force, made in 1947, regarding the appellant's discharge therefrom, had given as a reason for the discharge " temperamental instability " and had stated " Old history of psychiatric trouble. Suffers from apathy and depression. Shows personality disorder of the inadequate type "; that a specialist to whom the appellant was referred had described him as a case of " psychopathic personality with emotional abnormality ", and that a report on an electro-encephalogram, taken since the appellant had been in custody, stated that its appearance was most likely to be a reflection of emotional instability. In his final speech to the jury, counsel for the prosecution at the trial drew a distinction between mental and emotional responsibility and submitted that the reference to " mind " in s. 2 (1) of the Act of 1957 meant the mental processes of the brain and not emotional disturbances of the personality or character; counsel suggested that the medical evidence called for the appellant merely indicated that he was a man of immature personality, someone who could not properly control his emotions, but not that he suffered from an abnormality of the mind.

The trial judge, in his summing-up, directed the jury on the defence of diminished responsibility. After stating that the defence had been made available recently by s. 2 of the Homicide Act, 1957, and that he had had a copy made of the section that would be given to the jury when they retired so that the foreman could read it to them, and after reading the terms of s. 2 (1) the judge continued:

" So what you have to investigate is this. If you come to the conclusion that this man was sane, if you come to the conclusion that he killed Cunningham and was sane at the time, you have to inquire whether at that time he was suffering from such abnormality of mind as substantially impaired his mental responsibility for killing Cunningham. For every man is always presumed to intend the reasonable consequences of his acts, and you may think that if a man produces a A revolver in the circumstances described here and shoots at somebody else he should be presumed to have intended the reasonable consequences of killing that person. What you have to decide is whether you find he did it and was suffering from such abnormality of mind as substantially impaired his mental responsibility for doing it. If you come to the conclusion that that is established, your verdict should be guilty of manslaughter. In this case you cannot say that B the accused is not guilty. You can say that he is guilty of murder by shooting; you can say that he is guilty but insane; and if you think that he suffered from diminished responsibility you can say that he is guilty of manslaughter. Those are the three possible verdicts open to you."

---

* Section 2 of the Homicide Act, 1957, so far as relevant, is as follows:—

" (1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.

" (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.

" (3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter."

The trial judge then directed the jury on the onus of proof in accordance with *R.* v. *Dunbar* (1) ([1957] 2 All E.R. 737). He reviewed in detail the evidence relevant C to the defence of diminished responsibility. In the course of so doing he referred to explanations given by certain medical witnesses concerning some of the terms that were used in the course of the medical evidence; e.g., a doctor called for the defence had defined psychopathic personality by saying " I think a psychopathic personality is one who does not behave as a normal person would " and continuing to say " I do not think he would be capable of controlling his emotions ", D and another doctor called for the defence had said that there was no definition of " psychopathic personality ", on which point there seemed to be agreement. After completing his review of this evidence the trial judge continued:

" Members of the jury, it is idle to pretend that this is an easy matter with which you have to deal, but I have drawn your attention to all the evidence, and I think that if you will look closely at the words of the Act of Parliament and see E what has got to be proved to establish the defence of diminished responsibility, remembering that the accused has only to establish probability and not certainty, you will be able to come to a satisfactory conclusion."

When the summing-up was concluded and the jury retired to consider their verdict they were handed copies of the terms of s. 2 of the Homicide Act, 1957.

The appellant now appealed against his conviction on the grounds that the F trial judge failed to direct the jury as to the meaning of " abnormality of mind " and " mental responsibility " in s. 2 (1) of the Act of 1957, and failed to direct them as to the meaning of the terms, emotional instability, temperamental instability, gross personality disorder, psychopathic personality, emotional immaturity, abnormality of control of the emotions and immature personality, and whether these conditions came within the meaning of " abnormality of G mind " in s. 2 (1).

G. R. Swanwick, Q.C., and *C. H. Durman* for the appellant.
R. K. Brown for the Crown.

LORD GODDARD, C.J., having stated the facts and the grounds of the appellant's appeal, continued: The course which the learned judge took in H summing-up this matter was this. There were prepared and handed to the jury the terms of the section so that they could see it, and the learned judge told the jury that it was for them to decide whether or not the appellant suffered from such an abnormality of mind as substantially to impair his mental responsibility. To enable them to come to that decision the learned judge went meticulously and carefully through the evidence given on one side and the other. Let me say at I once that he was quite right to leave the question to the jury because there was evidence which might have justified the jury in finding in favour of the appellant that this was a case of diminished responsibility, but the jury did not take that view. The evidence was not such as to compel the jury to find that way; there was evidence on the other side and, speaking for myself and, I think, for the other members of the court, I cannot see that a judge dealing with this matter can do more than call the attention of the jury to the exact terms of the section Parliament has enacted and leave the jury to say whether, on the evidence, they are satisfied that the case comes within the section or not. It is not for judges, when Parliament has defined a particular state of things, as they have defined here what is to amount to diminished responsibility, to re-define or to attempt to define the definition. The definition has been laid down by Parliament and it is then a question for the jury. It is a question of fact for the jury in any particular case whether the prisoner's evidence brings him within the exception provided by s. 2 (1) of the Act of 1957 or whether it does not.

The conception of diminished responsibility is a novelty in English law. It is borrowed from the Scottish law where it has apparently always been part of the common law of Scotland. The Scottish judges have always found that it is a difficult matter to explain to the jury and a difficult matter for the jury to understand exactly what " diminished responsibility " means. I have in mind when I say this *H.M. Advocate* v. *Braithwaite* (2) (1945 S.C. (J.) 55), and I think it is worth while reading the charge that was given by LORD COOPER (Lord Justice-Clerk) to the jury (ibid., at p. 57) with regard to diminished responsibility:

> " Now, I have got to give you the most accurate instruction I can on this delicate question. The Solicitor-General read to you a passage from the charge of the Lord Justice-Clerk in the case of *Savage**, and I am going to read a sentence or two again, because it seems to me to give as explicit and clear a statement of the sort of thing which you have to look for as I can find. He says: ' It is very difficult to put it in a phrase '—and I respectfully agree—' but it has been put in this way; that there must be aberration or weakness of mind; that there must be some form of mental unsoundness; that there must be a state of mind which is bordering on, though not amounting to, insanity; that there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility—in other words, the prisoner in question must be only partially accountable for his actions '. And then he adds: ' And I think one can see running through the cases that there is implied . . . that there must be some form of mental disease.' The matter has been put in different words by other judges. I notice in a later case† that the condition was referred to for short as 'partial insanity'; and that this was explained as meaning ' that weakness or great peculiarity of mind which the law has recognised as possibly differentiating a case of murder from one of culpable homicide.' And finally, to give you one last test, the question as put by the late LORD CLYDE in the same case, quoting from a charge to a jury by LORD MONCRIEFF, was stated thus (at p. 48): ' Was he, owing to his mental state, of such inferior responsibility that his act should have attributed to it the quality not of murder but of culpable homicide ? ' You will see, ladies and gentlemen, the stress that has been laid in all these formulations upon weakness of intellect, aberration of mind, mental unsoundness, partial insanity, great peculiarity of mind, and the like. I am emphasising that just now because I shall have to revert to it when I come to say a word about the evidence we have heard today from Dr. Harrowes; but meantime, with those passages in your mind, I can only say to you that this is the sort of thing you have got to look for in the evidence led in support of this defence. If you can find enough to justify such a conclusion, your verdict should be one of culpable homicide only. If, on the other hand, you cannot find enough in the evidence to justify such a conclusion, then I have to tell you that, so far as this issue is concerned, you must steel yourselves to do your sworn duty by returning a verdict of guilty of murder."

It will be seen there that the Lord Justice-Clerk is not going into nice distinctions between mind and emotion or intellect and emotion, and one has to remember after all that juries are not drawn from university professors or university dons. They are ordinary men and women, and would not it only confuse them if one were to go into metaphysical and philosophical distinctions between what is emotion and what is intellect and matters of that sort ? The fact is that s. 2 of the Act of 1957 is borrowed from the Scottish law and the Scottish law, as the learned Lord Justice-Clerk points out, recognises that a man may be not quite mad but a border-line case, and that is the sort of thing which amounts to diminished responsibility. If a man sets up a defence of insanity it has always been for the jury to find whether or not he is suffering from a disease of the mind. There is no test to be laid down other than the test in *M'Naghten's Case* (3) ((1843), 10 Cl. & Fin. 200), but first of all a finding that there is a disease of the mind is necessary. That question can only be decided by listening to the medical evidence and the facts of the case and coming to a conclusion whether what the prisoner did was the act of a sane man or an insane man. So here, it seems to the court that all one can do is to read s. 2 (1) to the jury and say: " That is what Parliament has said will amount to diminished responsibility and will justify a verdict of manslaughter and not a verdict of murder ". I do not know of any better way of trying this very difficult point or instructing the jury on this very difficult point than saying: " That is what Parliament has said. Those are the tests you have to apply. You are to consider whether the accused has abnormality of mind, whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury. If you can find any of those matters in the evidence, then you will find a verdict of manslaughter and not a verdict of murder ". I do not know how abnormality of mind can be defined because it is very difficult to say what is a normal person, where is the norm. In English law, however, we are all very accustomed to the expression: " What would be the act of a reasonable man ? " Has anyone ever attempted to define what is a reasonable man ? I do not know of any definition of what is a reasonable man. The fact is that a jury have to decide for themselves whether the action in question is the action of what they would call a reasonable man. So here, I think that the matter was entirely one for the jury. I think that the learned judge put the case to the jury in the only way in which it can be put, and that it is not the duty of the judge to enter into metaphysical distinctions such as counsel for the appellant in his very attractive address to us sought to persuade us was the duty of the judge. For the reasons I have endeavoured to give this appeal fails and is dismissed.

---

* *H.M. Advocate* v. *Savage*, 1923 S.C. (J.) 49 at p. 51.

† *Muir* v. *H.M. Advocate*, 1933 S.C. (J.) 46 at p. 49.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions.*

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

OSTIME (INSPECTOR OF TAXES) *v.* AUSTRALIAN MUTUAL PROVIDENT SOCIETY.

[CHANCERY DIVISION (Upjohn, J.), December 11, 12, 20, 1957.]

Income Tax—Double taxation—Relief—Mutual life assurance society—Resident abroad—Australian company with branch office in United Kingdom—Assessments to income tax on income of society's life assurance fund—Whether assessments competent—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5 *c.* 40), *Sch.* 1, *Sch. D, Rules applicable to Case III, r.* 3*—Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *s.* 430*—Double Taxation Relief* (*Taxes on Income*) (*Australia*) *Order,* 1947 (*S.R. & O.* 1947 *No.* 806), *Schedule, art. II* (1) (*i*), (3), *art. III* (2), (3).

The taxpayer, Australian Mutual Provident Society, carried on mutual life assurance business in Australia and, through a branch office in London, in the United Kingdom. The taxpayer was assessed to United Kingdom income tax for the years of assessment 1947-48 to 1953-54 inclusive on the notional amount of its profits computed by reference to the appropriate part of the investment income of its life assurance fund under r. 3 of Case III of Sch. D to the Income Tax Act, 1918, or s. 430 of the Income Tax Act, 1952. On appeal by the taxpayer the Special Commissioners directed that the assessments be vacated on the ground that (a) any profits attributable to the taxpayer's United Kingdom branch were assessable under art. 3 of the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, not under r. 3 of Case III, as the Order of 1947 and r. 3 were in conflict and the Order of 1947 prevailed, and (b) no profits were attributable to the taxpayer's United Kingdom branch as the taxpayer was a mutual society, transacting business only with its members, and did not make profits. On appeal the Crown contended that the taxpayer as a mutual insurance society had no actual profits, but that the Order of 1947 did not extend to notional profits and therefore did not extend to income deemed to be profits and chargeable to tax by virtue of r. 3 of Case III.

Held: the taxpayer's notional profits (viz., under r. 3 of Case III of Sch. D to the Income Tax Act, 1918, or s. 430 of the Income Tax Act, 1952) were within the description " industrial or commercial profits " in the Order of 1947, which accordingly regulated any proper assessment in respect of the taxpayer's United Kingdom branch; therefore the existing assessments should be vacated for the reasons given by the Special Commissioners and summarised at (a) above.

Appeal dismissed.

[**Editorial Note.** The Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, was made under the repealed Finance (No. 2) Act, 1945, s. 51, and is continued in force by virtue of s. 528 (2) of the Income Tax Act, 1952, as if made under s. 347 of that Act; see, generally, 20 HALSBURY'S LAWS (3rd Edn.) 455, 741.

As to investment income of foreign and colonial life assurance companies, see 20 HALSBURY'S LAWS (3rd Edn.) 258, para. 473; and as to mutual insurance companies not being taxable on their surplus or profit, see ibid., 211, para. 376.

For the Income Tax Act, 1918, Sch. 1, Sch. D, Rules applicable to Case III, r. 3, see 12 HALSBURY'S STATUTES (2nd Edn.) 169; and for the Income Tax Act, 1952, s. 430, see 31 HALSBURY'S STATUTES (2nd Edn.) 412.

For a summary of the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, see 11 HALSBURY'S STATUTORY INSTRUMENTS 104.]

Cases referred to:

(1) *Inland Revenue Comrs.* v. *Australian Mutual Provident Society,* [1947] 1 All E.R. 600; [1947] A.C. 605; [1947] L.J.R. 690; 177 L.T. 9; 28 Tax Cas. 388; 2nd Digest Supp.

(2) *Inland Revenue Comrs.* v. *Ayrshire Employers Mutual Insurance Assocn., Ltd.*, [1946] 1 All E.R. 637; 175 L.T. 22; 27 Tax Cas. 331; 2nd Digest Supp.

(3) *Faulconbridge* v. *National Employers' Mutual General Insurance Assocn., Ltd.*, (1952), 33 Tax Cas. 103; 3rd Digest Supp.

(4) *New York Life Insurance Co.* v. *Styles*, (1889), 14 App. Cas. 381; 59 L.J.Q.B. 291; 61 L.T. 201; sub nom. *Styles* v. *New York Life Insurance Co.*, 2 Tax Cas. 460; 28 Digest 59, *300*.

Case Stated.

The taxpayer, Australian Mutual Provident Society, appealed to the Special Commissioners of Income Tax against assessments to income tax in the sum of £100,000 for each of the years 1947-48 to 1952-53 inclusive and in the sum of £50,000 for the year 1953-54. The assessments were made in respect of "life fund interest" under r. 3 of the Rules applicable to Case III of Sch. D to the Income Tax Act, 1918, Sch. 1, so far as the assessments related to the years 1947-48 to 1951-52 inclusive, and under s. 430 of the Income Tax Act, 1952, so far as they related to the years 1952-53 and 1953-54. The grounds of the appeal were that the assessments were not competent in law, having regard to the provisions of the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947.

The taxpayer was a mutual provident society which was established in New South Wales, Australia, in 1849, was incorporated in 1857, and was now governed by the Australian Mutual Provident Society's Acts, 1910-1941. At all material times the taxpayer carried on a life assurance business, including the granting of annuities, and was an assurance company to which the Assurance Companies Act, 1909, applied. The taxpayer was resident in Australia, its head office was in Sydney, New South Wales, and it carried on business in the United Kingdom through a branch office in London (both parties to the proceedings agreed that the taxpayer was not resident in the United Kingdom for income tax purposes). For the years of assessment prior to 1946-47, the society was assessed to income tax in the United Kingdom under r. 3 of Case III of Sch. D, i.e., on a proportion of its income from the investments of its life assurance fund (excluding the annuity fund) which by virtue of r. 3 was deemed to be profits comprised in Sch. D and chargeable under Case III, and was granted dominion income tax relief under s. 27 of the Finance Act, 1920 (see *Inland Revenue Comrs.* v. *Australian Mutual Provident Society* (1) (1945), 28 Tax Cas. 379). For the year 1946-47 and subsequent years this relief was not allowed by reason of s. 51 (2) of the Finance (No. 2) Act, 1945, and the Order of 1947.

It was contended on behalf of the taxpayer that the assessments under appeal were not competent in law and should be discharged for the following reasons:—

(i) by s. 51 (1) of the Act of 1945 (and s. 347 (1) of the Act of 1952), the provisions of the Order of 1947 had effect in relation to income tax so far as they provided for: (a) charging income arising from sources in the United Kingdom to persons not resident in the United Kingdom; (b) determining the income to be attributed to such persons and their agencies, branches or establishments in the United Kingdom; and the provisions had such effect notwithstanding anything in any enactment.

(ii) by art. III (2) of the Schedule to the Order of 1947, where an Australian enterprise was engaged in trade or business in the United Kingdom through a permanent establishment situated therein, United Kingdom income tax might be imposed only on so much of its profits as was attributable to that permanent establishment; and by art. III (3) of the Schedule to the Order the amount of profits so to be attributed was defined to be that amount of industrial or commercial profits which such permanent establishment might be expected to derive in the United Kingdom if it were an independent enterprise engaged in the same or similar activities to those in which the Australian enterprise was in fact engaged and if its dealings with the Australian enterprise were at arm's length.

(iii) rule 3 of Case III of Sch. D (as was made clear by the speeches of the House of Lords in *Inland Revenue Comrs.* v. *Australian Mutual Provident Society* (1), [1947] 1 All E.R. 600) and s. 430 of the Act of 1952 were charging rules which imposed a charge of United Kingdom income tax, not on the actual or estimated profits of a branch office through which a non-resident assurance company carried on business in the United Kingdom, but on a purely notional or conventional figure.

(iv) amounts computed for the purposes of the assessments according to r. 3 (and s. 430 of the Act of 1952) represented purely notional or conventional figures and bore no relation whatever to the amount of industrial or commercial profits which a permanent establishment might be expected to derive in the United Kingdom in the circumstances mentioned in art. III (3) of the Schedule to the Order of 1947, and, by the combined effect of the Order of 1947 and s. 51 of the Act of 1945 (or s. 347 of the Act of 1952), the latter amount was the only amount on which income tax might be charged.

(v) the taxpayer was a mutual society carrying on the trade or business of life assurance exclusively with its members so that the surplus arising from such trade or business yielded no profit assessable to United Kingdom tax, and, if its permanent establishment in the United Kingdom had been an independent enterprise engaged in the same activity and dealing at arm's length with the taxpayer, the taxable profits which it might have been expected to derive from that mutual trade or business would have been nil.

It was contended on behalf of the Crown that the assessments were competent in law for the following reasons*:

(i) the Order of 1947 did not remove or supersede the charge to United Kingdom income tax made by r. 3 of Case III of Sch. D and s. 430 of the Act of 1952.

(ii) at the most, the Order of 1947 laid down a condition which had to be satisfied before any charges on profits provided for by the Income Tax Acts might be imposed and put a limit on the extent to which such charges might be imposed.

(iii) the circumstances of the taxpayer were such that the condition imposed by art. III (2) and (3) of the Schedule to the Order of 1947 was satisfied.

The Special Commissioners held that the assessments were not competent and must be discharged. The reasons for their decision were stated as follows (in para. 6 (5) and (6) of the Case):

> " (5) The [taxpayer], being a mutual society, is prima facie not liable to income tax on the surplus arising from business done with its members. It has no profits or gains which fall to be assessed under Case I of Sch. D: *Inland Revenue Comrs.* v. *Ayrshire Employers Mutual Insurance Assocn., Ltd.* (2) ([1946] 1 All E.R. 637); *Faulconbridge* v. *National Employers' Mutual General Insurance Assocn., Ltd.* (3) ((1952), 33 Tax Cas. 103). Rule 3 of Case III is a charging rule (*Inland Revenue Comrs.* v. *Australian Mutual Provident Society* (1)) which seeks to charge an insurance company, not having its head office in the United Kingdom, which carries on life assurance business, mutual or otherwise, through a branch or agency in the United Kingdom, a condition which it is admitted exactly fits the [taxpayer's] present case. The charge is based, not on the actual profits or the commercial or industrial profits, if any, of the insurance company or its branch, but on a notional sum deemed to be ' profits ' comprised in Sch. D and chargeable under Case III, arrived at by reference to a proportion of the income of the company from the investments of its life assurance fund (excluding the annuities fund, if any) wherever received. It is on this basis that the [taxpayer] has been assessed to United Kingdom tax for years prior

---

* These are the contentions set out in para. 5 of the Case Stated.

> to 1946-47. Section 51 of the Finance (No. 2) Act, 1945, authorises the arrangements comprised in [the Schedule to the Order of 1947] in these terms: '. . . the arrangements shall, notwithstanding anything in any enactment, have effect . . .' [After referring to the terms of art. III (2) of the Schedule to the Order of 1947, the Special Commissioners continued:] Here again the conditions exactly fit the [taxpayer's] case. We have, therefore, to find so much of the industrial or commercial profits of the [taxpayer] as are attributable to its London branch, and art. III (3) . . . prescribes how this is to be done. In our opinion there is a clear conflict between the provisions of [the Order of 1947] and the provisions of r. 3 of Case III, which does not purport to deal with the industrial or commercial profits of the [taxpayer] within the meaning of the said art. III (2) and (3), nor does it provide for the exercise of a discretion or the making of an estimate in accordance with the principles cited in the said art. III (3). The provisions of [the Order of 1947] must therefore prevail, and the assessments, having been made under the provisions of r. 3 of Case III, and not under the provisions of the said art. III, are not competent and must be vacated.
>
> "(6) Apart from the foregoing, however, in our opinion the [taxpayer] being a mutual provident society, there are no industrial or commercial profits attributable to its London branch which are assessable to United Kingdom income tax, and on this ground also the assessments must be discharged."

The Crown appealed. Notice in writing was given by the Crown to the taxpayer that, at the hearing of the Case Stated, it might be contended as an additional point that the assessments under appeal fell outside the Order of 1947 in that the sums thereby charged to tax, although notionally profits of the business of insurance, were in fact sums received by the taxpayer in the form of dividends, interest and rents.

John Pennycuick, Q.C., and *A. S. Orr* for the Crown.

Heyworth Talbot, Q.C., and *G. B. Graham* for the taxpayer, Australian Mutual Provident Society.

Cur. adv. vult.

Dec. 20. **UPJOHN, J.**, read the following judgment: This is an appeal by way of Case Stated from a decision of the Special Commissioners of Income Tax making assessments to income tax on the respondent taxpayer, the Australian Mutual Provident Society, for the years 1947-48 to 1953-54 inclusive. For the five earlier years [1947-48 to 1951-52 inclusive] the assessments are made under r. 3 of the Rules applicable to Case III of Sch. D to the Income Tax Act, 1918, and for the last two years under s. 430 of the Income Tax Act, 1952. There is no substantial difference between the two Acts for the purposes of this appeal, and the case has been argued before me on the relevant provisions of the Act of 1918 to which alone I shall refer. The whole question is whether the assessments are correct having regard to the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947 (S.R. & O. 1947 No. 806), which I shall call "the relief Order"*.

The relevant facts can be stated in one sentence. The taxpayer is a mutual life assurance society, and has for many years carried on that business (inter alia) from its head office at Sydney in New South Wales where it was incorporated, and in other parts of the world, notably in the United Kingdom where it operates through a branch office in London.

---

*The Agreement between the Government of the United Kingdom and the Government of the Commonwealth of Australia for, among other things, the avoidance of double taxation is set out in the Schedule to the Order, which was made under the **Finance (No. 2) Act, 1945, s. 51.**

For the purposes of English income tax the taxpayer's life insurance business is treated as a separate business from other classes of insurance business (see r. 15 of the Rules applicable to Cases I and II of Sch. D), and its income from investments is taxed under r. 3 of the Rules applicable to Case III of Sch. D. Rule 3 reads:

> "(1) Where an assurance company not having its head office in the United Kingdom carries on life assurance business through any branch or agency in the United Kingdom, any income of the company from the investments of its life assurance fund (excluding the annuity fund, if any), wherever received, shall, to the extent provided in this rule, be deemed to be profits comprised in this Schedule and shall be charged under this Case. (2) Such portion only of the income from the investments of the life assurance fund for the year preceding the year of assessment shall be so charged as bears the same proportion to the total income from those investments as the amount of premiums received in that year from policy holders resident in the United Kingdom and from policy holders resident abroad whose proposals were made to the company at or through its office or agency in the United Kingdom bears to the total amount of the premiums received by the company . . . (3) Every such charge shall be made by the Special Commissioners as though the company under the provisions of this Act had required the proceedings relating to the charge to be had and taken before those commissioners. (4) Where a company has already been charged to tax, by deduction or otherwise, in respect of its life assurance business, to an amount equal to or exceeding the charge under this rule, no further charge shall be made under this rule, and where a company has already been so charged, but to a less amount, the charge shall be proportionately reduced."

The necessary calculations have been made pursuant to the provisions of this rule, and the assessments made accordingly.

Counsel for the taxpayer, with his usual admirable candour, admitted in argument that, apart from authority, there would be much to be said for the view that this rule is, in terms, taxing, not the life assurance business of the taxpayer at all, but its investment income, and if that be right it is clear from the relief Order, which I shall read a little later, that the assessments were rightly made, for the relief Order expressly excludes from its operation income from investments: see art. II (1) (i) of the Schedule to the Order. However, it is not in dispute that an assessment under r. 3 is in law an assessment on profits of the business of life insurance. That was decided by the House of Lords in 1947 in *Inland Revenue Comrs.* v. *Australian Mutual Provident Society* (1) ([1947] 1 All E.R. 600), in litigation between the Crown and this taxpayer. In that case the question arose how income received from securities which were exempt from income tax should be treated in an assessment under r. 3. It seems that in the lower courts both parties proceeded on the footing that tax under r. 3 was a tax on investment income, but there were differing views how the rule should be applied. In the House of Lords, however, during the argument it was asked by VISCOUNT SIMON ([1947] A.C. at p. 611) why the existence of tax-exempt income affected the application of r. 3, and he added:

> "Does the mere fact that it is included as an item in the computation of the profits charged under r. 3 amount to charging it with tax? "

It is quite clear from the speeches when judgment was delivered that in the opinion of their Lordships the tax exigible under r. 3 was not a tax on investment income at all but a tax on profits of the business, although measured by investment income.

It is, of course, a very familiar part of the system of taxation in this country that profits of a particular year of assessment may be, and, indeed, usually are, taxed by some yardstick other than the profits of that particular year—for

example, as in the old days, by reference to an average of three years' profits, or, A
as now, by reference to a period which may, and probably does, lie wholly outside the year of assessment. Both parties are agreed that the effect of the speeches in the House of Lords was as I have stated. I do not propose, therefore, to refer to them in any detail, but will content myself with one paragraph from the speech of LORD WRIGHT. Speaking of r. 3 he said ([1947] 1 All E.R. at p. 605):

> B
> "The charge was a tax on the investment income only as a machinery to tax the general profits of the British business, and as a manner of measuring the charge by an arbitrary figure derived from a percentage of the investment income."

This assessment is on a notional or conventional sum, but nevertheless is an assessment on the profits of the business. C

The real difficulty which arises in this case, however, is that, as the House of Lords itself decided many years ago in *New York Life Insurance Co.* v. *Styles* (4) ((1889), 14 App. Cas. 381), a mutual society, that is, a society which does business only with its members, does not make profits; its trading surplus accrues to the property of the members but it is not legally correct to look on the trading surplus as profits of the trade for income tax purposes. This aspect of the D
matter does not seem to have been discussed in the House of Lords in 1947. Nevertheless, it seems quite plain that, apart from the relief Order, a mutual society would be taxable under r. 3, for the rule is clear that income of investments is "deemed to be profits comprised in this Schedule", and it is always competent for an Act of Parliament to say that for the purpose of income tax a surplus which arises, although not profits, is "deemed to be" so. E

I turn then to the relief Order. Article 1 (1) of the Schedule to the Order reads:

> "The taxes which are the subject of the present agreement are . . . (b) In the United Kingdom: The income tax (including surtax), the excess profits tax, and the national defence contribution (hereinafter referred to as 'United Kingdom tax')." F

Then I must read some of the definitions in art. II (1) of the Schedule:

> "In the present agreement, unless the context otherwise requires . . . (h) The terms 'United Kingdom enterprise' and 'Australian enterprise' mean respectively an industrial or commercial enterprise or undertaking carried on by a United Kingdom resident and an industrial or commercial enterprise G
> or undertaking carried on by an Australian resident; and the terms 'enterprise of one of the territories' and 'enterprise of the other territory' mean a United Kingdom enterprise or an Australian enterprise, as the context requires.
>
> "(i) [and this is the important definition] The term 'industrial or commercial enterprise or undertaking' includes an enterprise or undertaking H
> engaged in mining, agricultural or pastoral activities, or in the business of banking, insurance, life insurance or dealing in investments, and the term 'industrial or commercial profits' includes profits from such activities or business but does not include income in the form of dividends, interest, rents, royalties, management charges, or remuneration for personal services.
>
> "(j) The term 'permanent establishment', when used with respect to an I
> enterprise of one of the territories, means a branch or other fixed place of business and includes a management, factory, mine, or agricultural or pastoral property, but does not include an agency in the other territory unless the agent has, and habitually exercises, authority to conclude contracts on behalf of such enterprise otherwise than at prices fixed by the enterprise or regularly fills orders on its behalf from a stock of goods or merchandise in that other territory . . ."

A I need not read the provisos. Article II (3) reads:

> "In the application of the provisions of the present agreement by one of the contracting governments any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that contracting government relating to the taxes which are the subject of the present agreement."

B Article III (2) reads:

> "The industrial or commercial profits of an Australian enterprise shall not be subject to United Kingdom tax unless the enterprise is engaged in trade or business in the United Kingdom through a permanent establishment situated therein. If it is so engaged, tax may be imposed on those profits C by the United Kingdom, but only on so much of them as is attributable to that permanent establishment: Provided that nothing in this paragraph shall affect any provisions of the law of the United Kingdom regarding the imposition of excess profits tax and national defence contribution in the case of inter-connected companies."

D Article III (3) reads:

> "Where an enterprise of one of the territories is engaged in trade or business in the other territory through a permanent establishment situated therein, there shall be attributed to that permanent establishment the industrial or commercial profits which it might be expected to derive in that other territory if it were an independent enterprise engaged in the same or E similar activities and its dealings with the enterprise of which it is a permanent establishment were dealings at arm's length with that enterprise or an independent enterprise; and the profits so attributed shall be deemed to be income derived from sources in that other territory."

Before the Special Commissioners the Crown put forward an argument which proceeded on the footing that the relief Order was capable of applying to notional F profits of a mutual insurance society, but, for the reasons which are to be found set out in para. 5* of the Case, it was said that in fact the relief Order did not affect tax under r. 3. That argument did not appeal to the commissioners who decided the case in favour of the taxpayer, and counsel for the Crown has not felt able before me to challenge the correctness of their decision on that footing by any argument. I have, accordingly, heard no argument on the case as G presented to the Special Commissioners, and, therefore, I do not propose to deal with their decision except to say that it was plainly reached after very careful and detailed reasoning, and on the footing stated I am content to accept their unchallenged reasoning and conclusions stated in para. 6 (5)† of the Case as my own.

Before me counsel for the Crown has raised a wholly new point, not suggested H before the Special Commissioners, which must now be briefly stated. He submits that the expression "industrial or commercial profits", in art. II (1) (i), is incapable of referring to anything but real profits arising from an actual source of profit, whereas the taxpayer, being a mutual society, has no actual profit nor any actual source of profit, and, therefore, the relief Order does not apply to the taxpayer. Counsel says that the relief Order is not dealing with I purely notional or conventional profits which have no existence in law but have only a purely fictional existence for the purposes of r. 3. It is submitted that the expression "industrial or commercial profits" is defined in art. II (1) (i), and that, therefore, art. II (3) has no application, whence it must follow that that phrase must be given its natural and ordinary meaning. That being so, it is said that the phrase cannot include purely notional or fictitious profits but can only refer to real or actual profits, and, there being none in law, the relief Order has no application. Counsel for the Crown further submitted that art. II was dealing only with profits taxable under Case I of Sch. D, and had no reference to notional profits taxed under Case III. If, however, it be accepted, as it must in my judgment be accepted in the light of the decision of the House of Lords, that tax under Case III is a tax on the profits of the business, I cannot see anything in the relief Order which distinguishes between taxation under different Cases.

---

* See p. 307, letter E, ante.

† See p. 307, letter G, ante.

This is a difficult case. In the first place I do not think that the expression " industrial or commercial profits " can really be said to be " otherwise defined " for the purposes of art. II (3) by art. II (1) (i). It is a curious definition, if it can be called such, which says ". . . 'industrial or commercial profits' *includes* profits from such . . . business [i.e., business of life assurance] but does not include . . ." (inter alia) investment income. I do not think that a clause so phrased (as so many Acts of Parliament now are) can properly be said to be a definition clause except in relation to those matters expressly stated to be included or expressly excluded. A large area not expressly defined is left. The word " profits " is nowhere defined, and one is left in the dark whether deemed profits are within the inclusion; certainly in terms they are not excluded by the exclusion of investment income.

My approach to the relief Order is that its whole object is to relieve from double taxation, and that, therefore, one is looking to those profits or surpluses which by the law of Australia or of the United Kingdom (as the case may be) are made the subject of taxation. Article II (3) seems designed to that very end. It seems to me that when considering United Kingdom tax one must look to " profits " which are taxed by the United Kingdom, and, if the United Kingdom taxation laws (as interpreted by the House of Lords) tax a trading surplus by deeming it to be a profit although in law it is not, then that trading surplus is by art. II (3) a profit within art. II (1) (i). In other words, if I may respectfully paraphrase the House of Lords' decision, r. 3 is taxing the trading surplus of the taxpayer in this country by deeming that surplus to be profits. Those deemed profits are measured by a yardstick which, indeed, has but little relation to the taxpayer's actual trading surplus in this country, but the actual yardstick, as I have already pointed out, matters not. However, the essential fact is that by statute the taxpayer is deemed to make taxable trading profits of its business. That seems to me to make the taxpayer's taxable surplus " profits " within the intendment of art. II (3) and not to be excluded by any partial definition in art. II (1) (i). I, therefore, reach the conclusion that these taxable surpluses of the taxpayer are properly described as " industrial or commercial profits " for the purposes of the relief Order. When that conclusion is reached, the decision of the Special Commissioners becomes dead in point, and, as I have already said, the consequence is not seriously challenged by counsel for the Crown. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue*; *Bell, Brodrick & Gray* (for the taxpayer).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

A

NOTE.

LIM SIEW NEO *v.* PANG KEAH SWEE.

B [PRIVY COUNCIL (Lord Reid, Lord Somervell of Harrow and Mr. L. M. D. de Silva), October 24, 28, 29, December 9, 1957.]

Privy Council—Costs—Printed record—Inclusion of matters not relevant to subject-matter of appeal—Cost of printing irrelevant matter deducted from costs.

[**Editorial Note.** The rule now in force concerning the incidence of costs C of printing the record is r. 28 of the Judicial Committee Rules, 1957, S.I. 1957 No. 2224.

As to the incidence of costs of the printing of the record on appeal to the Judicial Committee, see 9 HALSBURY'S LAWS (3rd Edn.) 385, para. 894.]

Appeal.

Appeal by Lim Siew Neo from an order of the Court of Appeal of the Colony D of Singapore (KNIGHT, TAYLOR and STORR, JJ.), dated July 1, 1955, affirming an order of WHITTON, J., in the Supreme Court of the Colony of Singapore, dated Feb. 23, 1955, whereby the respondent, Pang Keah Swee, was granted an injunction restraining the appellant from causing a nuisance to the respondent at 265, Orchard Road, Singapore. The appellant appealed to the Board on the ground that the respondent was not entitled to occupy the premises and was a E trespasser. The respondent contended that his occupation was lawful and that he was protected by the Colony of Singapore Control of Rent Ordinance, 1947 (No. 25 of 1947). The Board dismissed the appeal. This note is concerned only with the question of costs.

J. P. Widgery for the appellant.

M. O'C. Stranders for the respondent.

F

LORD REID said that their Lordships regretted to note that considerable unnecessary expense had been incurred by including in the printed record notes of counsel's arguments and certain preliminary matter not relevant to the subject-matter of this appeal. Their Lordships had been informed by counsel that the appellant's advisers wished to omit these parts of the record but that G the respondent's advisers required their inclusion. The usual order for costs must be modified so that the cost of printing this part of the record did not fall on the appellant. Their Lordships would humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal subject to deduction of the cost of printing those parts of the record which should not have been included.

H *Appeal dismissed.*

Solicitors: *Speechly, Mumford & Craig* (for the appellant); *Sydney Redfern & Co.* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

WARNER *v.* SAMPSON AND ANOTHER (No. 2).

[Queen's Bench Division (Ashworth, J.), January 13, 1958.]

Landlord and Tenant—Lease—Forfeiture—Denial of landlord's title—Application for relief against forfeiture—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 20), *s.* 146 (2).

In an action for possession of premises comprised in a lease on the ground of breaches of covenant, one of the defendants, by her defence, had in effect denied the landlord's title and judgment was given for the landlord on the ground that this denial gave rise to a forfeiture. On an application by the defendants, under s. 146 (2) of the Law of Property Act, 1925, for relief from forfeiture,

Held: the defendants were not entitled to relief under s. 146 (2) of the Act of 1925, because the forfeiture incurred by the defendants arose by operation of law, and not under a proviso or stipulation in a lease to which alone s. 146 (2) extended.

[As to the conditions for relief against forfeiture, see 20 Halsbury's Laws (2nd Edn.) 257, para. 290.

For the Law of Property Act, 1925, s. 146, see 20 Halsbury's Statutes (2nd Edn.) 739.]

Cases referred to:

(1) *Barton* v. *Reed,* [1932] 1 Ch. 362, 375; 101 L.J.Ch. 219; 146 L.T. 501; 31 Digest (Repl.) 171, *3049*.

(2) *Kisch* v. *Hawes Bros., Ltd.,* [1934] All E.R. Rep. 730; [1935] Ch. 102; 104 L.J.Ch. 86; 152 L.T. 235; 31 Digest (Repl.) 523, *6450*.

(3) *Doe d. Ellerbrock* v. *Flynn,* (1834), 1 Cr. M. & R. 137; 3 L.J.Ex. 221; 149 E.R. 1026; 31 Digest (Repl.) 522, *6443*.

Application.

This was an application under s. 146 (2) of the Law of Property Act, 1925, for relief from forfeiture. The applicants were the defendants in an action, reported at p. 44, ante, in which the plaintiff claimed possession of demised premises. The claim was based, in the first instance, on breaches of covenant. Ashworth, J., gave judgment for the plaintiff on the ground that the plaintiff was entitled to forfeit the lease because the second defendant, by her defence, had, in effect, denied the plaintiff's title. At the close of the hearing His Lordship reserved for argument at a later date the question whether the defendants could apply for relief from forfeiture.

J. H. Hames for the defendants*.

L. G. Scarman, Q.C., and *J. R. Phillips* for the plaintiff.

ASHWORTH, J.: Counsel for the defendants applies under s. 146 (2) of the Law of Property Act, 1925, for relief against forfeiture, and he fairly stated that his researches have not disclosed to him any case in which, in similar circumstances, relief has been sought, let alone granted. He prays in aid the fact that there is no express decision to the effect that the court will not grant relief in such circumstances. I feel, however, that there is a weighty counter to that last contention because this issue came before the courts in *Barton* v. *Reed* (1) ([1932] 1 Ch. 362) and in *Kisch* v. *Hawes Bros., Ltd.* (2) ([1934] All E.R. Rep. 730), to both of which cases I referred in my previous judgment; and it would be astonishing to me if this remedy were available, since, for example, in *Barton* v. *Reed* (1), counsel for the plaintiff expressly conceded that the defendants should be at liberty to withdraw their defence rather than to amend it, because otherwise the defendants were in a hopeless position. If relief from forfeiture

---

* Counsel and solicitors acting for the defendants did not act for the second defendant at the time when the defence referred to was delivered.

A could have been granted in those circumstances, that would have been a far less oblique way of reaching the desired object.

In my view, however, apart from those features of the case, s. 146 (2) does not apply. The facts must be borne in mind. In this action the plaintiff brought proceedings for breaches of covenant and for non-payment of rent. In the defence delivered by the second defendant, the landlord's title, as I have held, B was put in issue by denial. The result was that the landlord, as I have held, was entitled by way of reply to say that the plea amounted to a disclaimer or denial of the landlord's title, and that thereupon a forfeiture arose. The side-note to s. 146 is: " Restrictions on and relief against forfeiture of leases and under-leases ", and on reading s. 146 (1) it is quite apparent that this is a section dealing with the procedure for forfeiture arising in cases where a landlord is C seeking a right of re-entry or forfeiture under a proviso or stipulation in a lease for a breach of any covenant or condition in the lease. Section 146 (1) says that that right shall not be enforceable unless certain preliminary conditions are satisfied. It appears to me plain beyond argument that it would have been quite impossible for the landlord in this case to comply with those conditions—and, moreover, the section does not contemplate the application of those conditions D to such a situation as that of the present case. In my judgment, this is not a forfeiture under any proviso or stipulation in a lease; it is a forfeiture which arises by operation of law. I think that some of the cases cited in my previous judgment—in particular *Doe d. Ellerbrock* v. *Flynn* (3) ((1834), 1 Cr. M. & R. 137)*—justify this view.

If the forfeiture occurs (as I have held that it did) by reason of the denial of E the lease and the title, it seems to me strange to suggest that a lessee may, notwithstanding that denial, ask for relief on the footing that the lease exists. Having regard to the fact that on no previous occasion (so far as the researches of counsel go) has any successful application for relief in this type of case been made, I am not prepared to be the pioneer in the matter or to grant relief in this case. The application, therefore, is refused.

Application refused.

Solicitors: *Wilders & Sorrell*† (for the defendants); *Murray, Hutchins & Co.* (for the plaintiff).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

---

* See p. 50, letter G, ante.

† See footnote, p. 314, ante.

Re LAST (*deceased*).

[Probate, Divorce and Admiralty Division (Karminski, J.), December 12, 18, 1957, January 15, 1958.]

Will—Absolute gift—Effect of subsequent words—"Anything that is left"—Ambiguity—Cutting down of absolute gift to life interest.

The testatrix left a holograph will in the following form: "I give and bequeath unto my brother [T.G.C.] All property and everything I have money and otherwise. At his death anything that is left, that came from me to go to my late husband's grandchildren [C.F.G.B.] [H.G.L.]." T.G.C. died in 1957 intestate and without issue or relations entitled to share in the event of an intestacy. The applicants, C.F.G.B. and H.G.L., now sought letters of administration with the will annexed de bonis non administratis, claiming that they were entitled in equal shares to what remained of the estate of the testatrix. The Treasury Solicitor contended that on the true construction of the will there had been an absolute bequest of the whole of the estate of the testatrix to T.G.C. and that the Crown was entitled thereto as bona vacantia.

Held: the applicants were entitled in equal shares to the estate and accordingly letters of administration with the will annexed would be granted to them, since, on the true construction of the will, T.G.C.'s interest was cut down from an absolute interest to a life interest.

Re Sanford ([1901] 1 Ch. 939) applied.

[As to the cutting down of an absolute gift in a will by a gift over, see 34 Halsbury's Laws (2nd Edn.) 339, para. 388, note (i); and for cases on the subject, see 44 Digest 962-965, *8155-8176.*]

Cases referred to:

(1) *Constable* v. *Bull*, (1849), 3 De G. & Sm. 411; 18 L.J.Ch. 302; 22 L.J.Ch. 182; 64 E.R. 539.

(2) *Re Sheldon & Kemble*, (1885), 53 L.T. 527; 44 Digest 964, *8173*.

(3) *Re Thomson's Estate, Herring* v. *Barrow*, (1879), 13 Ch.D. 144; 49 L.J.Ch. 16; *affd.* C.A., (1880), 14 Ch.D. 263; 49 L.J.Ch. 622; 43 L.T. 35; 37 Digest 396, *85*.

(4) *Henderson* v. *Cross*, (1861), 29 Beav. 216; 54 E.R. 610; 44 Digest 963, *8160*.

(5) *Perry* v. *Merritt*, (1874), L.R. 18 Eq. 152; 43 L.J.Ch. 608; 44 Digest 963, *8158*.

(6) *Re Jones, Richards* v. *Jones*, [1898] 1 Ch. 438; 67 L.J.Ch. 211; 78 L.T. 74; 44 Digest 964, *8171*.

(7) *Re Sanford, Sanford* v. *Sanford*, [1901] 1 Ch. 939; 70 L.J.Ch. 591; 84 L.T. 456; 44 Digest 952, *8055*.

(8) *Re Gouk. Allen* v. *Allen*, [1957] 1 All E.R. 469.

Probate Motion.

The applicants in this case, C. F. G. Baker and H. G. Last, sought letters of administration with the will of Dec. 2, 1940, annexed de bonis non administratis.

The facts appear in the judgment.

J. W. Bygott-Webb for the applicants.

Victor Russell for the Treasury Solicitor.

Cur. adv. vult.

Jan. 15. **KARMINSKI, J.,** read the following judgment: Mrs. Bertha Mary Last (to whom I shall refer as the testatrix) died in April, 1953, having duly executed a will on Dec. 2, 1940. This will was written out by the testatrix herself on a printed will form. It does not appear that in the preparation of this will she had the benefit of any skilled advice, and in the result a matter of construction of some difficulty has arisen. The will revoked all earlier wills and appointed her brother Mr. Tom Goodman Cotton as her executor. The testatrix then sought to dispose of her estate in the following terms:

> " I give and bequeath unto my brother Tom Goodman Cotton.
> All property and everything I have money and otherwise.
> At his death anything that is left, that came from me to go to my late husband's grandchildren
> Claude Frederick George Baker
> Harold George Last."

The will was duly proved by the executor, T. G. Cotton, on June 17, 1953. On Apr. 22, 1957, the executor died intestate and without issue or relations entitled to share in his estate in the event of an intestacy, nor had he appointed trustees of the trusts (if any) created by the will.

The present motion is by C. F. G. Baker and H. G. Last for letters of administration with the will of December, 1940, annexed de bonis non administratis to the estate of the testatrix. The applicants claim that on the true construction of the will and in the events which have happened they are now entitled in equal shares to the estate of the testatrix. The applicants contend that on the correct construction of the will, T. G. Cotton took a life interest only in the estate of the testatrix, and that after his death the applicants became absolutely entitled thereto. The opposite view was canvassed by the Treasury Solicitor, who contends that T. G. Cotton took the whole of the estate of the testatrix absolutely, and that in the events which have happened the estate goes to the Crown as bona vacantia. The result is a question of construction which has caused me some difficulty. The testatrix has in consecutive sentences made what appears to be an absolute gift of all her estate to her brother, but then added words which indicate a gift over on his death to the present applicants. With the aid of a number of authorities (some of which are themselves difficult to reconcile) I have to try to ascertain first the true principles of construction, and then to apply them in order to ascertain what were the testamentary intentions of this unskilled testatrix.

In his clear and careful argument, counsel for the applicants submitted that effect must be given to the whole of the words used by the testatrix, and that the additional words bringing in the applicants cannot be without purpose and must indeed prevail over the earlier words purporting to make an absolute gift to T. G. Cotton. It was further submitted by counsel that the testatrix was very unlikely to have wished to benefit the Crown by the will, and that therefore the court should lean against a construction which would produce a result wholly inconsistent with the testatrix' wishes. It may well be that the testatrix did not intend the Crown to be the object of her testamentary bounty. It may be even more likely that such a possibility never even entered her mind. If, however, the true construction of this will warrants the conclusion that it gave the whole estate to T. G. Cotton absolutely, I cannot avoid such a conclusion only because it may produce a result which the testatrix did not clearly foresee and may not at all have desired. Counsel for the Treasury Solicitor argued that the gift to T. G. Cotton was absolute, and that the second part of the will was repugnant to the first. Counsel further argued that to reduce T. G. Cotton's absolute interest, very clear words must be used; that there were no such clear words used here, and that the introduction of the applicants into the will was no more than a pious hope expressed by the testatrix to T. G. Cotton.

It will be observed that the testatrix has used these words in her will:

> " At his death anything that is left, that came from me to go to my late husband's grandchildren."

I find that the difficulty stems from the use of the words " anything that is left ". A But for the introduction of these words I should have felt little difficulty in deciding that the testatrix intended to give a life interest only to T. G. Cotton. The introduction of these words, however, does not prevent the cutting down of an absolute interest to a life interest if the will itself supports such a construction (see THEOBALD ON WILLS (11th Edn.), p. 434). In *Constable* v. *Bull* (1) ((1849), 3 De G. & Sm. 411), the words used were " whatever remains of my said estate and B effects ". It was there held by KNIGHT BRUCE, V.-C., that these words prevented the widow from disposing of the property and that the other legatees mentioned in the will had a substantial interest. I do not think that there is any real difference in meaning between the words " whatever remains " and " anything that is left ". In *Re Sheldon & Kemble* (2) ((1885), 53 L.T. 527) a testator bequeathed in substance all his real and personal estate to his wife, but added the desire that C at her death what might remain of his property should be equally divided among his surviving children. KAY, J., refused to treat the gift over to the children as void. Saying that the case could not be distinguished from *Constable* v. *Bull* (1), he added these words (53 L.T. at p. 528):

> " If there is any sort of ambiguity, the court ought to adopt that construction, which most effectually regards the testator's intention, reading the whole will together." D

In *Re Thomson's Estate, Herring* v. *Barrow* (3) ((1879), 13 Ch.D. 144), a testator left all his property real and personal to his wife to be disposed of as she might think proper and in the event of her decease should there be anything remaining of the said property or any part thereof, to certain named persons. HALL, V.-C., E held that the widow took only an estate for life with a power of disposition only during her life, and not a power to dispose by will and that therefore what the widow had not actually disposed of in her lifetime was subject to the gift over.

I have so far discussed only some of the cases which have resulted in the defeat of an absolute interest and in the establishment of a gift over. Both counsel for the applicants and counsel for the Treasury Solicitor referred me to a number F of decisions in the contrary sense. Thus in *Henderson* v. *Cross* (4) ((1861), 29 Beav. 216), a testatrix left all her property to her father, but added these words " Should my dear father not spend the property which I leave in trust for him, it to be equally divided between my two sisters." SIR JOHN ROMILLY, M.R., held this to be an absolute gift to the father, on the principle that the gift over did not cut down the previous interest but left it in the same state as it was before. G In *Perry* v. *Merritt* (5) ((1874), L.R. 18 Eq. 152), where after a bequest of residue to a wife for her absolute use and benefit a will directed that all the money (if any) that should be remaining at her death be divided between a daughter and her three children, HALL, V.-C., held that the widow took an absolute interest in the residuary personal estate.

Perhaps the strongest authority in favour of the Treasury Solicitor's contention H is *Re Jones, Richards* v. *Jones* (6) ([1898] 1 Ch. 438). There a testator gave all his property to his wife

> " for her absolute use and benefit so that during her lifetime . . . she shall have the fullest power to sell and dispose of my said estate absolutely. After her death as to such parts . . . as she shall not have sold or disposed of . . . I give devise and bequeath . . . unto my brother . . . and my wife's I sister . . . upon trust to . . . divide "

among certain persons. BYRNE, J., held that the widow took an absolute interest in the testator's real and personal estate. Discussing the rules of construction in cases of this kind, he said (ibid., at p. 441):

> " It is clear that if a gift is made in terms to a person absolutely, that can only be reduced to a more limited interest by clear words cutting down the first estate. There is a principle also . . . that, although the words are

absolute in the first instance, you may find subsequently occurring words sufficiently strong to cut down the first apparent absolute interest to a life interest."

Re Jones (6) was distinguished by Joyce, J., on the facts in *Re Sanford, Sanford* v. *Sanford* (7) ([1901] 1 Ch. 939). In the latter case a will and codicil had to be construed together, and the facts there were wholly different from the present case; but in the course of his judgment Joyce, J., used the following words which are of general application (ibid., at p. 943):

> "The adoption of the construction which I prefer has the not unimportant merit of effectuating the obvious and expressed intention of the testator, and if the terms of the codicil be ambiguous . . . there is not wanting authority to show that in a case of obscurity or ambiguity . . . weight may be given to the consideration that it is better to effectuate than to frustrate the testator's intention."

Lastly I would refer briefly to the recent decision of *Re Gouk. Allen* v. *Allen* (8) ([1957] 1 All E.R. 469). There a testatrix gave all the remainder of her estate to her sister and thereafter to her sister's issue. Danckwerts, J., had to consider the meaning of the words "and thereafter", which he held to be indistinguishable from the word "afterwards". He held that the sister took absolutely, since there was no express reference to her death. I must distinguish that case from the present, where the words used by the testatrix were "at his death".

In a matter of construction of this kind it is clearly essential to pay particular attention to the terms of the instrument which is being construed and to avoid too close comparisons with words used in wills in other cases. In the present case, looking at the will as a whole, I have come to the conclusion that the words used are sufficiently clear to cut down T. G. Cotton's interest from an absolute to a life interest. Clearly there is an ambiguity, but I have attempted to read the will as a whole, and then to reach that construction which most effectively in my view expresses the intentions of the testatrix. I remind myself of the words of Joyce, J., in *Re Sanford* (7) ([1901] 1 Ch. at p. 944):

> ". . . weight may be given to the consideration that it is better to effectuate than to frustrate the testator's intention."

In the result I find that on the true construction of this will the applicants are entitled in equal shares to the estate of the testatrix and to a grant of letters of administration with the will of Dec. 2, 1940, annexed de bonis non administratis of the estate of the testatrix.

Order accordingly.

Solicitors: *Tapp, Blackmore & Weston,* agents for *Cousins, Burbidge & Connor,* Portsmouth (for the applicants); *Treasury Solicitor.*

[*Reported by* A. T. Hoolahan, Esq., *Barrister-at-Law.*]

LEACH *v.* LEACH AND HARROWER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Mr. Commissioner Latey, Q.C.), December 19, 20, 1957.]

Divorce—Costs—Judicial separation—Wife's petition alleging adultery with woman named—Claim for costs against woman named—Respondent in cause—Jurisdiction—Matrimonial Causes Act, 1950 (14 *Geo.* 6 *c.* 25), *s.* 3 (2), *s.* 14 (1)—*Matrimonial Causes Rules,* 1957 (*S.I.* 1957 *No.* 619), *r.* 5 (1).

The court has jurisdiction in a wife's suit for judicial separation to make an order for costs against a woman named as an adulteress and made a respondent in the cause.

[As to costs against the woman named divorce in a suit, see 12 HALSBURY'S LAWS (3rd Edn.) 405, para. 899.

For the Matrimonial Causes Act, 1950, s. 3 (2), s. 14 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) 394, 401.

For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 50 (1), s. 225, see 18 HALSBURY'S STATUTES (2nd Edn.) 486, 517.]

Case referred to:

(1) *Butler* v. *Butler,* (1890), 15 P.D. 126; 62 L.T. 477; 27 Digest (Repl.) 595, *5566.*

Petition.

In this case the wife petitioned for a decree of judicial separation on the ground that the husband had committed adultery with one Sylvia Harrower, alleged that the petition " was not presented or prosecuted in collusion with the respondent " (i.e., the husband), and concluded with a prayer that, inter alia, " the respondent [the husband] and the said Sylvia Harrower may be condemned in the costs of this suit ". Sylvia Harrower was named as a respondent in the title to the suit. The suit was undefended save that the woman named in the petition, Sylvia Harrower, opposed the application for costs against her on the ground that the court had no jurisdiction to make such an order. Counsel for the wife contended that since the petition was one which alleged adultery with a woman named, and contained a claim for costs against her, the woman named was added in the registry as a respondent in the cause and that the court could make an order for costs against her as she was a party to the suit.

H. S. Law for the wife.

D. Loudoun for the husband and the woman named.

MR. COMMISSIONER LATEY, Q.C.: In this case, an undefended suit by a wife for judicial separation on the ground of her husband's adultery with a Mrs. Sylvia Harrower, who is named in the petition as a respondent, a question has arisen concerning the claim for costs by the wife against Mrs. Harrower.

Counsel, who represents both the husband respondent, who is not defending the case, and the woman named as an adulteress, Mrs. Harrower, who has not defended the case on its merits, claims that this court has no jurisdiction to make the order for costs which is sought against Mrs. Harrower; and he further has made a plea in mitigation on her behalf that the determination of the wife to claim these costs against Mrs. Harrower is founded on a vindictive motive to punish her for taking her husband away. This second plea might have some effect on the mind of a judge if there were evidence that the wife was a vindictive, vicious sort of woman who had given her husband into the arms of the other woman, but my view of the evidence is the absolute converse. The husband had been very reluctantly persuaded by the other woman to leave his wife. Both husband and wife had reached the age of sixty-three, and they lived together as far as one could tell from the evidence with reasonable happiness until the end of the war. Ever since 1947 the husband has been, on his own admission, living in adultery with Mrs. Harrower, that is to say whenever the opportunity presented itself he stayed at her home and other places. Therefore I do not for one moment accept that this is a vindictive claim on the part of the wife.

Counsel has, however, introduced a novel plea in regard to jurisdiction—ingenious, if somewhat artificial. He says that s. 28 of the Matrimonial Causes Act, 1857, permitted a woman charged with adultery by a wife in a divorce suit to be made a respondent and to be made liable for the costs of the action. This court is somewhat slow in implementing that section. The first time it was given effect to was in 1926* although it had been the law since 1857. Since then, of course, it has often been employed against a woman who had put herself in the position of an adulteress. But he says that that provision which is now contained in the Matrimonial Causes Act, 1950, s. 3 (2), applies only to divorce, and so, indeed, it does if taken by itself. Section 3 (2) of the Matrimonial Causes Act, 1950, reads as follows:

> " On a petition for divorce presented by the wife on the ground of adultery the court may, if it thinks fit, direct that the person with whom the husband is alleged to have committed adultery be made a respondent."

In s. 14 (1) of the same Act it is provided:

> ". . . the foregoing provisions of this Act relating to the duty of the court on the presentation of a petition for divorce, and the circumstances in which such a petition shall or may be granted or dismissed, shall apply in like manner to a petition for judicial separation."

Counsel for the wife has said in opposition to the submission of counsel for the woman named that that part of s. 14 (1) which I have quoted picks up s. 3, a preceding section in the statute. He also argues that nowhere in the Matrimonial Causes Act, 1950, is there any section which provides in the ordinary way for an order for costs and that that must be implied as part of the ordinary duty of the court after a case has been decided, and he has referred me to the well-known case of *Butler* v. *Butler* (1) ((1890), 15 P.D. 126), in which it is declared that the court has an unfettered discretion in regard to an order for costs, on no less an authority than Lindley, L.J. That, of course, is only a declaration of the law which applied in those days under s. 51 of the Matrimonial Causes Act, 1857, which was repealed by the Statute Law Revision Act, 1892, and is now enshrined in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 50 (1). The principle which, of course, is well known, is that the judge has unfettered discretion, which he has to exercise judicially, in regard to costs.

Now, as counsel for the wife has pointed out, if counsel for the woman named is right, this section does not extend to a suit for judicial separation. Counsel for the woman named brings to bear in favour of his proposition a statement from Rayden on Divorce (6th Edn.), p. 484, para. 46†. The section therein referred to is s. 3 (2), which I have already quoted, of the Matrimonial Causes Act, 1950. There is no authority for that statement in that very valuable text-book and authority. Rule 5 (1) of the Matrimonial Causes Rules, 1957, reads:

> " Unless otherwise directed . . . where a wife's petition alleges adultery with a woman named and contains a claim for costs against her, she shall be made a respondent in the cause."

That rule applies to both co-respondents and interveners. I understood counsel for the woman named to submit that technically Mrs. Harrower is not an intervener although she has entered an appearance and although the title of the petition served on her bears her name as second respondent. What it really comes to is that counsel is entering protest to the jurisdiction to order costs. He is saying that the court has no jurisdiction because there is no special section of any statute which lays it down that costs may be granted in a judicial separation suit against a woman named as an adulteress.

---

* See *Pepper* v. *Pepper and Baker* (1926), 96 L.J.P. 17. At that date the provision had been re-enacted in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 177 (2).

† See now **Rayden on Divorce (7th Edn.), p. 566, para. 46.**

I cannot accept that submission for one moment. It is negatived by the fact that s. 14 of the Matrimonial Causes Act, 1950, picks up s. 3 (2) of that Act, and wherever there are parties to a suit the court is entitled to make an order for costs. In the interpretation clause of s. 225 of the Supreme Court of Judicature (Consolidation) Act, 1925, it is clearly stated that:

> " 'Party' includes every person served with notice of or attending any proceeding, although not named on the record."

In this particular case Mrs. Harrower is named on the record, and she stands in just the same position as a male co-respondent would in a husband's petition for divorce on the ground of his wife's adultery. In those circumstances, I have no hesitation in rejecting the submission of counsel for the woman named and making an order for costs against her as well as against the husband.

Order accordingly.

Solicitors: *Vizard, Oldham, Crowder & Cash* (for the wife); *Withers & Co.* (for the husband and the woman named).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

BARBER *v.* MANCHESTER REGIONAL HOSPITAL BOARD AND ANOTHER.

[QUEEN'S BENCH DIVISION (Barry, J.), December 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 1957.]

National Health Service—Hospital—Staff—Continuance of employment of consultant after nationalisation—Contract subject to terms and conditions of service issued by Minister—Termination of employment by regional hospital board—Non-compliance with clause of terms of service for reference to Minister before termination of employment—Remedies—Measure of damages—Declaration—Discretionary remedy—Breach of contract of employment—Breach of statutory duty under National Health Service Act, 1946 (9 & 10 *Geo.* 6 *c.* 81), *s.* 12, *s.* 14, *s.* 68.

Consequent on the establishment of the national health service on July 5, 1948, the first defendant, a regional hospital board, offered by a circular letter dated July 1, 1949, to continue the appointment of, among other persons, the plaintiff, who at the time of the establishment of the health service was employed as a consultant at a hospital administered by a local authority which thereafter came under the administration of the board on behalf of the Minister of Health. The continuance of the plaintiff's employment was subject to the terms and conditions of service of hospital medical staff stated in a memorandum of June 7, 1949, issued by the Minister. By cl. 16 of these terms a consultant who considered that his appointment was being unfairly terminated by a regional hospital board, was entitled to send a full statement of the facts to the Minister, who was then to place the case before a professional committee for their advice, in the light of which he would decide whether to confirm the termination of service or to direct reinstatement or to arrange some third solution agreeable to the parties concerned. This procedure was to be completed before a board's decision to terminate a consultant's services was carried into effect. The plaintiff continued in the employment of the board as hospital consultant. In January, 1952, the board purported to determine the plaintiff's employment as from Apr. 30, 1952, and the plaintiff, considering his dismissal unfair, caused the Minister to be informed of the facts, but it was maintained on behalf of the Minister that no appeal lay to him and the Minister, therefore, reached no decision under cl. 16. The plaintiff brought an action against the board and the Minister, claiming declarations that his employment with the board was subject to the terms and conditions of service issued by the Minister, and that it was never validly determined; he also claimed damages for breach of contract or wrongful dismissal and, as against the Minister, a declaration that in failing to comply with cl. 16 the Minister acted in breach of his statutory duty under the National Health Service Act, 1946.

Held: (i) such of the terms and conditions of service issued by the Minister as were appropriate to the contracts of employment of whole-time or part-time medical staff were capable of being incorporated in their contracts of employment by regional hospital boards, and cl. 16 was incorporated in the plaintiff's contract of employment as a consultant and had contractual effect; therefore the termination of the plaintiff's employment by the board without cl. 16 having been complied with was a breach of contract by the board.

(ii) if, contrary to the finding of the court, the plaintiff had not sent a full statement of the facts to the Minister in accordance with cl. 16, the Minister had, by his conduct in maintaining that no appeal to him lay under cl. 16, waived any defence (either by the Minister or by the board) that the plaintiff had not complied with cl. 16 by sending such a statement.

(iii) as regards relief—

(a) the plaintiff's contract with the board was one between master and servant, the termination of which could not be a nullity, and the plaintiff was not, therefore, entitled to a declaration that his employment had never been validly determined but was entitled to recover damages for breach of contract: *Vine* v. *National Dock Labour Board* ([1956] 3 All E.R. 939) distinguished.

(b) the measure of damages for the wrongful termination of the plaintiff's employment was his loss of salary for the period for which he would have been employed if his appeal under cl. 16 had been rightly decided.

(c) a declaration would be granted, as against the Minister, that in failing to comply with cl. 16 of the terms and conditions of service, he had acted in breach of his statutory duty under the National Health Service Act, 1946.

[For the National Health Service Act, 1946, s. 14, s. 68, see 15 HALSBURY'S STATUTES (2nd Edn.) 352, 396.]

Cases referred to:

(1) *Short* v. *Poole Corpn.*, [1926] Ch. 66; 95 L.J.Ch. 110; 134 L.T. 110; 90 J.P. 25; Digest Supp.

(2) *Price* v. *Rhondda Urban Council*, [1923] 2 Ch. 372; 93 L.J.Ch. 1; 88 J.P. 69; 19 Digest 604, *302*.

(3) *Vine* v. *National Dock Labour Board*, [1956] 3 All E.R. 939; [1957] A.C. 488; *revsg. in part*, [1956] 1 All E.R. 1; 3rd Digest Supp.

Action.

This was an action by Alexander Howard Barber, the plaintiff, against the Manchester Regional Hospital Board (referred to hereinafter as " the regional hospital board ") and the Minister of Health (referred to hereinafter as " the

Minister "), the defendants, arising out of the termination by the regional hospital board of the plaintiff's appointment as a consultant at Boundary Park Hospital, Oldham, which was a hospital administered by the board, on Apr. 30, 1952. The plaintiff claimed:—against both defendants (i) a declaration that his employment with the regional hospital board was subject to the Terms and Conditions of Service of Hospital Medical and Dental Staff (England and Wales) (referred to hereinafter as " the terms and conditions of service ") which were issued by the Minister on June 7, 1949; against the regional hospital board (ii) a declaration that his employment with the board was never validly determined; (iii) payment of salary at the rate of £2,375 per annum from May 1, 1952, to the date of the writ in the action; (iv) damages for breach of contract; and, alternatively, (v) damages for wrongful dismissal; and against the Minister, (vi) a declaration that the Minister, in failing to comply with cl. 16 of the terms and conditions of service, had acted wrongfully and in breach of his statutory duty under the National Health Service Act, 1946. The plaintiff further alleged that, in purporting to exercise their statutory power to terminate his employment, the regional hospital board and the Minister acted mala fide in breach of their duty.

At all material times immediately prior to July 5, 1948 (the date when the Act of 1946 came into force), the plaintiff was employed by Oldham Borough Council as visiting surgeon in charge of the obstetrical and gynaecological departments of Boundary Park Hospital, Oldham, which was then owned and administered by the borough council. He also carried on a relatively small private practice, but devoted the greater part of his skill and time to the hospital. By s. 6 (2) of the Act of 1946, the hospital was transferred to, and became vested in, the Minister on July 5, 1948. By s. 12 of the Act, it became the duty of the regional hospital board, subject to and in accordance with regulations and directions made by the Minister, to administer, on behalf of the Minister, the hospital and specialist services provided in their area, and to appoint officers required to be employed at hospitals other than teaching hospitals. Boundary Park Hospital came within the area administered by the regional hospital board, and by s. 14 (1) of the Act of 1946, all officers who were employed for the purposes of the hospital became officers of the regional hospital board. By the National Health Service (Transfer of Officers and Compensation) Regulations, 1948 (S.I. 1948 No. 1475), reg. 4, it was provided that officers who, immediately before July 5, 1948, were employed solely or mainly at or for the purposes of any hospital which was transferred to the Minister under the Act of 1946 should, on that day, be transferred to and become officers of the regional hospital board for the area in which the hospital was situated. Regulation 4 drew no distinction between whole-time and part-time officers, and, accordingly, the plaintiff, although classified as a part-time officer under the Act of 1946 because he carried on a private practice, was a transferred officer within reg. 4, being employed wholly or mainly at Boundary Park Hospital on July 5, 1948, and after that date, he was employed by the regional hospital board on the same terms as those which were applicable to his employment prior to July 5, 1948. Owing to an administrative error, the regional hospital board, for some months after July 5, 1948, thought that the plaintiff was a whole-time officer, but the senior medical administrative officer of the board was always fully aware of the plaintiff's position.

In a circular letter dated July 1, 1949, which was sent by the regional hospital board to the plaintiff, the board said (in para. 1 of the letter) that they now had in preparation the permanent contracts which they would " shortly offer to all whole-time practitioners now engaged in the hospital service ". In para. 2 of the letter it was stated that the permanent contracts would be

> " . . . on the basis of the terms and conditions of service agreed between the Ministry of Health and the medical and dental professions and detailed in the Supplement to the British Medical Journal of June 11, 1949* . . . "

that a further communication would be addressed to the plaintiff shortly; and that

> " In the meantime, this letter is to inform you that pending settlement of the permanent contracts the duties of your present post will be continued with effect from July 5, 1949, in the grade of specialist of full staff and consultant status and subject to the terms and conditions of service above referred to."

The plaintiff continued to serve the regional hospital board after receiving the letter, and thereafter the board regarded the letter as governing the terms of the plaintiff's employment with them and relied on it in making adjustments in the plaintiff's remuneration which (as stated in letters written by the treasurer of the regional hospital board to the plaintiff on Aug. 22, 1950, and Nov. 15, 1950, respectively) was fixed at £2,375 per annum from July 5, 1948. Clause 16 of the terms and conditions of service provided:

> " Where a consultant considers that his appointment is being unfairly terminated by a board, he shall be entitled to send a full statement of the facts to the Minister, who will obtain the written views of the board concerned and place the case before a professional committee . . . for their advice . . . In the light of their advice the Minister may confirm the termination of services, or direct reinstatement, or arrange some third solution agreeable to the parties concerned, such as re-employment in a different post. This procedure shall be completed before the board's decision to terminate the consultant's appointment is carried into effect."

In a letter dated Mar. 20, 1950, the regional hospital board offered the plaintiff a permanent contract as a consultant " to replace the existing interim contract ", and stated that the terms and conditions of service of the contract would be those agreed between the profession and the Ministry of Health, viz., those issued by the Minister on June 7, 1949, as amended, and that the form of the contract would be based on the amended model form agreed by the profession. The plaintiff did not accept this offer, as he did not consider that the number of sessions a week which were being offered to him were sufficient in view of the amount of work which he did at the hospital. The plaintiff was required to attend a meeting of the regional hospital board's disciplinary sub-committee on Dec. 13, 1951, and was informed that if he failed to sign the offered contract by Jan. 14, 1952, the board would assume that he was not prepared to accept a contract on the terms which the board were prepared to offer. The plaintiff, considering that he was being unfairly treated, caused his solicitors to report the facts of the case to the Minister, and on Jan. 14, 1952, there was an interview between the Minister's representative and a member of the firm of solicitors.

By a letter dated Jan. 23, 1952, the regional hospital board purported to terminate the plaintiff's employment from Apr. 30, 1952. The facts of the case were put before the Minister, on the plaintiff's behalf, in a letter dated Feb. 6, 1952, and written by the member of Parliament for Oldham West. The Minister, however, being of opinion that the terms and conditions of service did not apply to the plaintiff's employment, did not comply with the provisions of cl. 16, the case was never referred to a professional committee and the Minister did not reach a decision under cl. 16. The regional hospital board were of the same opinion as the Minister and purported to terminate the plaintiff's appointment although the provisions of cl. 16 had not been complied with.

---

* These were the terms and conditions issued by the Minister on June 7, 1949.

The defendants contended that the terms and conditions of service were never incorporated as part of the plaintiff's contract of employment, and, alternatively, that, if they were, cl. 16 thereof was not incorporated. They further contended that, if cl. 16 did form part of the contract, the plaintiff could not rely on it as he failed to send a full statement of the facts of his case to the Minister as provided in cl. 16. The defendants also denied that they had acted mala fide in their relationship with the plaintiff.

Scott Henderson, Q.C., and *A. C. Munro Kerr* for the plaintiff.

John Foster, Q.C., *J. T. Molony, Q.C.*, and *A. Garfitt* for the defendants, the regional hospital board and the Minister of Health.

BARRY, J., having stated the facts and referred to the correspondence, continued: It being admitted that the actual, or the purported, termination of the plaintiff's appointment was carried into effect before completion of the procedure laid down in cl. 16[*] of the terms and conditions of service, the first question for my consideration is whether or not that clause was incorporated in the contract under which the plaintiff was serving the regional hospital board as a consultant on the date when his services were terminated. After the appointed day, there can, I think, be no doubt that the plaintiff entered into the regional hospital board's employment under terms similar to those which were applicable to his contract before the appointed day with the Oldham Borough Council. If nothing further had been done, and no further contractual arrangements had been made, there is a great deal to be said in favour of the view of the Ministry of Health that the terms and conditions of service would have had no application until the plaintiff had entered into a new contract with the regional hospital board in which those terms and conditions were incorporated. In the present case I am entirely satisfied that the plaintiff did enter into a new contract with the regional hospital board on the terms indicated in their letter[†] of July 1, 1949, from which it is clear that from that date or from July 5, 1949, four days later, the plaintiff was being offered a continued service with the regional hospital board "subject to the terms and conditions of service above referred to", which were the terms and conditions issued by the Minister on June 7, 1949, and reprinted for the whole medical profession in the issue of the British Medical Journal for June 11, 1949.

The plaintiff continued to serve the regional hospital board after the receipt of this letter, and by so doing I am satisfied that he must be deemed impliedly to have accepted the offer which it contained. I wholly reject the argument that this letter had no effect because it purported to refer to whole-time officers. The plaintiff was plainly a transferred officer. There was not, at any time, any possible doubt on that point. As a transferred officer his position was, as I see it, identical with that of a whole-time transferred officer, except, when the terms and conditions of service came into force, with regard to remuneration, a part-time officer being, of course, remunerated on a different basis from that applying to whole-time officers. Whether by mistake or otherwise, the regional hospital board did in fact address this letter to the plaintiff, and after their own administrative mistake had been rectified they never suggested that this letter was not to be regarded as governing the plaintiff's terms of employment. Indeed, they more than once relied on the terms and conditions of service in order to adjust the plaintiff's salary in various directions. In this connexion one cannot forget the Minister's direction which is printed in full in the British Medical Journal[‡]:

> "Remuneration and conditions of service are interdependent and the application retrospectively of the former should ideally be accompanied by the application retrospectively of the latter."

---

[*] For the terms of cl. 16 see p. 325, letter D, ante.

[†] For the relevant terms of the letter, see p. 324, letter I, to p. 325, letter B, ante.

[‡] See the Supplement to the British Medical Journal for June 11, 1949, p. 327.

A Counsel for the regional hospital board's second submission, as I understand it, was to this effect: if, contrary to his submission, any of the terms and conditions were incorporated in this contract, it does not mean that they became part of the contract in the sense that the applicable terms and conditions became terms of the contract between the plaintiff and the regional hospital board. As I understood his argument, the phrase "subject to the terms and conditions
B of service" should only be regarded as meaning that the terms and conditions would regulate the future relationship between the plaintiff and the regional hospital board as regards leave and other such matters, and would ultimately be incorporated into a permanent contract. I am bound to say that in my judgment the second paragraph of the letter dated July 1, 1949*, cannot possibly be held to bear that suggested interpretation.

C Thirdly, counsel submitted that even if the letter and the words "subject to the terms and conditions of service above referred to" can be said to incorporate some of the terms and conditions, they cannot be said to incorporate all of them. In a sense, of course, as counsel for the plaintiff conceded, this argument is obviously correct. The terms and conditions are a code and obviously into the contract with a part-time officer there cannot be incorporated the terms and remuneration
D applicable to whole-time officers. Similarly, certain other paragraphs in the terms and conditions are more applicable to the regional hospital board itself, and really contain directions to the regional hospital board rather than directions which may be incorporated in any contract between either a whole-time or a part-time officer and the regional hospital board.

However, in my judgment, cl. 16 is a clause which can quite clearly be incor-
E porated in a contract made with either a whole-time or a part-time consultant, and if a whole-time or a part-time consultant is employed by the regional hospital board subject to these terms and conditions of service, one of the terms and conditions incorporated into his contract is cl. 16, which gives him a measure of security of tenure in his employment, and prevents its termination, if he considers the termination to be unfair, until the procedure laid down in that clause
F has been carried out. I cannot see any foundation for saying that the words "subject to the terms and conditions of service" can on any reasonable interpretation be said to exclude cl. 16. If any terms and conditions are to be incorporated in the contract, why should cl. 16 be excluded? I have been unable to find any satisfactory answer to that question. It is a clause clearly appropriate to inclusion in the contract of a consultant, just as appropriate as
G the clauses relating to his terms of remuneration, leave and other matters of a similar kind. Indeed, those words are identical with the words used in the pro-forma contracts suggested by the Ministry of Health and the regional hospital board which were offered to consultants when they entered into a long-term agreement. The long-term contract† offered to the plaintiff did include words exactly similar to the words used in the letter of July 1, 1949. It is, I think,
H common ground that it was the intention of the Ministry and of the regional hospital board that the terms and conditions should in fact be incorporated in the long-term contracts, and they were in fact incorporated by the use (as I have said) of words exactly similar to the words used in the letter of July 1.

In my judgment those words clearly mean that those of the terms and conditions which are applicable to any particular contract are to be incorporated in
I it, and I am quite satisfied that under the letter dated July 1, which was never altered or amended in any way, except as regards remuneration, the plaintiff's employment with the regional hospital board was, throughout his service, from that date, regulated by those terms and conditions.

---

* For the relevant terms of the second paragraph of the letter, see p. 325, letter B, ante.

† A long-term contract was offered to the plaintiff by the regional hospital board in a letter dated Mar. 20, 1950; see p. 325, letter F, ante.

Counsel for the regional hospital board, however, went further than the suggestion that cl. 16 was not incorporated in this particular contract. He submitted that in every contract, be it what might be described as an interim contract of this kind or a permanent contract, cl. 16 could not form the basis of any contractual and binding agreement between the regional hospital board and a consultant. He adduced, as one reason for that submission, that the operation of this clause involved the co-operation of the Minister and that the regional hospital board could never be sued on the ground that the Minister had refused that co-operation and denied the right of appeal to any particular consultant. Even if cl. 16 does form the basis of some contractual obligation, counsel for the regional hospital board submits that it must be subject to an implied term that its operation can only be effective if and when the Minister consents to entertain an appeal; if he does not do so prior to the termination of the consultant's employment, then the clause can have no operation. In view of the relationship between the Minister and the regional hospital board, which is made quite clear in s. 3, s. 11, s. 12, s. 13 and s. 14 of the National Health Service Act, 1946, I have no hesitation in rejecting that argument. I see no reason to suppose that in the negotiations which took place between the Ministry and the representatives of the medical profession it was ever doubted that cl. 16 would have contractual force. I am quite satisfied that it has contractual force.

I am unimpressed by the question raised by counsel for the regional hospital board as to what would happen if the Minister failed to entertain an appeal. I do not think that the regional hospital board would have to continue to employ a consultant until that consultant's death or until he reached the retiring age. It is, of course, a very unreal consideration, having regard to the relationship which I have mentioned between the Minister and the regional hospital board. The regional hospital board are administering the hospital and specialist services on behalf of the Minister, and subject to such regulations and directions as the Minister may give. If that were a real dilemma I see no reason why its solution should be thrust on the consultant rather than on the regional hospital board. If, indeed, in the inconceivable event of the Minister refusing to entertain an appeal, although a right of appeal had under his authority and directions been conferred on the consultant, and the regional hospital board were then placed in a difficulty, it would, I think, be for the regional hospital board to apply for an order of mandamus to compel the Minister to exercise his functions, and not for the consultant.

I am therefore satisfied, as I have said, that at least from July 5, 1949, cl. 16 of the terms and conditions of service formed part of the plaintiff's contract with the regional hospital board. The plaintiff was, of course, not bound to invoke the clause, and unless he did invoke it, or unless in law he was excused from doing so, before his employment was terminated he cannot, of course, rely on its provisions.

Both the defendants, as I understand it, raise, what to me is the singularly unmeritorious point, that the plaintiff failed to send a full statement of the facts to the Minister, and that in consequence of that failure the machinery of cl. 16 was never invoked by him, and never came into operation. In addition to its complete lack of merits, this point, I think, fails on two grounds. In the first place, as I have endeavoured to show when going through the correspondence, the plaintiff, by his previous solicitors, Messrs. Hempsons, and through Mr. Hale*, did, in fact, supply a full statement of facts and supply that full statement to the Minister. But that point seems to me to be of less significance than the second point which I regard as quite fatal to the defendants' submissions on this point. If ever there was a case of waiver, in my judgment, this is one.

After Mr. Hale had taken the matter up and indeed before, when the Minister's representative was interviewed by Messrs. Hempsons on Jan. 14, the Ministry

---

* The member of Parliament for Oldham West.

A were saying that no appeal lay. The regional hospital board, when they received information to that effect, as they did on Jan. 14, elected to support the Minister's view of the situation which was, I think, based on wholly inadequate information as to the facts of this particular case. Having done so, and done so, I think, with some alacrity, they adopted the same position as that which had been adopted by the Minister in relation to this appeal. In any B event, I think the Minister can be regarded here as the principal of the first defendants in relation to this matter. If he denied the right of appeal and the regional hospital board acquiesced in that view after they, at a very early stage, became apprised of it, clearly, in my judgment, it does not now lie in their mouth to say: "We, having said that no appeal will lie, now contend that you cannot invoke the provisions of cl. 16 because you did not put into operation the appeal C which we said we would refuse to entertain".

In those circumstances I am quite satisfied that the plaintiff's contract was governed by cl. 16, and that no omission to send a full statement of facts to the Minister, even if such omission was established, invalidated his contractual right which was that his employment should not be terminated until the machinery envisaged in cl. 16 had been put into effect and a decision reached by D the Minister. Clearly, therefore, the termination of the plaintiff's services on Apr. 30, 1952, was a breach of the regional hospital board's contractual obligations to him. A breach of contractual obligation on the part of the regional hospital board having been established, it necessarily follows that the plaintiff is entitled to some remedy. As to what remedy that should be, I shall consider in a few moments.

E Before I turn to the question of the remedies or remedy available to the plaintiff, I must say a few words concerning the other ground on which the plaintiff bases his claim, which is raised in the amended paragraphs of the statement of claim*. The law, I think, is clear: in ordinary circumstances, by giving the appropriate notice, a master can terminate his servant's employment and no one can question the motives of the master in reaching a decision to do so. The F position differs somewhat in relation to statutory bodies who can, of course, only act for the purposes for which they are created. A statutory body has, equally, an untrammelled right to terminate the services of one of its own employees by giving appropriate notice, provided that decision is arrived at bona fide. As I understand the meaning of the word, it is that the decision must be reached, and honestly reached, in the belief that it is a decision made in G the best interests of the objects of the statutory body, namely, in this case, the administration of the health services in the region under the control of the regional hospital board, and not made for some wholly extraneous reason; an obvious extraneous reason would be shown if it could be proved that a decision to terminate the employment of a servant was made, not because it was genuinely H or perhaps mistakenly thought by the statutory authority that the termination of his services was in the best interests of the service which they were administering, but because, while knowing that they were not furthering the interests of that service by dismissing him, the statutory authority dismissed the servant owing to personal spite against him. Then I think their decision could be impugned in the courts.

I One thing is quite clear: the discretion of the authority must be the governing factor in cases of this kind, and the court cannot substitute its views whether or not a servant should, in certain circumstances, have been dismissed for the views of the authority, provided the views of the authority were bona fide held. I need not cite a great deal of authority on this point. The law is most fully explained in the judgment of WARRINGTON, L.J., in *Short* v. *Poole Corpn.* (1) ([1926] Ch. 66 at pp. 90, 91). In view of the length of the present judgment,

---

* This was the ground of having acted mala fide, see p. 324, letter C, ante.

I think it is unnecessary for me to read those passages, which very clearly A explain the position, and I need refer only to a very much shorter passage from the judgment of Eve, J., in *Price* v. *Rhondda Urban Council* (2) ([1923] 2 Ch. 372 at p. 389), which reads:

> " Argument has been addressed to me on the question whether the authority in engaging and dismissing its employees is to be regarded as B acting in a fiduciary capacity, but I do not think it necessary to deal fully with these arguments, because in my opinion it is sufficient to point out that this body, being a statutory body entrusted with statutory powers, can only exercise those powers for the purpose and with the object of giving effect to the statutory duties imposed upon it, and as one must assume that in dismissing employees or in doing any other administrative act or C adopting any particular policy consistent with the powers conferred upon it it acts in good faith, it lies upon those who assert the contrary to establish the truth of that assertion if they can."

Counsel for the plaintiff asks me to say that in the present case the regional hospital board, through their members and officials, were not acting bona fide D or in the proper performance of their statutory powers when they reached their decision to terminate the plaintiff's employment.

[His Lordship then reviewed the facts and found that the regional hospital board decided to terminate the plaintiff's appointment on the ground that this would be in the best interests of the health service, and that no member of the regional hospital board acted mala fide in reaching that decision. His Lordship E continued:] Now I come to the question of the plaintiff's remedies, which I regard as perhaps the most difficult problem in the present case. In the statement of claim the plaintiff asked for a declaration that his employment was subject to the terms and conditions of service issued by the Minister. I have already found that it was, and whether or not that declaration is made is a matter which is only of academic importance. The second claim is for a declaration F that the plaintiff's employment with the regional hospital board has never been validly determined. The significant word is the word " validly ". If the declaration asked for was one which merely declared that the plaintiff's employment had never been lawfully or rightly determined, that is a declaration which, if necessary at all, would follow from the findings which I have already made. G

However, counsel for the plaintiff's case is that the termination of the plaintiff's employment on Apr. 30, 1952, was not only a breach of the plaintiff's contractual rights, but was in fact a nullity. In law, counsel for the plaintiff submits, the plaintiff's services were not terminated on Apr. 30, and have never been terminated up to today. In consequence he relies on the third prayer, namely, for an order for payment of salary at the full rate of £2,375 per annum from H May 1, 1952, to the date of writ in this action. Counsel for the plaintiff puts the case in a way which, at first sight, appears attractive. The terms and conditions of service, as he points out, provide in the clearest possible terms that the procedure laid down in cl. 16 shall be completed before the regional hospital board's decision to terminate the consultant's appointment is carried into effect. That procedure was never completed and, therefore, says counsel for the plaintiff, the I regional hospital board's decision to terminate the plaintiff's appointment can never have become effective and he is still in their service and is still entitled to his agreed rate of remuneration. Counsel for the plaintiff relied on certain authorities and in particular *Vine* v. *National Dock Labour Board* (3) ([1956] 3 All E.R. 939), and on the judgment of Jenkins, L.J., when the case came before the Court of Appeal ([1956] 1 All E.R. 1), a judgment which was approved on appeal to the House of Lords.

In reply to this argument, counsel for the regional hospital board submits that here there is an ordinary relationship of master and servant. In his submission, the law relating to master and servant is clear: a contract for personal services cannot be enforced by an order for specific performance, nor is it open to a servant to refuse to accept the repudiation of the contract of service by his master and to sit back and say that the contract has never been validly terminated and insist on the payment of his wages for the remainder of his working days. Counsel for the regional hospital board rightly said that it could not be suggested that a servant, who by the terms of his contract was entitled to three months' notice on dismissal, could say, if he was instantly dismissed without notice, that the dismissal was ineffective because no lawful dismissal could take place without the giving of the requisite period of notice. Similarly, he says that the plaintiff cannot say that the de facto determination of his services, which undoubtedly took place on Apr. 30, 1952, or just after, as he was threatened with criminal proceedings if he entered Boundary Park Hospital, can be said to be a nullity because it was in breach of a contractual obligation not to put that decision to terminate into effect until cl. 16 had been allowed to operate. Lord Keith of Avonholm, in dealing with this question in *Vine* v. *National Dock Labour Board* (3) ([1956] 3 All E.R. at p. 948), said:

> "This is not a straightforward relationship of master and servant. Normally, and apart from the intervention of statute, there would never be a nullity in terminating an ordinary contract of master and servant. Dismissal might be in breach of contract and so unlawful but could only sound in damages."

Giving this matter the best consideration that I can, I am unable to equate this case to the circumstances which were being considered by the Court of Appeal and the House of Lords in *Vine* v. *National Dock Labour Board* (3). There the plaintiff was working under a code which had statutory powers, and, clearly, in those circumstances, all the lords of appeal who dealt with the case in the House of Lords took the view that the case could not be dealt with as though it were an ordinary master and servant claim in which the rights of the parties were regulated solely by contract. Here, despite the strong statutory flavour attaching to the plaintiff's contract, I have reached the conclusion that in essence it was an ordinary contract between master and servant and nothing more. In those circumstances I feel bound to apply the general rule stated by Lord Keith of Avonholm in the passage which I have just read, and to reach the conclusion here that the plaintiff's only remedy is the recovery of damages, subject, of course, to any question relating to some of the declarations which have been asked for.

To assess those damages is a matter of the gravest difficulty. It would, of course, be easy to say that on the evidence three months' notice appears to be the appropriate period, and no one has seriously argued to the contrary. However, the plaintiff's contract was, as I have held, subject to cl. 16, and to refer to it as a contract which in reality was subject to three months' notice is to take an entirely (as I think) false view of the position. It is subject to three months' notice only if, on appeal to the Minister, the Minister took the view that the consultant's services had not been unfairly terminated. In those circumstances, the problem which I think faces me is first of all to assess the chances of a successful appeal, had an appeal been entertained in the present case, and then to do the best I can to ascertain the period during which the plaintiff would probably have been employed by the regional hospital board had that appeal been successful.

[His Lordship was of opinion that, on the information before him, the professional committee who would have considered the plaintiff's case on an appeal to the Minister under cl. 16, would have advised the Minister that a substantial element of unfairness had entered into the termination of the plaintiff's employment, and that the appeal would have resulted in the plaintiff continuing to act as a consultant at Boundary Park Hospital at a salary of £2,375 per annum. HIS LORDSHIP was of the further opinion that five years was a fair period to take in assessing damages for the plaintiff's loss of remuneration for his hospital appointment. Regarding the plaintiff's claim for damages for losses incurred in his private practice, which had resulted from the fact that he and his private patients were excluded from all hospitals administered by the regional hospital board after the board had terminated the plaintiff's appointment, HIS LORDSHIP awarded the plaintiff £1,500.

HIS LORDSHIP stated that, in view of recent decisions[*], the plaintiff's liability for income tax must be taken into account in assessing the damages for loss of remuneration in respect of the hospital appointment, and he proposed to treat the plaintiff's liability to tax as 10s. in the pound in the absence of information on the matter.

HIS LORDSHIP said that he would not make the first and second declarations[†] asked for, but that he would make the third declaration, which was asked for in claim (vi) of the statement of claim, viz., that the Minister of Health in failing to comply with the terms of cl. 16 of the Terms and Conditions of Service of Hospital Medical and Dental Staff (England and Wales) and the procedure therein laid down was acting wrongfully and in breach of his statutory duty under the National Health Service Act, 1946.]

Judgment for the plaintiff against the regional hospital board for £7,437 10s., and a declaration in the terms of claim (vi) of the statement of claim against the Minister of Health.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Ponsonbys*, Oldham (for the plaintiff); *Solicitor, Ministry of Health* (for the defendants, the regional hospital board and the Minister of Health).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

---

[*] Cf. *Beach* v. *Reed Corrugated Cases, Ltd.*, [1956] 2 All E.R. 652.

[†] The first and second declarations asked for were (i) that the plaintiff's employment with the regional hospital board was subject to the terms and conditions of service issued by the Minister of Health on June 7, 1949, and (ii) that the plaintiff's employment with the regional hospital board had never been validly determined.

THE FEHMARN.

[COURT OF APPEAL (Lord Denning, Hodson and Morris, L.JJ.), December 16, 17, 1957.]

Admiralty—Jurisdiction—Damage to cargo—Contract providing for disputes to be judged by foreign court—Discretion to allow proceedings in England—Administration of Justice Act, 1956 (4 *&* 5 *Eliz.* 2 *c.* 46), *s.* 1 (1) (*g*).

Conflict of Laws—Stay of proceedings—Admiralty action—Damage to cargo—Contract providing for disputes to be judged by foreign court—Discretion to allow proceedings in England—Administration of Justice Act, 1956 (4 *&* 5 *Eliz.* 2 *c.* 46), *s.* 1 (1) (*g*).

A cargo was loaded at a Russian port by a Russian shipper on board the Fehmarn, a ship owned by a German company. The cargo was, by the terms of the bill of lading, shipped in apparent good order and condition and was to be delivered at the port of London in like order and condition. An English company purchased the cargo and became the holders of the bill of lading, thereby agreeing to be bound by its terms, which included stipulations that all questions and disputes should be determined according to Russian law and judged in the U.S.S.R. The cargo-owners alleged that at the port of London the cargo was found to be three tons short and contaminated. The ship was surveyed in London, the cargo-owners and the shipowners being represented at the survey. The ship was a frequent visitor to England, and the cargo-owners asked the shipowners to give security for their claim, and threatened to arrest the ship when it next came to England if security was not given. The shipowners were willing to submit the dispute to a private arbitrator but objected to giving security. The cargo-owners then issued a writ against the shipowners claiming damages for breach of the contract of carriage evidenced by the bill of lading. On appeal against the dismissal of a motion by the shipowners to set aside the writ for want of jurisdiction, alternatively to stay the proceedings, on the ground that by the contract the parties had agreed that all disputes arising under it should be judged in the U.S.S.R.,

Held: (i) the Admiralty court had jurisdiction by virtue of the Administration of Justice Act, 1956, s. 1 (1) (g).

(ii) the court should not exercise its discretion to stay the proceedings because

(a) a stipulation that all disputes should be judged by the tribunals of a foreign country, although a matter to which the English court will pay much regard and to which it will normally give effect, is subject to the overriding principle that no one by his private stipulation can oust the English courts of their jurisdiction in a matter properly belonging to them.

(b) this dispute properly belonged to the English court because, being a dispute between English cargo-owners and German shipowners, it was more closely connected with England than with Russia, and because the facts showed that the shipowners did not object to the dispute being decided in England but wished to avoid giving security.

The Athenee ((1922), 11 Lloyd's Rep. 6) applied by HODSON, L.J.; dictum of MACKINNON, L.J., in *Racecourse Betting Control Board* v. *Secretary for Air* ([1944] 1 All E.R. at p. 65) considered by HODSON and MORRIS, L.JJ.

Decision of WILLMER, J. ([1957] 2 All E.R. 707) affirmed.

[As to Admiralty jurisdiction in respect of actions for damage to cargo, see 1 HALSBURY'S LAWS (3rd Edn.) 63, para. 125, and 30 HALSBURY'S LAWS (2nd Edn.) 864, para. 1144, note (y); and for cases on the subject, see 1 DIGEST **146-148,** ***524-560.***

As to a stay of proceedings in England where parties have agreed to submit disputes to a foreign tribunal, see 7 HALSBURY'S LAWS (3rd Edn.) 172, para. 308, note (m); and for cases on the subject, see 2 DIGEST 364, *329-331*.

For the Administration of Justice Act, 1956, s. 1 (1) (g), see 36 HALSBURY'S STATUTES (2nd Edn.) 3.]

Cases referred to:

(1) *Racecourse Betting Control Board* v. *Secretary for Air*, [1944] 1 All E.R. 60; [1944] Ch. 114; 113 L.J.Ch. 129; 170 L.T. 29; 2nd Digest Supp.

(2) *The Athenee*, (1922), 11 Lloyd's Rep. 6.

Interlocutory Appeal.

German shipowners appealed against the decision of WILLMER, J., dated June 7, 1957, and reported [1957] 2 All E.R. 707, refusing to set aside the writ in, or to stay, an action brought against them by English cargo-owners for damages for breach of a contract of carriage by sea. The contract was evidenced by a bill of lading which provided that all disputes should be determined by Russian law and judged in the U.S.S.R. The facts appear in the judgment of LORD DENNING.

T. G. Roche, Q.C., and *D. H. Hene* for the shipowners, the defendants,
G. G. Honeyman, Q.C., and *H. V. Brandon* for the cargo-owners, the plaintiffs.

LORD DENNING: In September, 1955, a Russian company loaded about five hundred tons of turpentine in bulk on a German ship then at a port in the Baltic. The Russian shippers presented to the master a bill of lading for signature. One half of the face of the bill of lading was in Russian and the corresponding half in English. All the conditions on the back were in the English language. The bill of lading said that these goods were shipped in apparent good order and condition on the vessel and that they were to be delivered subject to the conditions on the bill of lading. Amongst the conditions was one that the shipowners were bound to make the ship seaworthy before and at the beginning of the voyage. At the end of these conditions there were two clauses which I must read. Condition 26 says:

> "All claims and disputes arising under and in connexion with the bill of lading shall be judged in the U.S.S.R."

Condition 27 says:

> "All questions and disputes not mentioned in this bill of lading shall be determined according to the Merchant Shipping Code of the U.S.S.R."

The turpentine was duly shipped in bulk, I suppose by being pumped on board the ship, at the port of Ventspils in the Baltic. The Fehmarn was owned by German shipowners in Hamburg. She made her journey to London, and the Russian shippers sold the goods to English buyers, "the cargo-owners", who became holders of the bill of lading. After the turpentine was unloaded in England, the English cargo-owners made complaint of short delivery and contamination. They allege (as it now appears from the statement of claim) that there were some three tons short on delivery and that the turpentine was contaminated owing to the failure of the shipowners to make the ship seaworthy and fit for the reception of the turpentine. They allege that the tanks of the ship had previously carried linseed oil or other vegetable oils on previous voyages and that they had not been properly cleaned out before the turpentine was loaded, with the result that there was a skin of linseed oil on the inside of the tanks, which dissolved and so contaminated the turpentine. The solicitors to the English cargo-owners wrote a letter to the German shipowners making a

A claim for some £5,000 and intimating that, as the ship was a frequent visitor to this country, it might be necessary to take steps to arrest the ship when she next came to this country in order that their claim should be settled. The German shipowners instructed English solicitors to deal with the claim. The solicitors to the English cargo-owners spoke on the telephone to the solicitors for the German shipowners and told them that, if they did not receive an undertaking B for security to be given, they would arrest the ship when she next arrived in this country. Thereupon the solicitors for the German shipowners, after two months' interval, on Nov. 15, 1956, wrote:

> "We understand there will be no objection by our clients to a submission to a private arbitrator, but having regard to cl. 26 and cl. 27 of the bill of C lading our clients are not prepared to give security to meet your claim."

Clause 26 and cl. 27 are those which I have already read.

So the parties were at issue. Eventually the English importers, the owners of the cargo, brought an action against the German owners of the ship in the Admiralty Division of the High Court claiming damages. Thereupon the German shipowners moved to set aside the writ on the ground that the English courts D had no jurisdiction or alternatively that by the agreement [i.e., the bill of lading] the parties had agreed that all the disputes should be adjudged in the courts of Russia and not in this country.

As to the first point, it is not now suggested that the Court of Admiralty has not jurisdiction. By s. 1 (1) (g) of the Administration of Justice Act, 1956 (following previous statutes), it is plain that the Court of Admiralty in England E has jurisdiction to deal with such a claim as this.

The next question is whether the action ought to be stayed because of the provision in the bill of lading that all disputes are to be judged by the Russian courts. I do not regard this provision as equal to an arbitration clause, but I do say that the English courts are in charge of their own proceedings: and one of the rules which they apply is that a stipulation that all disputes should be F judged by the tribunals of a particular country is not absolutely binding. Such a stipulation is a matter to which the courts of this country will pay much regard and to which they will normally give effect, but it is subject to the overriding principle that no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them. I would ask myself therefore: is this dispute a matter which properly belongs to the courts G of this country? Here are English importers, the cargo-owners, who, when they take delivery of the goods in England, find them contaminated. The goods are surveyed by surveyors on both sides, with the result that the English cargo-owners make a claim against the German shipowners. The vessel is a frequent visitor to this country. In order to be sure that their claim, if substantiated, is paid by the shipowners, the English cargo-owners are entitled by the procedure H of our Courts of Admiralty to arrest the ship whenever she comes here in order to have security for their claim. There seems to me to be no doubt that such a dispute is one that properly belongs for its determination to the courts of this country. But still the question remains: ought these courts in their discretion to stay this action?

It has been said by counsel for the shipowners that this contract is governed by I Russian law and should be judged by the Russian courts, who know that law, and that the dispute may involve evidence from witnesses in Russia about the condition of the goods on shipment. Then why, says counsel, should not it be judged in Russia as the condition says? I do not regard the choice of law in the contract as decisive. I prefer to look to see with what country the dispute is most closely concerned. Here the Russian element in the dispute seems to be comparatively small. The dispute is between the German owners of the ship and the English owners of the cargo. It depends on evidence here as to the condition of the goods when they arrived here in London and on evidence of the ship, which is a frequent visitor to London. The correspondence leaves in my mind, just as it did in the learned judge's mind, the impression that the German owners did not object to the dispute being decided in this country but wished to avoid the giving of security.

The dispute is more closely connected with England than with Russia, and I agree with the judge that sufficient reason has been shown why the proceedings should continue in these courts and should not be stayed. I would therefore dismiss the appeal.

HODSON, L.J.: I agree. The learned judge stated in his judgment ([1957] 2 All E.R. at p. 710) that

> " where there is a provision in a contract providing that disputes are to be referred to a foreign tribunal, then, prima facie, this court will stay proceedings instituted in this country in breach of such agreement . . ."

That principle is well established and has been applied in a number of cases. MacKinnon, L.J., in *Racecourse Betting Control Board* v. *Secretary for Air* (1) ([1944] 1 All E.R. 60 at p. 65) made it plain that that general principle was quite independent of s. 4 of the Arbitration Act, 1889 (now s. 4 of the Arbitration Act, 1950) although in a number of cases where applications for a stay have been made argument has been addressed to the court and judgments have been delivered as if s. 4 itself were being invoked. In arguing this case on behalf of the shipowners counsel has sought to distinguish, or rather to escape from, the consequences of the decision of this court in *The Athenee* (2) ((1922), 11 Lloyd's Rep. 6) by saying that it was based, in part at any rate, on a concession by Mr. Langton, who was moving to stay the action, in admitting that he was moving under s. 4 of the Arbitration Act. I notice, however, that Atkin, L.J., did not proceed on that basis, but founded himself on the general principle, which the learned judge stated and to which MacKinnon, L.J., referred, that where parties have agreed that disputes should be referred to a foreign tribunal, there is no indisposition on the part of the courts of this country to give effect to such a bargain. He went on to say that such a bargain is treated as equivalent to an arbitration clause, that is to say, the discretion is to be exercised on the same lines as where there is an arbitration clause.

Looking at the facts in *The Athenee* (2), I am bound to say that it makes the argument for the shipowners very difficult when an attempt is made to distinguish that case, because the application for a stay was made to the President and, in exercising his discretion in refusing to stay the action, he referred to matters which come under the heading of convenience, and the Court of Appeal (Bankes, L.J., and Atkin, L.J., Warrington, L.J., agreeing with Bankes, L.J.) referred to matters of the same kind as those which the learned judge had to consider in this case, namely, the fact of the dispute being as to the condition of the cargo on arrival, the fitness of the ship to carry them and there having been a survey at which both parties were represented. It is true that in *The Athenee* (2) it was said that all the witnesses were in this country, whereas in this case it is clear that there will be witnesses or may be witnesses some of whom will not be in this country.

The learned judge in my view was quite correct in saying that on the authorities, particularly having regard to what was said in *The Athenee* (2), he had a discretion in considering whether a stay should be granted and he was entitled to take into consideration in exercising his discretion matters of convenience. For my part, I cannot see that he erred in any way in so doing and, if that is so, it is not for this court, in my judgment, to substitute its discretion for his. I therefore would dismiss the appeal.

A I have not forgotten one matter which was strongly relied on by counsel for the shipowners, namely that, in addition to the provision* that the contract should be judged in the U.S.S.R., there was a subsequent provision† in the succeeding paragraph in the conditions of the bill of lading to the effect that Russian law would apply. The learned judge took that matter into consideration, as indeed he took all relevant matters into consideration. In my opinion, his B judgment ought not to be disturbed.

MORRIS, L.J.: I am of the same opinion. In his judgment in *Racecourse Betting Control Board* v. *Secretary for Air* (1) ([1944] 1 All E.R. 60), MACKINNON, L.J., referred to contracts by which the parties had provided that the decision of a dispute should be in a foreign court. MACKINNON, L.J., said that the power C and the duty in such cases to stay arose under what he called (ibid., at p. 65) ". . . a wider general principle, namely, that the court makes people abide by their contracts". It seems to me that the approach of the learned judge in this case was quite correct, for the learned judge referred to what he called the prima facie presumption, by which, I think, he had in mind the same considerations as those referred to by MACKINNON, L.J., that the court will insist on the parties D honouring their bargain.

On the other hand, the learned judge referred to what he called the undoubted jurisdiction of the court, and again I think the learned judge was clearly correct in so referring to the jurisdiction of the court. He then considered whether sufficient grounds had been shown for displacing what he called the prima facie presumption so as to entitle the parties to take advantage of the jurisdiction of E this court. My Lords have referred to the grounds that existed which in the opinion of the learned judge were good and sufficient reasons, and I am also of the opinion that the reasons to which they have referred are sufficient to displace the presumption that arises from the parties' contract.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Bentleys, Stokes & Lowless* (for the shipowners, the defendants); *Clyde & Co.* (for the cargo-owners, the plaintiffs).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

---

* I.e., clause 26, see p. 334, letter F, ante.

† I.e., clause 27, see p. 334, letter G, ante.

WIGRAM FAMILY SETTLED ESTATES, LTD. (In Liquidation) *v.* INLAND REVENUE COMMISSIONERS.

[House of Lords (Viscount Simonds, Lord Reid, Lord Keith of Avonholm, Lord Somervell of Harrow and Lord Denning), November 25, 26, 1957, January 23, 1958.]

Surtax—Investment company—Apportionment of income—In accordance with the respective interests of members—Apportionment in proportion to dividend rights—Redeemable preference shares—Whether additional interest from contributions to redemption fund—Finance Act, 1922 (12 *&* 13 *Geo.* 5 *c.* 17), *s.* 21 (1), (8), *Sch.* 1, *para.* 8.

The capital of an investment company comprised (a) six per cent. redeemable preference shares, (b) participating cumulative preference shares, (c) cumulative non-participating preference shares and (d) ordinary shares, all of which were issued and fully paid up except for some of the participating cumulative preference shares. The company's articles contained provision for maintaining a redemption fund for the redeemable preference shares out of annual profits of the company which would otherwise be available for dividend. The whole of the redeemable preference shares were taken up by an assurance society. At all material times the capital of the redeemable preference shares was well secured without the redemption fund. In the years of assessment 1949-50, 1950-51 and 1951-52, parts of the profits of the company were accordingly transferred to the redemption fund. The Special Commissioners of Income Tax gave a direction under the Finance Act, 1922, s. 21 (1), that, for these years, the income of the company should be treated as the income of the members for the purposes of surtax, and they apportioned the income among the members pursuant to the Finance Act, 1922, s. 21 (8) and Sch. 1, para. 8, which provided that the apportionment should be made " in accordance with the respective interests of the members ". The commissioners apportioned to the society, as holder of the redeemable preference shares, only so much income as was equivalent to the six per cent. interest thereon. The apportionment to the other preference shareholders was similar, and the remainder was apportioned to the ordinary shareholders. The greater part of the company's income was thus apportioned to the ordinary shareholders, who were individuals and liable to surtax. On the question whether a greater proportion of the income should be apportioned to the society (which, being a body corporate, was not liable to surtax) since the society had an additional interest in respect of the sums carried to the redemption fund,

Held: the company's income had been rightly apportioned " in accordance with the respective interests of the members" under Sch. 1, para. 8, to the Act of 1922, since the society's only real interest, beyond the payment of the annual interest, was to receive in due course repayment of its capital, and for the purposes of this apportionment (a) as the amount of the society's shares was secure apart from the redemption fund, the society's interest in the fund and the sums carried to it could properly be regarded as negligible, and (b) (per Lord Reid) the carrying of sums to the redemption fund did not in any way increase the amount of money which the society would receive.

Decision of the Court of Appeal ([1957] 1 All E.R. 311) affirmed.

[As to the apportionment of a company's income among members, see 20 Halsbury's Laws (3rd Edn.) 558, para. 1085.

For the Finance Act, 1922, s. 21 (1), (8), and Sch. 1, para. 8, see 12 Halsbury's Statutes (2nd Edn.) 237-240, 245; and for the corresponding provisions of the Income Tax Act, 1952, viz., s. 245, s. 246 (1)-(3), s. 248 (1), s. 249 (1), (2) (a), (b), see 31 Halsbury's Statutes (2nd Edn.) 232-236.]

Case referred to:

(1) *F. P. H. Finance Trust, Ltd.* v. *Inland Revenue Comrs.*, [1945] 1 All E.R. 492; [1946] A.C. 38; 114 L.J.K.B. 203; 172 L.T. 278; 28 Tax Cas. 209; 2nd Digest Supp.

Appeal.

Appeal by Wigram Settled Estates, Ltd. (in liquidation) from an order of the Court of Appeal (LORD EVERSHED, M.R., BIRKETT and ROMER, L.JJ.), dated Dec. 14, 1956, and reported [1957] 1 All E.R. 311, affirming an order of VAISEY, J., dated July 17, 1956, and reported [1956] 3 All E.R. 118, dismissing the appellant company's appeal by way of Case Stated from a determination of the Special Commissioners of Income Tax. The facts are set out in the opinion of VISCOUNT SIMONDS.

Cyril King, Q.C., and *P. J. Sykes* for the appellant company.
J. Pennycuick, Q.C., and *A. S. Orr* for the Crown.

The House took time for consideration.

Jan. 23. The following opinions were read.

VISCOUNT SIMONDS: My Lords, this appeal is from an order of the Court of Appeal affirming an order of VAISEY, J., who, on a Case Stated by the Commissioners for the Special Purposes of the Income Tax Acts, had affirmed their determination. I have not been persuaded that a wrong conclusion has been reached.

The facts are set out in great detail in the Case Stated, which can be referred to if necessary. I shall content myself with a brief summary. The appellant company, which has been in liquidation since May 19, 1952, had, at the relevant dates, the following capital structure:—(A) 100,000 six per cent. redeemable preference shares of £1 each; (B) 2,500 six per cent. participating cumulative preference shares of £1 each; (C) 3,500 six per cent. cumulative non-participating preference shares of £1 each; (D) 1,500 ordinary shares of £1 each. All these shares were issued and fully paid up except five hundred of the (B) shares. The special feature in this structure on which, in effect, this appeal turns, lies in the provisions relating to the redeemable preference shares. These were (a) that such shares should be redeemed on the expiration of ten years from Mar. 31, 1935, out of the profits of the appellant company which would otherwise be available for dividend or out of the proceeds of a fresh issue made for the purposes of such redemption; (b) that, for the purposes of such redemption, the appellant company should create and, so long as any such shares should remain outstanding, should in each year beginning with the year ended Mar. 31, 1936, carry to the credit of, a separate fund out of the profits of the company which would otherwise be available for dividend (i) for the year ended Mar. 31, 1936, the sum of £9,050, (ii) for each subsequent year ended Mar. 31, the sum of £7,797 or such larger sum as the directors might think fit, with a proviso that, when and so long as the fund should amount in value to £100,000, no further sum should be carried to its credit; (c) that all sums carried to the fund should be invested in investments thereby authorised with power to vary such investments. The whole of these shares were taken up by the Equity and Law Life Assurance Society (whom I will call "the society"). It may be assumed that they insisted on the redemption terms as a condition of taking up the shares.

The appellant company did not comply precisely with these provisions, no doubt with the assent of the society, but by Mar. 31, 1949, the commencement of the first of the three relevant accounting periods of the company (namely, the years of assessment 1949-50, 1950-51 and 1951-52), a sum of £77,000 out of the profits had been transferred to and stood to the credit of the fund. During the relevant years ending Mar. 31, 1950, 1951, 1952, the following further transfers were made to the fund, namely, £4,000, £10,000 and £4,000. On Aug. 30, 1950, eighty thousand of the shares were redeemed by applying to that purpose £80,000 standing to the credit of the fund. The remaining twenty thousand shares continued to be held by the society. I need state only three further facts. First, it is plain from the facts as stated in the Case and the documents annexed to it that at all times the net assets of the appellant company were ample to meet its obligations in respect of its redeemable preference shares. Secondly, the appellant company was an " investment company " to which s. 20 (1) of the Finance Act, 1936, s. 14 (2) of the Finance Act, 1937, and s. 14 (1) of the Finance Act, 1939, applied. Thirdly, the actual income from all sources of the appellant company for the same three years ending Mar. 31 was £13,154, £21,885, and £13,527.

It follows from what I have said that the Special Commissioners had no discretion in the matter but were bound to give a direction that these sums should, however much or little thereof had been distributed to the members of the appellant company, be deemed for the purposes of surtax to be their income. This was at one time, but is no longer, disputed. The direction having been duly given, it then fell to the commissioners to apportion the same income among the several members of the appellant company, that is to say, among the several classes of preference shareholders and the ordinary shareholders. In doing so, they have no other statutory guidance than is to be found in para. 8 of Sch. 1 to the Finance Act, 1922, the relevant words of which are:

> " The apportionment of the actual income from all sources of the company shall be made by the Special Commissioners in accordance with the respective interests of the members . . ."

What, then, were the respective interests of the members in the actual income of the appellant company ? The commissioners apportioned to the redeemable preference shareholders, i.e., to the society, £6,000 (being six per cent. on the one hundred thousand shares) for the first year and £3,204 and £1,200 for the second and third years respectively (being six per cent. on the unredeemed shares during those years) and no more. They apportioned six per cent. per annum to the holders of the other preference shares, and the remainder they apportioned to the ordinary shareholders.

The appellant company appealed against the apportionment, contending that the society, in addition to their interest in the income of the appellant company to the extent of six per cent. on their shares, also had a relevant interest in the income in respect of the amounts carried in each of the three years to the redemption fund out of the profits available for dividend, that is to say, the several sums of £4,000, £10,000 and £4,000. The commissioners rejected this contention. They held that the society's interest as a member was adequately measured by taking six per cent. on the amount of its preference shareholding in the material years, and, further, that the guarantee on which the society had insisted as a condition of subscribing for its shares was no more than a security for the eventual repayment of its capital. They further stated that they had also considered whether any fairer method of apportionment could be devised, but, on the facts of the case, were unable to find one, after taking into account the voting rights and the rights of ordinary shareholders on a winding-up.

My Lords, as I have said, the determination of the commissioners was sustained by VAISEY, J., and by the Court of Appeal and I have no doubt that they were right.

I have already pointed out how little guidance is given to the commissioners in their task of apportionment, but it should, I think, be remembered that s. 21 of the Finance Act, 1922, from which this branch of taxation stems, opens with the words

> " With a view to preventing the avoidance of the payment of super-tax through the withholding from distribution of income of a company which would otherwise be distributed . . ."

A I should, therefore, expect any apportionment of the actual income of a company to proceed on the footing that what any member received on an apportionment would be a share which, if it had been distributed instead of being withheld, would have the character of income in his hands and, as such, would be liable to super-tax or surtax, if he was an individual. But I find myself at once in this difficulty. It would be a fantastic result of this legislation if it increased even B notionally the income of a six per cent. preference shareholder. But, if it does not have that effect and the apportionment beyond his six per cent. is to be regarded as a capital payment, then the purpose of the section is defeated. Surtax is neither payable nor avoided.

The strength of the appellant company's case lies in this, that the obligation imposed on it by its articles did preclude it from distributing the whole of its C income. It was contractually bound to carry yearly sums to the redemption fund. It may, therefore, be said that it would be a hardship on the ordinary shareholders that an apportionment should be made to them in any year of income on which they could not lay their hands. But the question is not whether such an apportionment would be a hardship on them but what are the respective interests of the different classes of shareholders in the actual income of the D appellant company. I do not intend to lay down any general rule. It would be hazardous to do so in face of the very general words by which the duty of apportionment is cast on the commissioners. But, on the facts of the present case, I cannot fail to be impressed by the consideration that neither at the end of any year nor at the commencement of the liquidation was there any doubt as to the capital of the redeemable preference shares being well secured apart from the E redemption fund. The commissioners, in their determination, regarded the fund as a security for eventual repayment of capital. I think that they were right in doing so, and, further, that, if in the event the security proved unnecessary because the capital was secure without it, they were well justified in treating the society's interest in it as negligible. They might ask the simple question whether the society in fact got any benefit from the fund. The answer could only be that F it may have got some peace of mind from the knowledge that the fund was there, but that it was the ordinary shareholders who would eventually get the income which was temporarily withheld. And that is what, in fact, happened.

I was further impressed by the admission which, as I understood him, counsel for the appellant company felt constrained to make, that, if the appellant company had built up the same fund out of profits not under the compulsion of G its articles but as a matter of prudent finance, the society could not be said for the purpose of apportionment to have any relevant interest in it. Yet, on the facts of the case, the material interest of the society was precisely the same, whether the fund was established voluntarily or under a contractual obligation. It may be observed, too, that, though in one sense the appellant company were obliged to carry some part of their profits to the fund, yet this was an obligation H into which they had voluntarily entered.

Reference was made both in the courts below and in argument before this House to *F. P. H. Finance Trust, Ltd.* v. *Inland Revenue Comrs.* (1) ([1945] 1 All E.R. 492). I agree with VAISEY, J., and the learned Master of the Rolls (LORD EVERSHED) in thinking that it gives no support to the appellant company's contention. In that case, LORD RUSSELL OF KILLOWEN said (ibid., at p. 497) I that it was the duty of the commissioners, in apportioning the income among the members, to determine who are the members

> ". . . of whom it can be said . . . that they are the persons who, in view of all their interests in the company, are the persons really interested in the income in question and in what proportions."

This seems to me to be just what the commissioners in the present case set out to do and fairly did.

The appeal must, in my opinion, be dismissed with costs.

A My noble and learned friend, **LORD DENNING,** who is unable to be here today, has asked me to say that he concurs in the opinion which I have just delivered.

LORD REID: My Lords, in consequence of directions given by the Special Commissioners under s. 21 of the Finance Act, 1922, in respect of the years 1949-50, 1950-51, and 1951-52, the actual income of the appellant company for B these years was deemed to be the income of its members; and the Special Commissioners had to apportion that income to them " in accordance with the respective interests of the members ", income so apportioned to each being " deemed to represent " his "income from his interest in the company" (Finance Act, 1922, Sch. 1, para. 8). As a result, the appellant company became liable to pay surtax on sums apportioned to individual members at rates appropriate C to them. But, as surtax is a tax on individuals, there is no liability to pay it in respect of any sum apportioned to a non-individual member. It is, therefore, in the appellant company's interest to have as large sums as possible apportioned to its non-individual member, the Equity and Law Life Assurance Society (hereinafter called " the society "), which held all the six per cent. redeemable preference shares in the appellant company. D

The Special Commissioners have apportioned to that society the sums required to pay the six per cent. on their shares, holding that the society's interest as a member was adequately so measured. By virtue of an agreement made when these preference shares were issued, the appellant company was bound to carry certain sums out of its profits to the credit of a redemption fund for these shares, and in the years in question it paid into that fund under the agreement sums of E £4,000, £10,000 and £4,000. The appellant company's contention is that these sums ought to have been apportioned to the society, in addition to the six per cent. on its shares because the society had an interest in these sums.

The society was concerned not merely to receive annually the six per cent. on its shares but also to have its shares redeemed in accordance with the agreement between it and the appellant company, and, in order that funds might be avail- F able for the redemption of the stipulated date, it was concerned to see that the redemption fund was built up by the appellant company carrying part of its profits to that fund. I shall assume, without deciding the point, that this could properly be regarded as an " interest " within the meaning of the Finance Act, 1922. But it would, in my opinion, be erroneous to hold that such an interest necessarily required the apportionment to the society of the whole of the sums G carried to the redemption fund. The other shareholders also had an interest in these sums, and it appears to me that, in the present case, the society's interest was negligible in comparison with the interest of the other shareholders. The real interest of the society, beyond payment of their six per cent. annually, was to receive payment in due course of its capital. In the present case, the assets of the appellant company were amply sufficient to enable the society's preference H shares to be redeemed in full in any foreseeable event, and the only importance of building up the redemption fund was to facilitate the redemption. Carrying these sums to the redemption fund did not in any way increase the amount of money which the society would receive. It meant, in effect, that the sums available for distribution to the other shareholders were diminished for the time being, but that the other shareholders' shares became more valuable. I They were entitled in the end to the whole of the appellant company's assets beyond what was required to redeem the society's shares and the amount of the appellant company's assets was increased by carrying these sums to the redemption fund instead of distributing them. In other words, retaining these sums in this fund postponed the enjoyment of them by the other shareholders but did not in any substantial way add to the financial return which the society would receive or the probability that they would be paid in full. That appears to me to justify the apportionment made by the Special Commissioners.

A It has been said in the Court of Appeal that this is a hard case for the appellant company and the other shareholders. No doubt all high taxation is a hardship for the taxpayer, but I do not see any special hardship in this case. If an individual, in order to raise more capital, chooses to undertake to set aside part of his income to provide for repayment, he cannot thereby diminish his liability for surtax. I see no reason why a company should be entitled to expect to be B better off.

I would dismiss this appeal.

LORD KEITH OF AVONHOLM: My Lords, I agree with the speech delivered by my noble and learned friend on the Woolsack.

C **LORD SOMERVELL OF HARROW:** My Lords, I agree.

Appeal dismissed.

Solicitors: *Wigram & Co.* (for the appellant company); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

D

SPECIAL COMMISSIONERS OF INCOME TAX *v.* LINSLEYS (ESTABLISHED 1894), LTD.

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Somervell of Harrow and Lord Denning), November 12, 13, 14, 19, 20, E 1957, January 23, 1958.]

Surtax—Investment company—Directions and apportionments—Compellability of direction—Profits tax, if payable, exceeding actual income from all sources —Appeal against profits tax—Meaning of "payable"—When profits tax "falls to be computed"—Right of election relieving from profits tax— Power dependent on issue of surtax direction—Mandamus to commissioners F *to issue direction—Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *s.* 245, *s.* 262 (1)—*Finance Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 33), *s.* 68 (1)—*Finance Act,* 1947 (10 *&* 11 *Geo.* 6 *c.* 35), *s.* 31 (3).

On Apr. 1, 1952, a limited company (which at all material times was under the control of not more than five persons within the meaning of the Income Tax Act, 1952, s. 256 (1)) sold its business. After Apr. 1, 1952, until May 7, G 1953 (when it went into voluntary liquidation), the company was an investment company, and for the period Apr. 6, 1953, to May 7, 1953, it had an actual income from all sources of £8,920 (if no account were taken of an assessment to profits tax which had been made). For its last chargeable accounting period (viz., Apr. 1, 1953, to May 7, 1953) the company was assessed to profits tax in the sum of £18,927 (mainly on account of distri- H bution charges in respect of assets distributed on the liquidation), of which £16,421 was attributable to the period from Apr. 6, 1953, to May 7, 1953. The company claimed that since it was an investment company, the Special Commissioners of Income Tax were bound to give a direction under s. 245* and s. 262* of the Act of 1952 that the actual income (as defined in s. 255 (3)*) of the company for the period Apr. 6, 1953, to May 7, 1953, should, for the I purposes of surtax, be deemed to be the income of its members. Because some only, but not all, of the members of the company to whom the income could be apportioned under s. 248 (1)† of the Act, were individuals, a result of this direction would be that the company and such of the members who were not individuals could make a joint election (under s. 31 (3)‡ of the

---

* The relevant provisions are printed at p. 348, letter G, to p. 349, letter E, post.

† This provision is printed at p. 349, letter F, post.

‡ This sub-section is printed at p. 351, letter I, to p. 352, letter C, post.

Finance Act, 1947), the effect of which would be to relieve the company from paying profits tax. If the profits tax was treated as deductible in computing the company's actual income for apportionment (i.e., if the profits tax were treated as " payable " within s. 68 (1)* of the Finance Act, 1952, despite the possibility that in the ultimate event no profits tax might be exigible in consequence of an election) the company's actual income for the period would be nil.

Held: (i) mandamus to apportion the actual income of the company among its members should not be granted because there was nothing to apportion, the profits tax being " payable " within s. 68 (1) of the Finance Act, 1952, and thus deductible in the computing of actual income.

(ii) (per Lord Reid, Viscount Simonds and Lord Morton of Henryton agreeing) reasons why the profits tax was " payable " within s. 68 (1) of the Finance Act, 1952, were—

(a) the computation of " actual income " of a s. 245 company and the consideration of the apportionment of income among members of the company involved the deduction of profits tax, and

(b) the " actual income " apportionable was similarly ascertainable where the income was that of an investment company, although obligation to apportion any such income arose automatically under s. 262 of the Income Tax Act, 1952, and

(c) s. 31 (2) of the Finance Act, 1947, showed that the charge to the profits tax continued until there was an apportionment for the purposes of s. 245 of the Income Tax Act, 1952, and

(d) therefore, when the direction under s. 245 was automatic by virtue of s. 262, the profits tax should rightly be regarded as " payable " until the time when there was an apportionment of income, even though, after apportionment, the profits tax would or might cease to be payable in consequence of an election under s. 31 (3) of the Finance Act, 1947.

Decision of the Court of Appeal (sub nom. *R.* v. *Special Commissioners of Income Tax, Ex parte Linsleys* (*Established 1894*), *Ltd.*, [1957] 2 All E.R. 167) reversed.

[As to deduction of the profits tax in the computation of a company's actual income, see 20 Halsbury's Laws (3rd Edn.) 556, para. 1083.

As to the issue of mandamus to the Special Commissioners of Income Tax, see ibid., 702, para. 1390.

For the Income Tax Act, 1952, s. 245, s. 262, see 31 Halsbury's Statutes (2nd Edn.) 232, 252; for the Finance Act, 1952, s. 68, see 32 Halsbury's Statutes (2nd Edn.) 224; for the Finance Act, 1947, s. 31, see 12 Halsbury's Statutes (2nd Edn.) 775.]

Cases referred to:

(1) *Whitney* v. *Inland Revenue Comrs.*, [1926] A.C. 37; 95 L.J.K.B. 165; 134 L.T. 98; 10 Tax Cas. 88; 28 Digest 105, *649*.

(2) *Inland Revenue Comrs.* v. *John Dow Stuart, Ltd.*, [1950] 1 All E.R. 1; [1950] A.C. 149; 1950 S.C. (H.L.) 31; 31 Tax Cas. 274; 2nd Digest Supp.

Appeal.

Appeal by the Crown from an order of the Court of Appeal (Jenkins, Hodson and Sellers, L.JJ.), dated Mar. 6, 1957, and reported sub nom. *R.* v. *Special Commissioners of Income Tax, Ex parte Linsleys* (*Established 1894*), *Ltd.*, [1957] 2 All E.R. 167, affirming an order of the Queen's Bench Divisional Court (Lord Goddard, C.J., Hallett and Donovan, JJ.), dated Oct. 19, 1956, and reported [1956] 3 All E.R. 577, directing that an order of mandamus be issued to the Special Commissioners of Income Tax, requiring them to give a surtax direction under the Income Tax Act, 1952, s. 245 and s. 262, in respect of the respondent company, Linsleys (Established 1894), Ltd., in respect of the period Apr. 6 to May 7, 1953. The facts are set out in the opinion of LORD REID, p. 347, letters A to C, post.

---

* This sub-section is printed at p. 350, letter H, post.

The Attorney-General (*Sir Reginald Manningham-Buller, Q.C.*) and *E. Blanshard Stamp* for the Crown.

Cyril King, Q.C., and *H. H. Monroe* for the respondent company.

The House took time for consideration.

Jan. 23. The following opinions were read.

VISCOUNT SIMONDS: My Lords, I have had the advantage of reading the opinion which my noble and learned friend, LORD REID, is about to deliver, and I agree so fully in his reasoning and conclusions that I do not think it necessary to add anything. In accordance with it, I move that the appeal be allowed and the appropriate declaration made; the respondent company must pay the Crown's costs in the Divisional Court; each party will bear their own costs in the Court of Appeal and this House.

LORD MORTON OF HENRYTON: My Lords, I have had the privilege of reading in print the opinion which is about to be delivered by my noble and learned friend, LORD REID. That opinion sets out fully the facts leading up to this appeal, and the relevant statutory provisions, and I agree with it; but as your Lordships are differing from the unanimous conclusion of the Court of Appeal and of the Divisional Court, I shall state shortly, in my own words, my reasons for thinking that the appeal should be allowed.

For the purpose of stating the respective contentions of the parties, I borrow, with only trifling alterations, the language of DONOVAN, J., in delivering the judgment of the Divisional Court. Counsel for the Crown contend that the Special Commissioners are not obliged to give a direction under s. 262 (1) of the Income Tax Act, 1952, followed by an apportionment, because—(i) a necessary preliminary to a direction and apportionment is the computation of the respondent company's (hereinafter called " the company ") actual income from all sources in accordance with the terms of s. 255 (3) of the same Act; (ii) in computing that income, any profits tax payable by the company for the relevant period (Apr. 6 to May 7, 1953) " grossed-up " in accordance with s. 68 of the Finance Act, 1952, must be deducted under the mandatory provisions of the same section; (iii) the amount of the profits tax so payable is £16,421, and the gross sum to be deducted is £29,856; (iv) when this sum is deducted, the result is that the actual income from all sources of the company for the relevant period is reduced to nil; (v) there is no obligation under s. 262 to make a direction in regard to non-existent income, and no possibility of " apportioning " nothing; (vi) therefore, s. 262 (1) imposes no duty on the Special Commissioners for the relevant period.

Counsel for the company attack the third stage in this reasoning. They submit that the sum there mentioned is not " payable " within the meaning of s. 68 of the Finance Act, 1952, because profits tax is not " payable " within the meaning of that section unless the amount thereof has been finally determined and must ultimately be payable, having regard to all relevant sections of the taxing statutes, including s. 31 of the Finance Act, 1947; and no profits tax will ever be payable by the company if, after a direction under s. 262 of the Income Tax Act, 1952, and a consequent apportionment, the company and the corporate members thereof exercise their right to "elect" under s. 31 (3) of the Finance Act, 1947. To this argument counsel for the Crown reply that profits tax is now " payable " within the meaning of s. 68 of the Finance Act, 1952, because the distributions made by the company in liquidation attracted profits tax under the charge imposed by s. 30 (3) of the Finance Act, 1947; and the amount of tax payable has been particularised by an assessment made on the company. Thus the decision of this appeal turns on the question whether this sum of tax is or is not " payable ", within the meaning of s. 68 of the Finance Act, 1952, in the circumstances of the present case.

My Lords, I express no opinion on the question whether a particular sum of profits tax can be said to be " payable " within the meaning of s. 68 before there has been an assessment, but, in the present case I am of opinion that the contentions of counsel for the Crown are well founded. In the case of an investment company, to which s. 262 of the Income Tax Act, 1952, applies, it may not be necessary for the Special Commissioners to make any computation of the actual income from all sources of the company before giving a direction, because the direction is to be given under s. 262 (1) " without considering whether or not the company has distributed a reasonable part of its said income ". To this extent, the position under s. 262 differs from the position under s. 245; but it seems to me impossible for the commissioners to apportion the actual income from all sources of the company among the members of the company without first computing what that actual income is. This computation must be carried out in accordance with the provisions of s. 255 (3) of the Income Tax Act, 1952, and s. 68 of the Finance Act, 1952, and no election under s. 31 (3) of the Act of 1947 can take place until there has been an apportionment of the income. Thus, the order of events is first, computation, secondly, apportionment, and thirdly, election, and, in my view, the provisions of s. 68 compel the commissioners to deduct, at the first stage, the sum of £29,856 already mentioned. The reasons which lead me to this result are as follows: (a) This sum has already been assessed on the company and is, I think " payable ", in any ordinary sense of the word. This view is supported by the observations of Lord Dunedin in *Whitney* v. *Inland Revenue Comrs.* (1) ((1926), 10 Tax Cas. 88 at p. 101), and by members of your Lordships' House in *Inland Revenue Comrs.* v. *John Dow Stuart, Ltd.* (2) ([1950] 1 All E.R. 1 at pp. 5, 12). (b) The words " the amount payable " appear in sub-s. (4) of the same s. 68, and in that sub-section the word " payable " cannot mean " finally determined ", because it is contemplated that the amount " payable " may be reduced by reason of a deficiency of profits for a subsequent period. It seems to me that the same meaning should be given to the word " payable " in sub-s. (1) and sub-s. (4). If so, the possibility of a subsequent election under s. 31 (3) of the Act of 1947 would not relieve the commissioners from the duty to deduct the sum now in question in accordance with s. 68 (1) of the Act of 1952. (c) The contention of counsel for the company would result in s. 68 (1) having a very limited application, whereas it appears to me to be intended to be a general relieving section for the benefit of the taxpayer. (d) It might well happen in many cases that the company would have paid the sum assessed by way of profits tax before the commissioners came to make their computation under s. 68, and it would seem strange if a sum which had actually been paid, and properly paid, should be held not to be " payable " within the meaning of the section. (e) Although both sides could point to certain anomalous results if their contention were rejected, the most striking anomaly arises from the argument on behalf of the company. For, if that argument were correct, an investment company having an investment income of (e.g.) £10, and being liable for profits tax amounting to a very large sum, could get rid of the liability for profits tax by insisting on a direction being given by the commissioners under s. 262 (1), followed by an apportionment of the £10, thus bringing into effect the provisions of s. 31 (2) or s. 31 (3) of the Finance Act, 1947.

I have not overlooked the fact that an appeal against the relevant assessment to profits tax is still pending, but that appeal only raises again the question which is now before this House. I agree with my noble and learned friend, Lord Reid, in thinking that, in these circumstances, the fact that this appeal is still pending can be disregarded, and I join with him in refraining from expressing any opinion on a case in which the assessment is attacked on some other ground.

I agree with the motion proposed by my noble and learned friend on the Woolsack.

LORD REID: My Lords, the facts of this case are simple. The respondent company, whom I will call " the company ", was at all material times under the control of not more than five persons of whom some, but not all, were individuals. Until 1952 the company carried on trade as beer, wine and spirit merchants, but on Apr. 1 of that year it sold its business. Thereafter it was an investment company. On May 7, 1953, it went into voluntary liquidation. In respect of its last chargeable accounting period from Apr. 1 to May 7, 1953, the company was assessed to profits tax in the sum of £18,927 mainly on account of distribution charges in respect of assets distributed in the liquidation. If no account be taken of this assessment, its actual income for the period Apr. 6 to May 7, 1953, was not more than £8,920. If this assessed amount of profits tax is treated as an expense, its actual income for the period is nil, being arithmetically a minus quantity. In this action, the company seeks an order of mandamus against the appellants, the Special Commissioners; and, by a judgment of the Divisional Court, affirmed by the Court of Appeal, the Special Commissioners have been ordered to give a direction under s. 245 and s. 262 of the Income Tax Act, 1952, in respect of the period Apr. 6 to May 7, 1953. The present appeal is brought against that order. The result of that order would be that the company would not be bound to pay that part of the profits tax attributable to that period, i.e., £16,421, but that the actual income of the company, i.e., £8,920, or such less sum as might ultimately be determined, would be deemed to be the income of its members, so that surtax would be payable in respect of what would be apportioned to individual members, and other additional tax would be payable in respect of the part apportioned to corporate members of the company.

The difficulty in this case arises from the inter-relation of the provisions by which the income of certain companies can be deemed to be the income of their members, beginning with s. 21 of the Finance Act, 1922, and provisions dealing with profits tax, which began as the National Defence Contribution in the Finance Act, 1937. Under the Act of 1922, if it appeared to the Special Commissioners that a company to which these provisions applied had not distributed a reasonable part of its actual income (i.e., its income for the year in question estimated on income tax principles), they could direct that the company's actual income should be deemed to be the income of its members and apportion that income among the members. As a result surtax (then super-tax) had to be paid by the company on the whole of the company's actual income at rates at which its members would pay the surtax, although the income had not been distributed to the members. Then the Finance Act, 1939, made even more stringent provisions regarding certain investment companies; s. 14 (1) required the Special Commissioners to give such a direction whereby the whole actual income of such companies (subject to special provisions for any part of it which might be estate or trading income) was deemed to be the income of the members, whether or not a reasonable part had been distributed.

The Finance Act, 1937, s. 19, charged National Defence Contribution on profits in each chargeable accounting period from trade or business, and included investment companies within the scope of the charge. But, by s. 25, it allowed National Defence Contribution to be deducted as an expense in computing profits for income tax purposes. By the Finance Act, 1947, extensive alterations were made. This tax had been re-named profits tax; the rate was increased to twenty-five per cent.; and provision was made for non-distribution relief and for a distribution charge when profits which had enjoyed that relief were ultimately distributed. Moreover, individuals and partnerships were relieved from this tax, which thereafter only applied to companies and corporate bodies. The provision which allowed National Defence Contribution to be deducted as an expense for income tax purposes remained in force for profits tax. The previous enactments dealing with income tax were consolidated in the Income Tax Act, 1952. Thereafter, further amendments were made by the Finance Act, 1952, whereby, in the general case, profits tax was no longer allowed to be deducted as an expense in computing income for income tax purposes; but special provision was made to permit deduction of profits tax in cases where directions were to be given by the Special Commissioners.

The difficulty which arises in the present case can only arise if profits tax payable by an investment company in respect of a particular period exceeds the profits of the company for that period. That can happen, and has happened in this case, because, in the past, the company has enjoyed non-distribution relief in respect of profits not then distributed to its members; and then, when those profits come to be distributed, as happened here in the liquidation, the company has to pay distribution charges, corresponding to the earlier non-distribution relief, in addition to profits tax payable in respect of the actual profits for the period in question. The drafting of the various statutory provisions suggests that this possibility was overlooked, but that is hardly surprising. We are, therefore, confronted with the not unusual problem of applying statutory provisions to circumstances which they were not designed to meet. In such a case, it appears to me to be necessary to make a rather wide survey because one can easily reach a wrong conclusion if attention is concentrated only on those provisions which are immediately applicable to the particular case.

Two general points call for notice. In the first place, in cases where the Special Commissioners direct that the whole actual income of a company is to be deemed to be the income of its members, such income would be subject to triple taxation unless special provision were made—it would be subject to income tax, profits tax, and surtax notwithstanding the fact that surtax is a tax on individuals and that individuals are not subject to profits tax. And, secondly, the matter is complicated by the fact that the provisions regarding profits tax and surtax might seem to be at cross purposes. Non-distribution relief in respect of profits tax is calculated to discourage companies from making a full distribution of profits to their members; whereas the provisions with regard to directions by the Special Commissioners are calculated to encourage such distribution by imposing heavy, and indeed penal, liabilities on companies which fail to make sufficiently large distributions.

It seems appropriate first to consider s. 245 and s. 262 of the Income Tax Act, 1952 (which replaced s. 21 of the Finance Act, 1922, and s. 14 (1) of the Finance Act, 1939). The relevant parts of those sections are as follows:

> " 245. *Power to direct that income of bodies corporate is to be deemed to be income of their members.* With a view to preventing the avoidance of the payment of surtax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted that where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period for which accounts have been made up, distributed to its members, in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of surtax, a reasonable part of its actual income from all sources for the said year or other period, the commissioners may, by notice in writing to the company, direct that, for purposes of assessment to surtax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members.
>
> " 262. *Investment companies; directions to be given automatically for all years in certain cases.* (1) Subject to the provisions of this section with respect to companies with estate or trading income, the whole of the actual income from all sources, for every year of assessment, of every investment

> company to which s. 245 of this Act applies shall, however much or however little thereof has been distributed to its members, be deemed for the purposes of assessment to surtax to be the income of the members of the company, and accordingly the Special Commissioners shall give a direction under the said s. 245 in respect of each year of assessment in relation to every such company without considering whether or not the company has distributed a reasonable part of its said income.
>
> "(2) The provisions of this Chapter shall apply, with the necessary modifications, in cases in which directions are given by virtue of sub-s. (1) of this section as they apply in cases in which directions are given by virtue of the last preceding section with respect to a year of assessment:
>
> "Provided that—(a) no deduction shall be allowed in computing the actual income from all sources of the company which would not be allowable in computing the total income of an individual for the purposes of this Act, other than deductions for any profits tax payable by the company or for any such sums disbursed by the company as expenses of management as the Special Commissioners consider reasonable, having regard to the requirements of the company's business and, in the case of directors' fees or other payments for services, to the actual services rendered to the company;"

"Actual income" is defined as follows, by s. 255 (3):

> "In computing, for the purposes of this Chapter, the actual income from all sources of a company for any year or period, the income from any source shall be estimated in accordance with the provisions of this Act relating to the computation of income from that source, except that the income shall be computed by reference to the income for such year or period as aforesaid and not by reference to any other year or period."

The procedure for apportionment of income is set out in s. 248 as follows:

> "(1) Where a direction has been given under s. 245 of this Act with respect to a company, the apportionment of the actual income from all sources of the company shall be made by the Special Commissioners in accordance with the respective interests of the members.
>
> "(2) Notice of any such apportionment shall be given by serving on the company a statement showing the amount of the actual income from all sources adopted by the Special Commissioners for the purposes of the said s. 245 and either the amount apportioned to each member or the amount apportioned to each class of shares, as the commissioners think fit."

It will be seen that s. 245 is the leading section. Under it, the giving of a direction is within the discretion of the Special Commissioners, and before giving a direction they must determine whether or not a reasonable part of the company's actual income has been distributed. It would seem to be clear that they cannot determine whether a reasonable part of the actual income has been distributed unless they know what the actual income was. There appears to be no means whereby a direction once given can later be cancelled or withdrawn and, therefore, it would not be right for the commissioners to make their determination until they had before them all the facts from which the actual income could be computed, and had made the necessary computation. When this section was enacted, profits tax was still a permissible deduction for income tax purposes, and it would require an exceedingly cogent argument to persuade me that the commissioners were not required to deduct profits tax in computing the actual income which they must have in mind when determining whether a reasonable part of it has been distributed.

Section 262 applies to a particular class of the companies to which s. 245 applies. When it applies, the commissioners have no discretion. They are required to give a direction, which is a direction under s. 245, whether or not a reasonable part of the actual income has been distributed. Again it would require an exceedingly cogent argument to persuade me that " actual income " in this section has a different meaning from " actual income " in s. 245.

In the present case the taxpayer, the company, seeks to compel the commissioners to issue a direction under this section. It must be very unusual for a taxpayer to take this course, but I think that it is open to the company, provided it can show that the section does apply. But, in my judgment, the section cannot apply unless there is some " actual income " for the period in question. Subject to an exception which does not arise in this case, the section provides that the whole actual income for every year of assessment shall be deemed to be the income of the members of the company, and the giving of a direction is merely for the purpose of achieving this object. It would be quite unreasonable to read this section as requiring the commissioners to give a direction as regards a year when the company had no actual income, and there was nothing which could be deemed to be the income of its members. Moreover, a direction must be followed by an apportionment. Directions given by virtue of s. 262 are directions under s. 245, and s. 248 (2) requires that every such direction must be followed by a statement showing the amount of the actual income adopted by the commissioners for the purposes of s. 245, and the amount apportioned to each member or each class of shares. It would be even more unreasonable to read this as requiring the commissioners to apportion a non-existent income by attributing nil to each member or class of shares.

I have said that this company was an investment company. A point was taken that, by reason of the definition, a company can only be an investment company so long as it has an actual income and that, if this company had no actual income during the period in question, it ceased to be an investment company during that period. I find it unnecessary to deal with the point and only mention it to avoid any misunderstanding.

The question, therefore, is whether, for the period in question, the company had any actual income. If the profits tax of £16,421 was not a proper deduction, then the company had an actual income, and the commissioners were bound to give a direction and to apportion that income. But, if the profits tax was deductible in ascertaining the actual income, then the company had no actual income, the commissioners were not bound to give a direction, and this appeal must succeed.

It is, I think, clear that any profits tax which was " payable " by the company at the time when the computation of actual income was made must be deducted in making that computation. That is, in effect, enacted by the proviso to s. 262 (2), which I have already quoted. The Finance Act, 1952, by s. 33, provided that, in general, profits tax should not be a deduction, but special provision was made by s. 68 to cover cases involving directions. The relevant parts of that section are:

> " (1) Where for the purposes of s. 21 of the Finance Act, 1922, or Chapter 3 of Part 9 of the Income Tax Act, 1952 (which provide for the payment of surtax, in certain cases, on undistributed income of companies), the actual income from all sources of a body corporate for a year or period ending after the end of the year 1951 falls to be computed under para. 6 of Sch. 1 to the said Act of 1922 or sub-s. (3) of s. 255 of the said Act of 1952, then, if any amount is payable by the body corporate by way of the profits tax or the excess profits levy, respectively, for any chargeable accounting period falling wholly or partly within that year or period, a deduction shall be allowed, in computing the said actual income, of such an amount as would, after deduction of income tax at the standard rate in force for the year of assessment during which the said year or period ends, be equal to so much of the amount so payable by the body corporate as is apportionable to the said year or period:

> A "(2) Paragraph (a) of the proviso to sub-s. (2) of s. 262 of the Income Tax Act, 1952 (which relates to the deductions allowable in computing the actual income from all sources of an investment company in relation to which a direction is in force under sub-s. (1) of that section), shall have effect as if instead of authorising a deduction for profits tax payable by the company it authorised a deduction, in relation to any amount payable by the company B by way of profits tax or the excess profits levy, of such an amount as would, after deduction of income tax at the standard rate in force for the year of assessment in respect of which the direction is given, be equal to the first-mentioned amount.
>
> "(4) If—(a) the amount payable by a body corporate in respect of the excess profits levy for any chargeable accounting period is reduced by C reason of a deficiency of profits for a subsequent period; and (b) the amount deducted under the preceding provisions of this section in computing the actual income from all sources of the body corporate was arrived at without regard to the reduction and is excessive in view thereof, such apportionments, assessments or additional assessments to surtax shall be made as are necessary to counteract the excessive deduction and may be so made notwith- D standing that the time limited by law for making assessments or additional assessments has expired."

Again, a deduction is to be made if any amount is " payable " by way of profits tax. The amount of the deduction is not the sum payable as profits tax but that sum " grossed up ". But no point arises on that in this case.

I hope that I state the company's contention accurately when I say that it is E that the profits tax which has been assessed on the company was not and is not now " payable " within the meaning of these provisions, because, if a certain event should happen, the company would be under no obligation to pay the tax. To understand this contention, it is necessary first to consider the provisions of s. 31 of the Finance Act, 1947. Sub-section (1) provides (subject to modifications which do not affect the present question) that s. 19 of the Finance Act, 1937 F (the section which charges profits tax), shall not apply to any trade or business, unless it is carried on by a body corporate, unincorporated society or other body. Having so provided, it then was logical and reasonable to make special provisions for the case where a business is carried on by a body corporate, but, by reason of a direction by the Special Commissioners, the actual income of the body corporate must be deemed to be the income of its members so as to attract surtax. Profits G tax was now only a tax on bodies corporate; surtax was, and is, only a tax on individuals. So it would not have been appropriate to charge both profits tax and surtax in respect of the same income. The remaining provisions of s. 31 appear to be intended to avoid this double taxation so far as possible. Those provisions, so far as relevant to this matter, are as follows:

> H "(2) The said s. 19 shall not apply to any trade or business carried on by a body corporate during any chargeable accounting period if, for a year or period which includes, or for years or periods which together include, the whole of the chargeable accounting period, the actual income of the body corporate from all sources is apportioned under or for the purposes of s. 21 of the Finance Act, 1922, and all the persons to whom it is apportioned are individuals.
>
> I "(3) If, for a year or period which includes, or for years or periods which together include, the whole of a chargeable accounting period of a trade or business carried on by a body corporate, the actual income of the body corporate from all sources is apportioned under or for the purposes of the said s. 21, and some (but not all) of the persons to whom the income is apportioned are individuals, then if by notice in writing given to the commissioners within six months from the end of that chargeable accounting period, or such longer time as the commissioners may in any case allow, the body corporate and

> the persons other than individuals to whom the income is apportioned jointly so elect as respects that chargeable accounting period and each subsequent chargeable accounting period the whole of which is included in a year or period or years or periods for which the said actual income is so apportioned to those persons and persons who are individuals, the provisions of this Part of this Act shall apply as if—
>
> " (a) the trade or business had been carried on, during that and each such subsequent chargeable accounting period, in partnership by the persons to whom the income is apportioned, and the share of any one of them of the profits and losses of the trade or business therefor had been equal to the proportion of the income apportioned for the year or period or years or periods in question which is apportioned therefor to that one of them; . . . and the body itself shall not be chargeable to profits tax for that or any such subsequent chargeable accounting period."

Sub-section (2) deals with the case where all the members of the company are individuals, and, before coming to the more complicated provisions of sub-s. (3), I think it desirable to deal with sub-s. (2). Its provisions are somewhat complicated, because the periods in respect of which profits tax and surtax are calculated are not the same. But I do not think that any light is thrown on the present question by considering this complication. Omitting it, the sub-section provides that the section charging profits tax " shall not apply . . . if . . . the actual income of the body corporate . . . is apportioned under or for the purposes of s. 21 of the Finance Act, 1922 " (now s. 245 of the Income Tax Act, 1952). That appears to me to mean that the section charging profits tax does apply unless and until the actual income has been apportioned, but that it ceases to apply if and when the apportionment is made. That can be illustrated in this way. The Special Commissioners who deal with directions do not deal with profits tax, and, in the general case of a trading company, a considerable time may elapse before they are in a position to decide whether to give a direction. In the meantime profits tax may well have been assessed and, on a demand being made for payment of the assessed profits tax, it would, in my opinion, be no answer for the company to say that the profits tax is not payable because the Special Commissioners may later give a direction, which would be followed by an apportionment and consequent relief from the tax. The profits tax must be paid, but if later a direction is given by the Special Commissioners and is followed by an apportionment, then the section charging profits tax does not apply, and the tax which has been paid must be repaid. Any other view would mean that the recovery of profits tax from " s. 21 " trading companies would be held up for years until it was clear that the Special Commissioners could not give directions to them under s. 245.

If I am right so far, then it appears to me necessarily to follow that, at least as regards trading companies where the commissioners have a discretion whether or not to give a direction, profits tax which has been assessed is " payable " in every ordinary sense of that word and, therefore, must be allowed as a deduction by the commissioners in computing the actual income which they adopt when considering whether the sums which have been distributed to the members amount to a reasonable part of the company's actual income. Otherwise there might be grave injustice. The commissioners' decision whether a reasonable part of the actual income has been distributed must depend in large measure on the figure which they adopt as the amount of the actual income. If this figure is inflated by neglecting the liability for profits tax because it is not yet " payable ", the commissioners might see fit to give a direction which they would not have given if the amount of actual income which they had in mind had been the lower figure resulting from deduction of the amount of profits tax. It appears to me to be an inadequate answer to say that, although the commissioners are not entitled to deduct profits tax in computing actual income because it is not yet

A "payable", yet they may make allowance for profits tax as a potential liability in considering whether the amount of the actual income which has been distributed is reasonable.

The terms of s. 68 of the Finance Act, 1952, appear to me to give strong support to the view which I have expressed. But the Court of Appeal took a different view of this section, and it is, therefore, necessary to examine it with B some care. It directs that where, for the purposes of Chapter 3 of Part 9 of the Income Tax Act, 1952, the actual income of a company "falls to be computed" under s. 255 (3), then, if any profits tax or excess profits levy is payable, a deduction shall be allowed. The Court of Appeal held that the actual income did not fall to be computed until after a direction had been given. With all respect, I am unable to agree. Chapter 3 includes all the provisions with regard to the C giving of directions to which I have referred. Section 255 (3) is merely the definition of actual income. I have already given my reasons for thinking that the provisions of Chapter 3 require the commissioners to determine the amount of actual income before they decide whether or not to give a direction in cases where they have a discretion and, therefore, it appears to me that the actual income does "fall to be computed" within the meaning of s. 68 at that stage. D And the same must apply to investment companies because, for the reasons I have stated, directions can only be given to those companies if they have an actual income, and before giving a direction there must be a computation to determine whether there is any actual income. Moreover, under s. 248 the commissioners must apportion the amount of the actual income adopted by them for the purposes of s. 245. There is no provision for a computation of E actual income after the direction but before the apportionment, and that again appears to me to require a computation before a direction is given.

The Court of Appeal also relied on the terms of s. 68 (2). That sub-section deals with the amount of a deduction. The difficulty does not arise from the enacting words but from the words in brackets which purport to describe the proviso to s. 262 (2) of the Income Tax Act, 1952. Those words could well be F held to support the view of the Court of Appeal, but they seem to me to be a misdescription of the proviso to s. 262 (2). This is one of the places where I think that obscurity has resulted from a failure of the draftsman to anticipate a case like the present—as I have said, a very natural failure. In fact, the proviso merely deals with the deductions to be allowed in computing actual income. But the words in brackets in s. 68 (2) refer to deductions in computing the actual G income of a company "in relation to which a direction is in force" under s. 262 (1). It would seem that these words have crept in because the draftsman assumed that a direction would always be given automatically to an investment company, and did not realise that a computation must first be made to determine whether the company has, in fact, any actual income. Whether that be the true explanation or not, I cannot regard the presence of these words in brackets, which are H mere description, as of much weight in comparison with the other considerations to which I have referred.

It, therefore, appears to me that s. 68 has enacted that, when a computation of actual income is being made by the commissioners before they consider whether or not to give a direction, then if any amount is payable as profits tax a deduction shall be allowed. But the argument for the company is that at that stage no I profits tax can ever be "payable" because the tax cannot be finally payable until the commissioners have decided that no direction is to be given. If the company's argument is right, I cannot imagine any possible case where profits tax could be "payable", in the sense of finally payable, at that stage, and no such case was suggested in argument; so this provision of s. 68 would be meaningless.

A further argument was submitted for the company. If the amount of profits tax is deducted in computing the income apportioned and thereafter, by reason of the apportionment, profits tax ceases to be payable, then the sum so A deducted will be retained by the company unapportioned, and will not be chargeable to surtax. If this were so, it would support the company's contention, but counsel for the Crown submitted an argument that this sum would not escape taxation but could be covered by an additional apportionment.

Section 68 also deals with excess profits levy. Some argument was based on the provisions which deal with this tax. For what they are worth in this B connexion, they appear to me to support the Crown's contention, because they make it clear that excess profits levy is " payable " within the meaning of this section, although not finally payable because events in subsequent years may cause the amount " payable " to be ultimately reduced.

I can now turn to s. 31 (3) of the Finance Act, 1947, under which the present question arises. This sub-section applies where, as in the present case, not all C the members of the company subject to direction are individuals, some being corporate bodies. Giving a direction imposes a liability on the company to pay surtax, but it does not directly affect individual members unless they choose to relieve the company by paying their shares of the surtax. It does, however, affect the tax position of non-individual members, and it was apparently thought that such members required special protection. Accordingly, a direction given D to a company with non-individual members is not followed automatically by relief from profits tax as it would be if all the members were individuals. Such relief only arises if the company itself and its non-individual members jointly elect to claim it. One might suppose that it would always be in their interest to claim the relief, but we were informed that there are cases where that is not so, in view of the fact that the election to claim relief, once made, applies not only E to the period in question but to all subsequent periods.

Basically, the schemes under sub-s. (2) and sub-s. (3) of s. 31 are the same. Under whichever sub-section the case falls, no question of relief from profits tax can arise until there has been a direction and consequent apportionment of the actual income of the company. There cannot be a direction unless the company has an actual income, and, in determining whether the company has an F actual income, there must be deducted profits tax which is payable, and will remain payable if no direction is given. The only difference is that, whereas under sub-s. (2) relief from profits tax is automatic once a direction is given, under sub-s. (3) there is a further stage, and there must be an election before relief is granted. If all the members of this company had been individuals, there would have been no automatic relief from profits tax for the reasons which I G have given, and for the same reasons there is no right to elect that there shall be relief. It would be somewhat strange if it were otherwise. If the company were right, they would escape payment of £16,421 by electing to pay surtax on a sum not exceeding £8,920. Such a result might follow from the construction of numerous and complicated enactments, but it could hardly have been intended.

It only remains to note a further argument for the company. In this case, the H profits tax was assessed, but the assessment is still under appeal, and it was said that, whatever might be the effect when such an assessment had become final, the tax cannot be " payable " before that. I do not intend to express any opinion about a case where there has been no assessment, or where the amount payable is in dispute. But it appears that the only ground for the appeal in the present case is that nothing is " payable "—the same ground as the company I maintains before your Lordships. If this appeal is allowed, it follows that the appeal against the assessment must fail and, therefore, I think that it is proper to disregard the fact that that appeal is still pending.

In my judgment, this appeal should be allowed. I agree with what my noble and learned friend has just said about costs.

LORD SOMERVELL OF HARROW: My Lords, where the actual income of companies liable to surtax falls to be computed, s. 68 of the Finance Act, 1952, allows a deduction, if any amount is payable by the company by way of the profits tax or the excess profits levy. Section 31 of the Finance Act, 1947, gives exemption from profits tax to such companies if certain conditions are fulfilled. Under s. 31 (2), if the actual income from all sources is apportioned and all the persons to whom it is apportioned are individuals, the section which charges the profits tax is not to apply. Under s. 31 (3), if the actual income from all sources is apportioned and some but not all of the persons to whom it is apportioned are individuals, then the company is not chargeable to profits tax if, by notice, the company and the persons aforesaid, other than individuals, so elect. The election binds those concerned for the current and all subsequent chargeable accounting periods. There are other provisions which I need not summarise.

The question turns on the construction of s. 68 and, in particular, on the word " payable ". The taxpayer company submits that no deduction is to be made unless and until it is clear that the conditions of s. 31 providing for exemption cannot be fulfilled. In other words, " payable " means payable in the last resort. As apportionment is a condition precedent to the exemption under s. 31, there can, on this view, be no deduction before or for the purpose of apportionment. There is an initial difficulty, to my mind, in that there must be computation before apportionment and, on the face of it, the deduction is to be made when the actual income falls to be computed. The Crown submits that the profits tax is payable within the section notwithstanding that later events may give exemption. The courts below have accepted the contention of the company. It is, no doubt, a possible meaning of " payable ", a meaning which certain contexts might make plainly right.

It is, therefore, necessary to consider the context. Beginning with trading companies under s. 245 of the Income Tax Act, 1952, the first computation of the actual income from all sources would be in order that the commissioners may decide whether the company has, or has not, distributed a reasonable amount of its income. In considering that question, it would be absurd to disregard the liability to profits tax. If the commissioners decide that there has been no failure to distribute a reasonable amount, no exemption under s. 31 will arise. The company's submission does not make sense at that stage. This stage does not exist in the case of investment companies where the direction is automatic (s. 262 of the Income Tax Act, 1952). If the commissioners decide to make a direction and apportionment, and all the members are individuals, the company's construction works more simply than the Crown's. If the actual income is £2,000 and the profits tax £500, the Crown has to make two bites at the cherry although, under s. 31 (2), there can be no ultimate liability to profits tax. When one comes to s. 31 (3), the Crown would, on the above figures, apportion £1,500 and then have to have an additional apportionment of £500 if, but only if, the election were exercised. On the company's construction, the whole £2,000 would be apportioned, since the election might destroy liability to profits tax. Counsel for the Crown submitted that there would be no machinery if the election were not exercised for withdrawing the original apportionment and substituting one for £1,500. In his view, surtax would be levied on the whole £2,000 and the company would, in addition, have to pay £500 profits tax. If I had thought the company's construction was right, there would, in my opinion, be no difficulty in implying a power to make the necessary adjustment to carry out the substantive effect of the Act.

If one considers consequences, the results of the company's construction would be remarkable. In the present case, however small the actual income and however large the distribution charges, the apportionment of the former would relieve the company of all liability for the latter if all members were individuals or if the election were exercised. Benevolent as at times financial provisions may be, it is impossible to believe that such capricious benevolence could have been intended. Unhappily, the Crown's submission has its own anomaly, though, perhaps, a lesser one. On the Crown's contention, if the profits tax is less than the actual income by however small a sum, the whole of the actual income is treated on a surtax basis and no profits tax is exigible. I am assuming that either it is a s. 31 (2) case or the election is exercised. If, on the other hand, the profits tax exceeds the actual income by however small a sum, one would have expected the actual income to be treated on a surtax basis, the excess of the profits tax over that amount being payable as profits tax. This is not the result of the Crown's contention. The whole has to be handed over as profits tax, the company not retaining what would be left out of the actual income after surtax.

Context and consequences do not, in my opinion, give any sufficient support to the company's construction. The ordinary meaning of " payable " is, I think, that for which the Crown contend, that is, payable at the time of computation disregarding the fact that subsequent events may destroy the liability.

I would, therefore, allow the appeal.

LORD DENNING: My Lords, this case depends on the meaning of the word " payable " in s. 68 of the Finance Act, 1952. The courts below have held that profits tax is not " payable " within that section until it has been ascertained that no election can or will be made under s. 31 (3) of the Finance Act, 1947. It seems to me that this treats the making of an election as a *condition precedent* to the profits tax being payable; whereas, on the true construction of the statute, it is not a condition precedent but a *condition defeasant.* The profits tax is " payable " when everything has happened to make it payable, that is to say, when it is duly assessed on the taxpayer. It may, thereafter, cease to be payable if an election is made; but, that being a condition defeasant, the legal position is that, right up till that moment, it is payable. The result is that, in computing the " actual income " of these surtax companies—so as to see whether a direction or apportionment should be made—the profits tax (grossed-up) must be deducted before the direction or apportionment is made. This is a sensible and practical way of working the Act.

I would allow the appeal.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Smith & Hudson*, agents for *Rollit, Farrell & Bladon*, Hull (for the respondent company).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

A

PONTICELLI *v.* PONTICELLI
(otherwise GIGLIO) (by her guardian).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), January 13, 14, 15, 1958.]

B *Nullity—Domicil—Marriage by proxy of Italians in Italy—Wilful refusal by wife to consummate marriage—Husband domiciled in England at time of marriage and at time of suit—Law applicable for determining issue of nullity.*

Marriage—Proxy—Validity.

The parties were Italian nationals and were married by proxy in Italy in
C 1955, the husband then being resident in England. The parties never cohabited and the marriage was never consummated owing to the wife's refusal, and the husband instituted proceedings in England for a decree of nullity on that ground. The husband was domiciled in England both at the date of the marriage and at the date of the institution of the proceedings. The only evidence relating to the proxy marriage was that the
D husband signed a document for that purpose in July, 1955, in England, and that the wife admitted a proxy marriage; the marriage certificate was produced although it did not reveal either that the marriage was by proxy or what kind of ceremony was performed (civil or religious or concordat), but it would have been acceptable in the courts of Italy where a marriage by proxy was valid. Wilful refusal to consummate a marriage was not,
E except in certain circumstances, a ground for a decree of nullity in either the Italian civil or consistory court.

Held: (i) applying the presumption omnia rite esse acta, the marriage would be recognised as valid by English law (*Apt* v. *Apt*, [1947] 2 All E.R. 677, applied).

(ii) the proper law for determining the issue of nullity was English law
F because the lex loci celebrationis was not applicable and the lex domicilii and the lex fori, as also the law of the matrimonial domicil, were all English law (*Robert* (*otherwise de la Mare*) v. *Robert*, [1947] 2 All E.R. 22, not followed; *Way* v. *Way*, [1949] 2 All E.R. 959, applied).

(iii) therefore, since on the facts wilful refusal by the wife to consummate the marriage was established, the husband was entitled to a decree of
G nullity.

Semble: as between the lex domicilii and the lex fori the former was the proper law for determining the issue of nullity (see p. 363, letter C, post).

[**Editorial Note.** The decision in this case on the question of recognition by English courts of a marriage celebrated by proxy in Italy where the husband was domiciled in England and where the matrimonial home was intended to
H be in England seems to cover one of the examples left undecided by LORD MERRIMAN, P., in *Apt* v. *Apt* ([1947] 1 All E.R. at p. 627, letter C).

As to jurisdiction of English court in suits for nullity in respect of voidable marriage celebrated abroad, see 7 HALSBURY'S LAWS (3rd Edn.) 110, para. 195, notes (f) (g); and for cases on the subject, see 11 DIGEST (Repl.) 479, 480, *1072-1076*.

I As to recognition by English law of marriage by proxy, see 7 HALSBURY'S LAWS (3rd Edn.) 91, para. 164, note (q); and for a case on the subject, see 11 DIGEST (Repl.) 456, *912*.

For the Matrimonial Causes Act, 1950, s. 8 (1) (a), see 29 HALSBURY'S STATUTES (2nd Edn.) 397.]

Cases referred to:

(1) *Apt* v. *Apt*, [1947] 2 All E.R. 677; [1948] P. 83; [1948] L.J.R. 539; 177 L.T. 620; 11 Digest (Repl.) 456, *912*.

(2) *Robert* (*otherwise de la Mare*) v. *Robert*, [1947] 2 All E.R. 22; [1947] P. 164; [1948] L.J.R. 680; 11 Digest (Repl.) 479, *1074*.
(3) *Way* v. *Way*, *Rowley* v. *Rowley*, *Kenward* v. *Kenward*, *Whitehead* v. *Whitehead*, [1949] 2 All E.R. 959; [1950] P. 71.
(4) *Kenward* v. *Kenward*, [1950] 2 All E.R. 297; [1951] P. 124; 11 Digest (Repl.) 460, *942*.
(5) *De Reneville* v. *De Reneville*, [1948] 1 All E.R. 56; [1948] P. 100; [1948] L.J.R. 1761; 11 Digest (Repl.) 479, *1075*.
(6) *Sottomayor* v. *De Barros*, (1877), 3 P.D. 1; 47 L.J.P. 23; 37 L.T. 415; 11 Digest (Repl.) 460, *945*.
(7) *Brook* v. *Brook*, (1861), 9 H.L. Cas. 193; 4 L.T. 93; 25 J.P. 259; 11 E.R. 703; 11 Digest (Repl.) 457, *915*.
(8) *Ramsay-Fairfax* (*otherwise Scott-Gibson*) v. *Ramsay-Fairfax*, [1955] 3 All E.R. 695; [1956] P. 126; 3rd Digest Supp.

Petition.

In this case the husband petitioned for a decree of nullity. Both the husband and wife were born in Italy, and by his petition dated Nov. 12, 1956, the husband alleged that on July 11, 1955, a ceremony of marriage by proxy was celebrated between himself (he then being in England) and the wife at the office of Civil Status, Ostuni, in the province of Brindisi in Italy; that there had been no cohabitation between the parties; that the marriage had never been consummated owing to the wife's wilful refusal in that although she came to England on Oct. 26, 1955, and met the husband, she had in effect made it clear to him that she wanted nothing to do with him and wanted to return to Italy; and that the parties were domiciled in England. By her answer the wife did not admit the validity of the proxy marriage, admitted that there had been no cohabitation and that the marriage had not been consummated but alleged that the non-cohabitation and non-consummation were due to the husband's default in that he had failed to meet her when she came to England and that he had refused to take her to his home or provide accommodation for her. The wife having been born on Feb. 9, 1937, was an infant and appeared by the Official Solicitor as her guardian ad litem.

G. L. S. Dobry for the husband.

R. F. G. Ormrod and *Bruce Holroyd Pearce* for the Official Solicitor, as guardian ad litem for the wife.

SACHS, J.: Both the husband and the wife in the present case were born in Ostuni in the province of Brindisi in Italy. The former, according to the marriage certificate, was born on Oct. 1, 1927, and the latter on Feb. 9, 1937. Both, at all material times, remained and still are Italian nationals. In 1952, however, the husband came to this country where, he considered, there were prospects of earning a better livelihood. He has settled here and intends shortly to apply for naturalisation. Only once since 1952 has he been back to Italy; that was on a visit to Ostuni at Eastertide, 1955.

One of his objectives on that occasion was to seek a wife, he then being aged twenty-seven. During his stay of a few weeks in Italy, the girl who became his wife, then aged eighteen, was presented to him by her parents at the instance of his aunt, in case she should be found suitable for matrimony. After a few visits to see her at her parents' home an engagement was effected. Thus they became betrothed by methods which may sound strange to those who live in England in this decade, but appear to be common form in Ostuni. It is to be noted that the man and the girl had never spoken to each other in the absence of their elders before the betrothal took place, and that the true negotiators seem to have been the respective families. It was then and there arranged that whilst the husband was still in Italy matters should be put in hand with a view to a marriage by proxy taking place, and the preliminary steps were

A accordingly taken. The husband returned to England and here signed documents, including a power of attorney, with a view to forwarding the matrimonial project. Then, on July 11, it appears that the proxy marriage between these two took place in Italy whilst the husband was in England. I say " appears " to have taken place, because nobody who was there has been called to give evidence before me, and the only evidence that a marriage took place is that the B certificate, to which I will refer later, was produced.

The wife remained in Italy for the rest of July, for August and September. On Oct. 26, 1955, she arrived in England and appears to have reached Paddington. The husband had by then secured accommodation in Bedford where he had taken a furnished room. It is common ground that the wife never went to Bedford, never spent a night anywhere with the husband, has never had C sexual intercourse with him and, in fact, returned to Italy within a few days of landing in this country. What transpired between husband and wife I will refer to in due course. Since the wife left for Italy she has not returned to this country, nor has the husband visited Italy. By his petition dated Nov. 12, 1956, the husband seeks a decree of nullity on the ground of the wife's wilful refusal to consummate the marriage. The wife, by her answer, puts in D issue the validity of the marriage, admits that there was no cohabitation between her and the husband and that there was no consummation of the marriage, but lays the blame for these last two facts at the door of the husband.

The issues raised for decision in the course of the trial before this court were as follows: first, was there a valid marriage in Italy between the husband and wife on July 11, 1955; secondly, if the parties were thus validly married, E then by the law of what country does the husband's plea fall to be decided, lex loci contractus, lex domicilii or lex fori; thirdly, if the law in question is that of this country, has wilful refusal as alleged been established ? A decision on these points has been rendered, if anything, a little more difficult by the absence of the wife. She being still an infant has, however, had the good fortune to be represented by the Official Solicitor and by counsel. She was given F every opportunity to come to this country and attend this trial and it is unfortunate that she did not come, especially as she was offered the expenses of attendance.

Turning now to the validity of the marriage, the position is that by 1955 the husband had, in my view, become domiciled in this country. He was so domiciled when in 1955 in Ostuni the betrothal took place, and it was the basis G of the arrangement between the parties that the matrimonial home should be in this country. By the evidence of Dr. Terni, an expert on Italian law, it appears that marriages by proxy as between parties resident in Italy are recognised as valid. It further appears that by art. 3, sub-s. 2, of the Italian Civil Code, bk. 1, a marriage by proxy can also take place when one of the spouses resides abroad and there are " serious reasons to be evalued by the General H Attorney of the Italian court of the place where the other spouse resides ". It is to be noted that, wisely, the proxy must mention the name of the other spouse. It follows that the husband could in 1955 in Italy have executed a power of attorney validly authorising a proxy marriage. It is also clear that providing the appropriate formalities take place, such a proxy executed in this country would be valid for the purpose of a marriage in Italy. The correct I approach by the courts of this country to the issue of whether a proxy marriage, such as the present, is valid was clearly laid down by the Court of Appeal in *Apt* v. *Apt* (1) ([1947] 2 All E.R. 677), the case of a proxy marriage in Argentina. COHEN, L.J., delivered the judgment of the court. After holding that it was not contrary to public policy here to recognise a marriage by proxy which has taken place outside this country, he went on to say (ibid., at p. 680):

> " . . . we are unable to see any reason in public policy which would require the English courts, if they recognise the validity of proxy marriages

> celebrated outside the United Kingdom, to deny to a person domiciled in this country the right of so celebrating a marriage, provided, of course, that he or she has, in other respects, capacity to marry, and does not infringe any provision of English law . . . We think it impossible to hold that, in the absence of some statutory prohibition, it is contrary to public policy to execute in England a power of attorney which the same person could validly execute in the Argentine, the power of attorney being intended to authorise an act in the Argentine which is lawful by the law of that country."

Clearly, those passages cover the present proxy marriage in Italy, despite the fact that the husband was domiciled here. There are here no facts which suggest that a power of attorney was used to effect a marriage which was not at the material moment voluntary on the part of the giver of the power.

The only point which caused me some concern was the paucity of the evidence as to the marriage itself. Neither the power of attorney nor any copy of it was put in evidence. No testimony was given as to the contents or the effect of any document signed or executed by the husband or as to any " evaluation of serious reasons ". The marriage certificate does not even reveal that the marriage was a proxy one, nor does it disclose whether the ceremony was religious, civil or of that mixed variety called a concordat marriage. The totality of the evidence is that a marriage by proxy was arranged; that the husband signed a document for that purpose when he was in England on July 11, 1955, that the wife admits a proxy marriage took place; and that the marriage certificate in question is produced. It seems to me, however, that in the above state of affairs the court should in relation to that marriage certificate, which Dr. Terni said was acceptable by the courts of Italy when issued in regard to a proxy marriage, apply the presumption of omnia rite esse acta, and I hold that a valid marriage is shown to have taken place.

The next issue is: What law is applicable to the plea of nullity by reason of wilful refusal to consummate the marriage ? The importance of that issue in the present case derives from the fact that such a refusal, if established, (i) is a ground on which a decree of nullity may be granted, according to the law of this country, under s. 8 (1) of the Matrimonial Causes Act, 1950; (ii) is not a ground for such a decree of nullity before a civil court in Italy; and (iii) is not a ground for such a decree before a consistory court there, unless the intention to refuse to consummate the marriage existed at the moment of the ceremony itself. I pause to note that on the evidence before me it is not clear whether in Italy it would be the civil or the consistory court which has jurisdiction over this particular marriage—but most probably it would be the latter.

As regards the authorities on the question of which law applies, I first refer to *Robert* (*otherwise de la Mare*) v. *Robert* (2) ([1947] 2 All E.R. 22). There Barnard, J., said (ibid., at p. 24):

> " I have come to the conclusion that I ought to apply the lex loci celebrationis, for the following reasons. Wilful refusal to consummate a marriage, in order to be justified on principle as a ground for annulment and not dissolution, must be considered as a defect in marriage, an error in the quality of the respondent."

Then he goes on to explain that he considered that this wilful refusal did not relate to the personal capacity of the respondent spouse and so he decided it could not be the lex domicilii which applied. In Rayden on Divorce (7th Edn.), p. 93, the law is stated as follows:

> " Wilful refusal to consummate a marriage has been held in one case to be a defect in the marriage, so as to make the lex loci contractus applicable, rather than something affecting capacity to contract."

In *Way* v. *Way*, *Rowley* v. *Rowley*, *Kenward* v. *Kenward*, *Whitehead* v. *Whitehead* (3) ([1949] 2 All E.R. 959), however, Hodson, J., took a contrary view.

A That was the case which concerned the validity of four marriages by British members of military missions and other organisations concerned with the prosecution of the war when they were on duty in Russia during the period 1941 to 1945. In all four cases the main point put forward by the petitioners was that the marriages were void for want of form according to the law of the U.S.S.R., a plea rejected by HODSON, J. Brigadier Way, however, succeeded B at trial on his alternative plea of wilful refusal to consummate and HODSON, J., said (ibid., at p. 964):

> " In the case of *Way*, however, on the facts stated, accepting as I do his evidence, the wife has wilfully refused to consummate the marriage, and the marriage is, accordingly, voidable by English law, which is the law of the matrimonial domicil and the husband is entitled to a decree."

C It is true there seems to have been little or no argument in that case whether it was lex loci or lex domicilii which was applicable, and there is no trace of the judgment of BARNARD, J., having been cited. It is also true that on appeal by one of the above four petitioners, the Court of Appeal held that the marriages were void for want of form (*Kenward* v. *Kenward* (4), [1950] 2 All E.R. 297), D and thus the point as to wilful refusal to consummate should perhaps strictly not have been decided in *Way* v. *Way* (3). None the less, the judgment of HODSON, J., retains considerable persuasive force and moreover it is reinforced by the fact that later when he wrote the introduction to Mr. JACKSON'S work on the FORMATION AND ANNULMENT OF MARRIAGE (1951 Edn.) he stated:

> " Wilful refusal being a post-nuptial fact, it is difficult to see how, for E example, the lex loci celebrationis can have any application thereto."

Next I should refer to the judgments of the Court of Appeal in *De Reneville* v. *De Reneville* (5) ([1948] 1 All E.R. 56). That well-known case concerned the jurisdiction of the court where the marriage had taken place in Paris—the petitioner being an Englishwoman, who previous to the marriage was domiciled in England, the husband being a French national who was domiciled in Paris F both at the date of the marriage and at the date of the petition, and France being the place of the matrimonial home. The wife there alleged incapacity on the part of the husband or, alternatively, wilful refusal to consummate the marriage. LORD GREENE, M.R., whose judgment was supported in toto by SOMERVELL, L.J., stated (ibid., at p. 61) that the wife's allegations went to the essential validity of the marriage and then proceeded to say:

> G " In my opinion, the question whether the marriage is void or merely voidable is for French law to answer. My reasons are as follows. The validity of a marriage so far as regards the observance of formalities is a matter for the lex loci celebrationis. But this is not a case of forms. It is a case of essential validity. By what law is that to be decided ? In my opinion, by the law of France, either because that is the law of the H husband's domicil at the date of the marriage or (preferably, in my view) because at that date it was the law of the matrimonial domicil in reference to which the parties may have been supposed to enter into the bonds of marriage."

BUCKNILL, L.J., said (ibid., at p. 65):

> I " The wife consented to marry her husband in France and intended to live with him there and also impliedly intended to take her husband's French domicil on the assumption that the marriage was valid. In these circumstances it seems to me that the question as to the validity of the marriage should be decided by French law."

The phrasing of those judgments and the reference to the place where the marriage took place may, of course, be argued to leave open the question, which did not arise in *De Reneville's* case (5), which law should prevail if there were a conflict between the lex loci and lex domicilii.

Turning from authority to general principles, the position is that matters touching the validity of a marriage have, at any rate since *Sottomayor* v. *De Barros* (6) ((1877), 3 P.D. 1), been generally regarded as divided into two broad categories. The first related to matters of form and ceremony, to be determined by lex loci. The second related to matters " affecting the personal capacity of the parties " at the moment of marriage. Indeed, earlier, LORD CAMPBELL, L.C., in his much quoted speech in *Brook* v. *Brook* (7) ((1861), 9 H.L. Cas. 193 at p. 207), said:

> " But while the forms of entering into the contract of marriage are to be regulated by the lex loci contractus, the law of the country in which it is celebrated, the essentials of the contract depend upon the lex domicilii, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated."

Wilful refusal to consummate a marriage, clearly, cannot be said to fall within the categories of matters of form and ceremony. To my mind the true question is whether it should be treated as falling within the category of matters affecting the personal capacity of the spouse, in which case lex domicilii (which normally coincides with the law pertaining to the country of the husband's domicil at the time of marriage) applies, or whether it should be treated as something akin to matters for which the true remedy is divorce, in which case lex fori (e.g., the law pertaining to the domicil of the husband at the date of presentation of the petition, or the law pertaining to the residence of a wife who may bring herself within the provisions of s. 18 (1) of the Matrimonial Causes Act, 1950) applies.

It is first to be noted that no direct decision has been cited to me on the question whether sexual incapacity should be regarded as a matter of " personal capacity " within the meaning of the words used by COTTON, L.J., in *Sottomayor* v. *De Barros* (6) (3 P.D. at p. 5) when delivering the judgment of the court. Counsel for the wife submitted that it should be so regarded, but that any claim for a decree of nullity where a marriage was voidable, as opposed to void, should be decided according to lex fori. DICEY'S CONFLICT OF LAWS (6th Edn.), p. 266, treats the point as being open and submits that the choice lies between lex domicilii and lex fori. It is there suggested (ibid., at p. 267), on the one hand:

> " . . . it would be logically and historically correct to hold that, even if the court has jurisdiction in the case of a voidable marriage, it can only pronounce a decree if the ground upon which it is sought is recognised by the law of the husband's domicil at the date of the marriage."

The opposing view is then put as follows (ibid.):

> " In answer it may be urged, however, that, as the practice of ' looking behind the form and regarding the substance of the matter ' has been approved by the Court of Appeal* when the question is one of jurisdiction in the case of a voidable marriage, it must be adopted when the question is one of choice of law. The substance of the matter is that someone is claiming to terminate an existing status, and his right to do so should be referred to the law of his domicil at the date the claim is made."

It is next to be observed that on the authority of the judgment of DENNING, L.J., in *Ramsay-Fairfax* (*otherwise Scott-Gibson*) v. *Ramsay-Fairfax* (8) ([1955] 3 All E.R. 695 at p. 697) I feel bound to take the view that there is no distinction in regard to the present issue to be drawn because the proceedings are for wilful refusal to consummate the marriage, rather than for sexual incapacity. The words of the judgment, albeit in a jurisdiction case, were:

> " No one can call a marriage a real marriage when it has not been consummated, and this is the same, no matter whether the want of consummation is due to incapacity or to wilful refusal. Let the theologians dispute

---

* *De Reneville* v. *De Reneville* (5).

> as they will, so far as the lawyers are concerned, Parliament has made it plain that wilful refusal and incapacity stand together as grounds of nullity and not for dissolution . . ."

Counsel for the husband put the opposite and logical view in a persuasive manner, but I am unable to accede to his argument, supported though it may be by other judicial dicta. I would add that the reasoning in *De Reneville* v. *De Reneville* (5) also implicitly rules out any attempt to distinguish between the two in relation to the point now under consideration. In the light of the matters mentioned above, I regret being unable to agree with Barnard, J., that lex loci is the proper law applicable to the husband's plea. The choice, in my view, is between lex domicilii and lex fori. As between those, lex domicilii is favoured by Hodson, J., by the fact that it was chosen as being the proper alternative by Barnard, J., in *Robert* v. *Robert* (2) if he was wrong as to lex loci, and by the fact that the judgments in *De Reneville* v. *De Reneville* (5) clearly tend against the applicability of lex fori. For myself, I would, in support of applying lex domicilii, urge that it would be unfortunate indeed if a marriage were to be held valid or invalid according to which country's courts adjudicated on the issue; and the danger of differences of that type arising is now all the more to be feared by reason of the provisions of s. 8 (1) of the Act of 1950.

It is surely a matter of some importance that the initial validity of a marriage should in relation to all matters except form be consistently decided according to the law of one country alone—a point of view which seems to be supported by the judgment of Bucknill, L.J., in *De Reneville* v. *De Reneville* (5) ([1948] 1 All E.R. at p. 65), and consistency cannot be attained if the test is lex fori. Being of the opinion that the relevant proper law is either lex domicilii or lex fori, it is not, however, in the present case essential to come to a final conclusion as between the two. The husband having been domiciled in England, both at the date of the marriage and when he presented his petition, it is the law of this country that applies in each case. Further, if, and in so far as there may be, according to counsel for the husband's submission, a third alternative as to the law to be applied in the present case, viz., the law of the intended matrimonial domicil, should that be distinguishable from lex domicilii, again no difference would be involved, for both spouses originally intended to live and settle here after the marriage.

The law of this country being thus the proper law by which to test the validity of the marriage in relation to the allegations made by the husband, I now turn to the facts to see whether the husband is entitled to relief by virtue of s. 8 (1) of the Act of 1950. That, in turn, depends on the view taken of the evidence of what occurred on the wife's arrival in England and during the short period she remained there. On those facts the husband was clearly a witness of truth; not a witness who readily understood the questions asked and not a man who could remember all the details, but one on the substance of whose recollection I am prepared to rely. I may add that on more than one occasion the gaps in his memory related to important points which told in his favour. The most reliable of the independent witnesses was undoubtedly Sister Spreaficio, who was most helpful, as also was Police Sergeant Clover; but I did not find that Mr. Ruocco was equally reliable.

The essence of the story is clear. Some six or seven weeks after the wife had received from her husband money to pay for her fares and the expenses of her voyage, she arrived in London without having given him notice of the date or time of her arrival. She considered that she had been forced by her relatives into the marriage and it seems that by the time her husband met her at Paddington any disposition on her part to carry out further the wishes of her relatives had evaporated. She gave the husband nothing in the form of a greeting, though he tried to embrace her. On the way from Paddington to

King's Cross it did not take much to start some minor tiff and by the time they reached the train that was to start for Bedford the wife was manifesting a firm intention to go back to Italy. She refused to go to Bedford so it became necessary, as there was no accommodation available readily for her in London, to repair to the police station at King's Cross. There, this not very literate but extremely determined young woman, introduced herself to the police sergeant by her maiden name and made clear her intention not to stay in this country. No doubt both spouses by then were irritated and excited, and I am not prepared to attach real importance to what was said in those particular circumstances. What is, however, of importance is that in the next few days, first at the Italian consulate and next at the convent to which she was taken, the husband on his side made it clear that he wanted her to come to Bedford and the wife, on her side, made clear her determination on three points: first, she did not want him as a husband; secondly, she considered she had been forced into the marriage by her relatives and, thirdly, she was going back to Italy. Having due regard to the fact that the views of the sisters of the convent would enable calm reflection and would, indeed, favour the maintenance of what the wife told the sisters was a church marriage, it is clear that she had a firm and decisive objection to the petitioner qua husband, that she made up her mind never to live with him and she was determined in no way to be a wife to him.

In those circumstances, it seems that she was unswerving in denying the opportunity to the husband to consummate the marriage and counsel for the wife, very rightly, did not feel able to submit that such conduct, if proved, did not amount to a wilful refusal to consummate within the meaning of s. 8 (1). The husband is accordingly entitled to his decree of nullity.

Decree accordingly.

Solicitors: *Leader, Henderson & Leader* (for the husband); *Official Solicitor* (as guardian ad litem for the wife).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

PRACTICE DIRECTION.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

Divorce—Evidence—Foreign marriage—Validity of marriage not in issue—Proof by affidavit.

Where it is necessary to adduce expert evidence to establish the validity of a foreign marriage which is the subject of proceedings in the Divorce Division, the validity of the marriage not being in issue, such evidence, unless otherwise directed, may be given by affidavit, without prior leave.

This does not apply to marriages celebrated in France or Belgium, which are covered by the Practice Direction of May 16, 1955 ([1955] 2 All E.R. 465).

B. LONG,
Senior Registrar,
Jan. 28, 1958.

Divorce Registry,
Somerset House,
Strand, London, W.C.2.

GRAHAM *v.* C. E. HEINKE & CO., LTD.

[QUEEN'S BENCH DIVISION (Donovan, J.), January 16, 17, 1958.]

Costs—Payment into court—Several causes of action—Negligence or breach of statutory duty—Claim for damages for personal injuries—Notice of payment in not specifying whether payment in respect of common law negligence or breach of statutory duty—Damages awarded less than sum paid in—Costs—R.S.C., Ord. 22, *r.* 1 (2).

The requirement of R.S.C., Ord. 22, r. 1 (2), that a notice of payment into court in satisfaction of several causes of action should specify what sum is paid in respect of each cause of action is directed to cases where the several causes of action give rise to independent claims for damages, not to cases where satisfaction of one cause of action ends the whole claim (see p. 367, letter H, post).

The plaintiff, an assisted person, brought an action against his employers for damages for personal injuries sustained by him when working at a machine in the course of his employment. The claim was based on alleged negligence and breach of statutory duty. Before any defence was delivered the defendants paid £1,000 into court, stating in their notice of payment in that this sum was " enough to satisfy the plaintiff's claim ". The notice did not specify what sum was paid in respect of which cause of action (cf., R.S.C., Ord. 22, r. 1 (2)*). At the trial the plaintiff succeeded on both causes of action and recovered one sum of £760 damages.

Held: (i) the defendants were entitled to their costs of the action after the date of payment in because the two causes of action, viz., the alleged negligence and the breach of statutory duty, did not give rise to independent claims for damages but entitled the plaintiff to only one award.

(ii) the costs so awarded should come out of the damages awarded (*Nolan* v. *C. & C. Marshall, Ltd.*, [1954] 1 All E.R. 328, followed).

[As to costs after payment into court, see 26 HALSBURY'S LAWS (2nd Edn.) 99, para. 187; and for cases on the subject, see DIGEST (Practice) 874-876, *4156-4163*.]

Cases referred to:

(1) *Lochgelly Iron & Coal Co., Ltd.* v. *M'Mullan*, [1934] A.C. 1; 102 L.J.P.C. 123; 149 L.T. 526; 26 B.W.C.C. 463; Digest Supp.

(2) *London Passenger Transport Board* v. *Upson*, [1949] 1 All E.R. 60; [1949] A.C. 155; [1949] L.J.R. 238; 2nd Digest Supp.

(3) *Murfin* v. *United Steel Companies, Ltd.*, [1957] 1 All E.R. 23.

(4) *Nolan* v. *Marshall* (*C. & C.*), *Ltd.*, [1954] 1 All E.R. 328; [1954] 2 Q.B. 42; 3rd Digest Supp.

Application for costs.

By a statement of claim delivered on Dec. 5, 1956, the date on which the writ in the action was issued, the plaintiff, Reuben Graham, claimed against the defendants, his employers, C. E. Heinke & Co., Ltd.,

> " damages for negligence and/or breach of statutory duty consequent upon personal injuries sustained by the plaintiff whilst in the defendants' employment at their factory . . . "

The plaintiff was an assisted person under the Legal Aid and Advice Act, 1949. On Dec. 28, 1956, before any defence was delivered, the defendants paid into court £1,000, the notice of payment in to the plaintiff of the same date stating:

> " Take notice that the defendants, Heinke & Co., Ltd., have paid into court £1,000 and say that that sum is enough to satisfy the plaintiff's claim."

---

* The terms of this rule are printed at p. 366, letter F, post.

The plaintiff did not take this sum out of court and the action proceeded to trial; the judge found that the defendants were negligent at common law and were in breach of their statutory duty and he awarded the plaintiff damages of £760, viz., less than the sum which had been paid into court by the defendants.

The defendants now applied for the costs of the action from the date of the payment into court of £1,000; the plaintiff resisted the application on the ground that the payment in did not comply with R.S.C., Ord. 22, r. 1, and in the event of the court holding that it did so comply, he asked the court to exercise its discretion in his favour, and further, not to order the costs to be paid out of the damages awarded to him, as he was an assisted person.

Leonard Halpern for the plaintiff.
J. D. Stocker for the defendants.

Cur. adv. vult.

Jan. 17. **DONOVAN, J.,** read the following judgment: Consequent on my award of £760 damages as compared with a payment into court by the defendants of £1,000 the defendants ask that they shall have the costs of the action as from the date of such payment in.

The application is resisted on behalf of the plaintiff on the ground that the payment in must be regarded as a nullity, since it did not comply with the terms of R.S.C., Ord. 22. R.S.C., Ord. 22, r. 1 (1), provides, missing out irrelevant words:

> " In any action for a debt or damages . . . the defendant may at any time after appearance upon notice to the plaintiff pay into court a sum of money in satisfaction of the claim or (where several causes of action are joined in one action) in satisfaction of one or more of the causes of action . . . "

Rule 1 (2) of R.S.C., Ord. 22, says this:

> " Where the money is paid into court in satisfaction of one or more of several causes of action the notice shall specify the cause or causes of action in respect of which payment is made and the sum paid in respect of each such cause of action unless the court or a judge otherwise order."

The plaintiff's claim in the present case was for damages for injury suffered by him through a breach of statutory duty on the part of the defendants, or through their negligence at common law. The notice of payment in is dated Dec. 28, 1956, and reads as follows:

> " Take notice that the defendants, Heinke & Co., Ltd., have paid into court £1,000 and say that that sum is enough to satisfy the plaintiff's claim."

The plaintiff did not take out this sum and the action proceeded to trial with the result already stated. It is now said for the plaintiff that the notice should have specified the cause of action in respect of which the payment was made, that is, either breach of statutory duty or negligence at common law, or partly the one and partly the other, and that in the absence of such specification the payment in must be disregarded, so as to entitle the plaintiff to his full costs.

One view of this matter is that there are not two causes of action at all but only one, namely, damages suffered through the defendants' negligence, that negligence being the failure to take reasonable steps for the safety of the plaintiff while working for the defendants; and that this cause of action remains one such cause and not two, whether the negligence be the non-observance of the statute passed to protect a workman or the non-observance of the common law obligation to the like effect. Reference may be made in this connexion to LORD MACMILLAN'S speech in *Lochgelly Iron & Coal Co., Ltd.* v. *M'Mullan* (1) ([1934] A.C. 1 at p. 18). On the other hand one knows that in practice a defendant may be acquitted altogether of negligence at common law and yet commit a breach of statutory duty sounding in damages towards a workman. This supports the view that for practical purposes there are two causes of action and not one. I need not go into the matter at length because LORD WRIGHT said in *London Passenger Transport Board* v. *Upson* (2) ([1949] 1 All E.R. 60 at pp. 67, 68), that the two causes of action were different; and distinctions between claims for breach of statutory duty and for negligence at common law were also pointed out by the Court of Appeal in *Murfin* v. *United Steel Companies, Ltd.* (3) ([1957] 1 All E.R. 23).

On the footing, therefore, that there are two causes of action in the present case the problem remains: are there two such causes of action as R.S.C., Ord. 22, r. 1 (2), contemplates; and this is purely a question of construction. The purpose of the rule is tolerably clear. For example, in a claim for damages for slander, false imprisonment and malicious prosecution, there is a separate claim for damages under each head, and a lump sum paid in generally, not specifying to which claim it related, would obviously embarrass the plaintiff in deciding whether to go on with the whole of his action or not, or which part of it to drop. No such situation arises in the present case. There is one and one only head of damage, namely, personal injuries suffered through the defendants' neglect either of their statutory or common law duty, so that that payment in left the plaintiff in no doubt at all what it was for, and this he frankly admits.

It is said that perhaps in some other case a plaintiff would be embarrassed if different defences were raised against the claim for breach of statutory duty and the claim for negligence at common law unless the payment in were appropriated to one or other claim or apportioned between the two. Since the question is one of construction the argument is legitimate but I must say that I have a difficulty in envisaging such a case. The present is certainly not one, for the payment in was made before any defence was delivered. Looking at the matter from the point of view of a defendant, if he pays a sum into court and specifies that it is in satisfaction of the plaintiff's claim in respect of a breach of statutory duty nothing is really gained by anybody, because if the sum is taken out then automatically the claim for damages for common law negligence will go. No additional damages are payable under that head. The converse is true if the notice of payment in specifies the claim for common law negligence as the claim or the cause of action which is being satisfied, and if the notice appropriates part of the payment to each of the two claims the process is quite unreal and the defendant would be doing something which never has to be done at the trial. Alternatively, if the sum is invested in court and the action proceeds and only one of the two causes of action fructifies in damages there is no difference in the amount.

The plaintiff in the present case says that any difficulties can be resolved by an application under the rule itself for exemption from specifying the causes of action*; but this does not solve the problem here posed, which is one of construction, namely: is there any duty at all from which exemption could be sought.

In my opinion there is not. I think R.S.C., Ord. 22, r. 1 (2), contemplates cases where there are several causes of action giving rise to several independent claims for damages; not a case where although there may be two causes of action they are really alternative in that only one award of damages is possible; so that satisfaction of one cause of action ends the whole claim. Such is the present case, and no purpose at all would be served by making the defendant in such a case specify that his payment in was in respect of a breach of statutory duty or in respect of common law negligence. Accordingly, to deprive such a defendant of his costs for failure to make such a specification would be wholly injust, and I ought to avoid such a result if some other construction of R.S.C., Ord. 22, r. 1 (2), is reasonably possible. I think that it clearly is, being the one I have stated. I therefore reject the plaintiff's argument on this point.

I am next urged to exercise my discretion in favour of the plaintiff in the matter of costs, either by giving him the whole of his costs or making an order for no costs after the date of payment in. It should be remembered that the writ in this case was issued on Dec. 5, 1956, and the statement of claim was delivered on the same day. The payment in of £1,000 was made on Dec. 28, 1956, before any defence was delivered.

---

* See the ANNUAL PRACTICE, 1958, notes to r. 1 (2), at p. 526.

The plaintiff considered it was not enough. Rightly or wrongly I have held that it was more than enough. So the whole costs of the action since Dec. 28, 1956, have been occasioned by the plaintiff's view, now held to be wrong. In these circumstances I can see no ground for making the defendants pay the expense of the proceedings after payment in, or to deprive them of their own costs of resisting such proceedings.

Next I am asked not to order that any balance of costs found to be due to the defendants should come out of the damages now awarded to the plaintiff, since he is legally assisted. *Nolan* v. *C. & C. Marshall, Ltd.* (4) ([1954] 1 All E.R. 328), where such an order was made and upheld, was cited to me, though no doubt in a proper case a judge still has a discretion to do otherwise. I can see, however, no reason to do otherwise in this case. Where a litigant is assisted by public funds a particular duty lies on him not to refuse a reasonable offer, and certainly not to trade on his privileged position in the matter of costs to decline to accept a payment in which he might well accept if not so privileged. I am not saying that this is such a case, but if I were to treat the award of damages in the present case as inviolate, as I am asked to do, I think I should be setting an unfortunate precedent because there are no special facts about the present case to justify such special treatment.

Having said that I hope I may still say that I am very sorry for this particular plaintiff. Through not accepting the £1,000, he gets £760 less costs which will substantially diminish the award; but I can see no ground on which I can give him relief. If the defendants feel it right not to enforce the order regarding costs, or to make some concession regarding that, that of course is a matter entirely for them.

My order must be that the plaintiff have the costs of the action up to the date of payment in, and the defendants have the costs thereafter, and that any excess of the latter costs over the former be paid to the defendants out of the £1,000 in court; the balance to be paid out to the plaintiff.

Order accordingly.

Solicitors: *King-Hamilton & Green* (for the plaintiff); *Kingsbury & Turner* (for the defendants).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

JENNINGS *v.* KINDER (INSPECTOR OF TAXES). HOCHSTRASSER (INSPECTOR OF TAXES) *v.* MAYES.

[CHANCERY DIVISION (Upjohn, J.), December 18, 19, 20, 1957.]

Income Tax—Income—Voluntary payments—Indemnity to employee against loss on house purchase—Employers' housing assistance scheme—Reimbursement of loss on sale of house on transfer to new place of employment—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *Sch.* 9, *Rules applicable to Sch. E, r.* 1.

A taxpayer was employed by Imperial Chemical Industries, Ltd., from 1941 under contracts which obliged him to move to such of their factories or offices as his employers should from time to time direct. In 1950 under that obligation he was transferred from Hertfordshire to Lancashire. He then first heard of the employers' housing scheme for the assistance of employees in the purchase of a house in the form of an interest-free loan secured by mortgage of the house, and not to be called in for fifteen years except on certain eventualities such as transfer elsewhere. Under the scheme the employers undertook (among other obligations) in the event of the taxpayer's transfer elsewhere to pay for any loss on sale of the house, reserving to themselves an option to purchase it. In 1951 the taxpayer entered into an agreement with the employers under the scheme and bought a house for £1,850 on which he received a tax-free loan of £300. In 1954 on his transfer to Wilton in Yorkshire he sold the house for £1,500 with the consent of the employers. They made good to him the £350 representing the loss incurred. He was assessed to income tax under Sch. E in respect of the £350. On appeal,

Held: the £350 was not a profit arising from the taxpayer's employment, but was something collateral, and therefore was not taxable under Sch. E (s. 156 of the Income Tax Act, 1952); see p. 378, letter B, post.

Per CURIAM: to be a profit arising from the employment, the payment must be made in reference to the service the employee renders by virtue of his office, and must be something in the nature of a reward for services past, present or future (dicta of MORRIS, L.J., in *Bridges* v. *Hewitt*, [1957] 2 All E.R. at p. 301, applied); see p. 375, letter A, and p. 377, letter F, post.

Appeal dismissed.

Income Tax—Income—Benefit to employee—Reimbursement of loss on sale of house purchased under employers' housing assistance scheme—Whether an "expense"—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *s.* 160.

A taxpayer to whom s. 160* of the Income Tax Act, 1952, applied was transferred by his employers to a new place of employment. Under their housing assistance scheme he had purchased some years previously a house in which he was living at the time of his transfer. On being transferred he sold the house and sustained a loss of £450, which was reimbursed to him under the scheme by his employers. He was assessed to income tax on the £450 as being "paid in respect of expenses" to a person to whom s. 160 applied and as thus being taxable as a perquisite of his employment. On appeal,

Held: the loss on the sale of the taxpayer's house was not an "expense" within the ordinary meaning of that word or within s. 160 (1) of the Income Tax Act, 1952, and accordingly the payment of £450 was not assessable to tax and the assessment would be discharged.

Appeal allowed.

---

* The terms of s. 160 (1) are printed at p. 378, letter E, post.

[**Editorial Note.** As from the year of assessment 1956-57 the relevant terms of para. 1 of Sch. E are superseded by those enacted in s. 10 (1) of the Finance Act, 1956. Under these tax is still chargeable in respect of emoluments from "any office or employment" within the particular descriptions in s. 10 (1). Para. 1 of Sch. 9 to the Income Tax Act, 1952, is amended by the Finance Act, 1956, s. 44 and Sch. 5.

As to taxation of collateral payments to the holder of an office or employment, see 20 Halsbury's Laws (3rd Edn.) 322-324, para. 592; and for cases on the subject, see 28 Digest 85-88, *490-507*.

For r. 1 of the Rules applicable to Sch. E in Sch. 9 to the Income Tax Act, 1952, see 31 Halsbury's Statutes (2nd Edn.) 522.]

Cases referred to:

(1) *Herbert* v. *McQuade*, [1902] 2 K.B. 631; 71 L.J.K.B. 884; 87 L.T. 349; 66 J.P. 692; 4 Tax Cas. 489; 28 Digest 86, *492*.

(2) *Blakiston* v. *Cooper*, [1909] A.C. 104; 78 L.J.K.B. 135; 100 L.T. 51; sub nom. *Cooper* v. *Blakiston*, 5 Tax Cas. 347; 28 Digest 86, *495*.

(3) *Seymour* v. *Reed*, [1927] A.C. 554; 96 L.J.K.B. 839; 137 L.T. 312; 11 Tax Cas. 625; Digest Supp.

(4) *Moorhouse* v. *Dooland*, [1955] 1 All E.R. 93; [1955] Ch. 284; 36 Tax Cas. 1, 12; 3rd Digest Supp.

(5) *Henry* v. *Foster* (*A.*), *Henry* v. *Foster* (*J.*), *Hunter* v. *Dewhurst*, (1932), 16 Tax Cas. 605; sub nom. *Dewhurst* v. *Hunter*, 146 L.T. 510; Digest Supp.

(6) *Cameron* v. *Prendergast*, [1940] 2 All E.R. 35; [1940] A.C. 549; 109 L.J.K.B. 486; 162 L.T. 348; sub nom. *Prendergast* v. *Cameron*, 23 Tax Cas. 122; 2nd Digest Supp.

(7) *Beak* v. *Robson*, [1943] 1 All E.R. 46; [1943] A.C. 352; 112 L.J.K.B. 141; 169 L.T. 65; 25 Tax Cas. 33; 2nd Digest Supp.

(8) *Tilley* v. *Wales*, [1943] 1 All E.R. 280; [1943] A.C. 386; 112 L.J.K.B. 186; 169 L.T. 49; sub nom. *Wales* v. *Tilley*, 25 Tax Cas. 136; 2nd Digest Supp.

(9) *Bridges* v. *Hewitt*, *Bridges* v. *Bearsley*, [1957] 2 All E.R. 281.

Cases Stated.

These were two appeals by Case Stated under s. 64 of the Income Tax Act, 1952, by the taxpayer from a decision of the General Commissioners of Income Tax for Stockton Ward, County Durham, and by the Crown from a decision of the General Commissioners of Income Tax for Langbaurgh East, Yorkshire. The second appeal, that of the Crown, was taken first by the court. The appellant in this appeal (H.M. Inspector of Taxes) appealed from the disallowance of an assessment to income tax made on Leonard Harry Mayes under Sch. E to the Income Tax Act, 1952 (s. 156), for the year 1954-55 in the sum of £1,170, which included the sum of £350 paid or credited to him in the circumstances hereinafter mentioned. The appellant in the other appeal (Charles Maurice Jennings) appealed against an additional assessment in the sum of £450 made on him under Sch. E for 1953-54.

In the appeal by the Crown the following facts were admitted or proved. The taxpayer had been employed by Imperial Chemical Industries, Ltd., since December, 1941. In September, 1950, he was transferred from Welwyn, Hertfordshire, to his employers' works at Hillhouse in Lancashire, and on Apr. 27, 1951*, he entered into a service agreement with them. He was first informed of his employers' housing scheme at the time when he was transferred to Hillhouse. In June, 1951, the taxpayer purchased No. 16, Ribble Road, Fleetwood, Lancashire, for the sum of £1,850. He was offered and accepted the housing agreement afforded by his employers with respect to the house. Of the purchase money the taxpayer borrowed £300 on second mortgage from his employers, who paid all legal costs including stamp duties and the taxpayer's removal expenses to Fleetwood. In October, 1954, the taxpayer was transferred to Wilton in Yorkshire and offered his house for sale to his employers in accordance with the housing agreement. They declined to accept it, and the taxpayer sold it with their consent for £1,500. The loss on this sale, viz., £350, was made good to the taxpayer by his employers.

---

* Cf., p. 372, letters B and C, post.

It was contended on the taxpayer's behalf that any benefit received by him under the housing scheme was to meet a loss of capital and therefore was not taxable and, further, that if any taxable benefit was received by the taxpayer, it should have been assessed for the year 1950-51. It was contended on behalf of the Crown that the £350 represented a profit from the taxpayer's employment for which he was chargeable to income tax and that no deduction in respect of it was allowable under r. 7 of Sch. 9 to the Income Tax Act, 1952. The commissioners decided that the £350 was a payment made against a capital loss and, being made to meet such a loss, was not assessable to income tax.

On the appeal in the case of the taxpayer, Charles Maurice Jennings, the following facts were admitted. The taxpayer joined the service of Imperial Chemical Industries, Ltd., in July, 1944, when he lived in London. In January, 1949, he was transferred to Wilton, Yorkshire. In April, 1952, he was transferred to a post in London. In June, 1953, he was transferred to Billingham, Durham. On each of these transfers he acquired a house under his employers' housing scheme. On the occasion of transfer after the first house purchase a loss of £80 was sustained by the taxpayer which was made good by his employers. The second house was sold on the occasion of the taxpayer's transfer in 1953, his employers having declined to buy it and the sale being with their consent. On this occasion a loss of £450 was sustained by the taxpayer, which was made good to him by his employers in accordance with their housing agreement with him. They paid his costs and removal expenses. When the taxpayer joined Imperial Chemical Industries, Ltd. in 1944, he had no knowledge that the employers provided any form of housing scheme and was not moved to join by the prospect of any housing scheme. If there had been no housing scheme he would still have been employed by his employers; he considered his remuneration to be adequate for the work which he did. An employee's salary was calculated by his employers independently of anything that the employee might receive under the housing scheme. The £450 paid to the taxpayer was not salary for services under his service agreement with his employers.

It was contended on behalf of the taxpayer in this appeal that the £450 was received by him to meet a loss of capital and was not taxable, and that any benefit arising under the housing agreement was not a reward for his services. It was contended on behalf of the Crown that the sum of £450 represented a profit or emolument of the taxpayer from his employment and was of an income nature and assessable to income tax under Sch. E and Sch. 9, r. 1 and r. 4 to the Income Tax Act, 1952. The commissioners decided that the sum of £450 was a profit or emolument from the taxpayer's employment within the meaning of r. 1 and r. 4 and that an additional assessment in respect of it was properly made on the taxpayer for the year 1953-54. They were also of opinion that the loss on the sale of the house in 1953 was not money wholly, exclusively and necessarily expended in the performance of the duties of the office or employment of the taxpayer within the meaning of r. 7 of Sch. 9 to the Income Tax Act, 1952. They, therefore, confirmed the additional assessment.

F. N. Bucher, Q.C., and *H. H. Monroe* for the taxpayers.
J. Pennycuick, Q.C., and *A. S. Orr* for the Crown.

UPJOHN, J.: I have before me two appeals by way of Case Stated from the General Commissioners for Income Tax, one by the Crown and one by the subject. Both raise precisely the same point and they are in their essential facts indistinguishable one from the other, save that in Jennings' case an additional point arises on s. 160 of the Income Tax Act, 1952. The appeals raise, to my mind, novel and important points. In Mayes' case, the commissioners for a division of York decided in favour of the subject, and in Jennings' case on the very next day the commissioners for a division of Durham decided in favour of the Crown. I propose to take the taxpayer Mayes' case first, as on its facts it is the simpler.

Mayes has been employed by Imperial Chemical Industries, Ltd. since 1941. He started, plainly, in a fairly junior capacity. In the Case reference is made to a written agreement of employment dated Apr. 27, 1951. As will be seen from what follows, that date gives rise to certain difficulties, but it has this morning been agreed that the Crown will accept the statement made by counsel for the taxpayer on instructions that, although that was his first written agreement, he was employed under earlier oral contracts, and one of the terms of each of those contracts was that he was obliged to move to such of his employers' factories or offices as they should from time to time direct. Pursuant to that obligation, the taxpayer was transferred in September, 1950, from Welwyn, where he was then working, to the Imperial Chemical Industries, Ltd.'s works at Hillhouse in the county of Lancaster. He went there as an assistant technical officer. He found a good deal of trouble in purchasing a house, and he was then for the first time informed of his employers' housing scheme.

The housing scheme is headed " Housing: Scheme of assistance to transferred married male staff (including foremen) ", and it states that the company is prepared to offer its employees assistance in the purchase of a house, provided the price is within certain limits. It is stated that the company is prepared to make an interest-free loan to an amount which varied in relation to gross Imperial Chemical Industries, Ltd. emoluments. Then they set out the terms of the interest-free loan. It is to be secured by a mortgage of the house, and, where there was a first mortgage by a building society or a private lender, the interest-free loan would be secured by a second mortgage. Where the employee financed the purchase, of course, it would be a first mortgage. Then in para. 2 the memorandum sets out that:

> " It is not the present intention of the company to require the interest-free loan to be repaid until the expiration of fifteen years "

or the earlier of the following events: transfer by the company to a new locality so that the employee ceased to reside in the house, or giving up possession of the whole or any part of the house, or retiring from the service on pension, or leaving the company's employment, or death.

The memorandum then continues:

> " Subject to your maintaining the house in good repair, the company will guarantee you against loss on depreciation of the house on the following terms: 1. (a) The company will pay you the amount of any loss due to depreciation in the value of the house on the happening of any of the following events, namely:—(i) If you are subsequently transferred by the company and you wish to sell or let the house. (ii) If you die whilst in the service of the company. (iii) If you retire on pension. (b) In the event of your being transferred by the company, and by reason of such transfer you wish to sell or let the house, you will offer the house to the company who will have the right to buy it at a valuation price. If the house is purchased by the company and the valuation price is less than the original cost price plus improvement costs, the difference is made up by the company under the guarantee. If the house is not purchased by the company, the provisions of the two following sub-cll. (c) and (d) will apply. (c) If the house is sold within one year after such one of the three events mentioned in (a) above as shall first happen and the sale is a bona fide sale at the best price reasonably obtainable and is not for the purpose of a speculation, the

> company will pay you or your executors or administrators, in the case of your death, the amount (if any) by which the sale price is less than the original cost price, together with improvement costs. (d) If the house is not sold within that one year, a valuation is made at the end of that year and if the valuation price is less than the original cost price, plus any improvement costs, the company will pay the difference."

Then cl. 2 deals with the case where the employee may desire to sell his house for his own good reasons, although none of these events of transfer, death or retirement happened, and in that case it is provided that, if good and sufficient reasons be given for the sale, the company will consent to the sale, and if there is a loss the company will pay the loss. Then there is further provision about improvement, costs and so on, which I need not set out.

So, very briefly, the effect of this scheme was that the employee entering into it purchased a house with or without the assistance of an interest-free loan according to his desires. The company, in the events I have mentioned, would guarantee him against loss, e.g., if he was transferred to another place he had to offer the house to the company, who might buy it. If it did not buy it, but the house was sold within a year and there was a loss, the company paid the amount of the loss. If there was no sale, then at the end of the year there was a valuation, and the company would pay the amount of the loss as estimated by the valuation. That was how the scheme worked. It was, of course, purely optional whether the employee entered into it or not.

In 1950 the taxpayer, as is found in the Case, first heard of the scheme, and he decided to enter into it. Accordingly he signed the housing agreement on June 1, 1951. That is a lengthy and carefully drawn agreement which carries out in great detail the general scheme which I have already outlined. I do not think that it is necessary for my purpose to refer in detail to it. It is annexed to the Case Stated in any event.

Having entered into it, the taxpayer purchased a house, No. 16, Ribble Road, Fleetwood, for the sum of £1,850. He financed that by a first mortgage from the Abbey National Building Society, by an interest-free loan of £300, and he provided £90 of the purchase money himself. In October, 1954, he was transferred to the Wilton works in the county of Yorkshire, and he was, of course, anxious to sell his house. So, in pursuance of the housing agreement, he offered his house to Imperial Chemical Industries, Ltd., but they declined to accept it, and so, with his employers' consent, he sold the house for £1,500, and the loss on the sale was therefore £350. Although nothing turns on it, I think, in fact the loss was a little greater, because, as he was paying off the Abbey National Building Society prematurely, I suppose, he had to pay them some £22 1s. 3d. more than he had received from them. That loss he had to bear himself. The main loss, i.e., the difference between £1,500 and £1,850, was paid to him in due course by Imperial Chemical Industries, Ltd., and it is that sum on which he has been assessed. Imperial Chemical Industries, Ltd., in fact paid all the legal costs and the removal expenses, but nothing turns on that.

The commissioners found as a fact that the terms of the taxpayer's employment were completely independent of this housing agreement. They say this:

> "An employee's salary is calculated quite independently of anything he might receive under the housing agreement. I.C.I. salaries compare favourably with salaries paid by other employers not operating a housing scheme."

No one doubts that the scheme was introduced to benefit both employer and employee. The scheme was introduced in 1948, when housing conditions were more difficult even than they are now, and it is quite clear from the evidence that was given before the commissioners and from their findings that the principal object of introducing this scheme was so that the employee should be free from worry on transfer. He knew that if he liked he could go into the scheme, and if he was transferred away subsequently he would be guaranteed against loss. The advantage to Imperial Chemical Industries, Ltd., was twofold. They had more contented employees, and, of course, they also had the call on the house when the employee left it on transfer or death, and that might be quite valuable, because they could then offer the house to the person coming in to take the place of the employee who was transferred, and they could offer him accommodation which might otherwise be difficult to get.

The assessment is made on the taxpayer Mayes under Sch. E. The charging section is s. 156, which at the relevant time before it was amended in 1956 provided:

> " The Schedule referred to in this Act as Sch. E is as follows . . . (2) Tax under this Schedule shall also be charged in respect of any office, employment or pension the profits or gains arising or accruing from which would be chargeable to tax under Sch. D but for the proviso to para. 1 of that Schedule."

The first of the rules which by s. 156 (5) are applicable to a charge under Sch. E, provides:

> " Tax under Sch. E shall be annually charged on every person having or exercising an office or employment of profit mentioned in Sch. E, or to whom any annuity, pension or stipend chargeable under that Schedule is payable, in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment, after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament, where the same have been really and bona fide paid and borne by the party to be charged."

The important words are those beginning " in respect of all salaries ". It is this sum of £350 which has been paid to Mayes which the Crown seek to tax as being a salary, fee, wage, perquisite or profit arising " therefrom " for the year of assessment. As I have said, in Mayes' case they failed. In Jennings' case they succeeded.

The argument on behalf of the taxpayer is this. He says that this payment of £350 does not arise from his office or his employment because it is not a profit; it is not in any sense a reward for services, and therefore he says it is not a profit that arises therefrom, i.e., from the employment. It is submitted that a profit or perquisite must essentially arise as a reward for services, whether past, present or future.

The Crown, on the other hand, offer a dichotomy. It is submitted that, if one leaves out transactions for full value between employer and employee, the consideration being something other than services, e.g., the purchase for full value in money or money's worth of an employee's house or a motor car, one finds on the authorities that every payment by an employer to an employee must be either a personal gift, i.e., a gift to an employee on grounds personal to him and not to him qua employee, when admittedly it is not taxable, or a payment to him as an employee and because he fulfils some office or employment, in which case it is a profit from the office or employment, and is taxable. Counsel for the Crown says that putting it the other way round and leaving out of account transactions for full consideration in money's worth, every payment to the employee is a profit from his office and taxable unless personal to him, and that all the authorities show that. With all respect to the argument of the Crown, I do not think they show any such easy dichotomy. In my judgment, the authorities show this, that it is a question to be answered in the light of the particular facts of every case whether or not a particular payment is or is not a profit arising from the employment. Disregarding entirely contracts for full consideration in money or money's worth and personal presents, in my judgment not every payment made to an employee is necessarily made to him as a profit arising from his employment. Indeed, in my judgment, the authorities show that, to be a profit arising from the employment, the payment must be made in reference to the service the employee renders by virtue of his office, and it must be something in the nature of a reward for services past, present or future. I venture to think that the Crown's argument is based on a misinterpretation of some of the authorities, and for this reason, that in so many cases on this much litigated branch of the law, such, for instance, as the Clergy Sustentation Fund case (*Herbert* v. *McQuade* (1) (1902), 4 Tax Cas. 489), the Easter offerings case (*Cooper* v. *Blakiston* (2) (1908), 5 Tax Cas. 347), the cricketers' benefit cases (*Seymour* v. *Reed* (3) (1927), 11 Tax Cas. 625, and *Moorhouse* v. *Dooland* (4), [1955] 1 All E.R. 93) and so on, it was clear from the very nature of the payment that it was in respect of services, and the whole question was whether it was a profit from the employment or a personal present, and the possibility of its being a payment not in connexion with services simply did not arise. For that reason, the point which is in the forefront of this case frequently did not rise to the surface in many of the well-known cases.

The first of the authorities which seem to me to justify the view that I have expressed is *Henry* v. *A. Foster*, *Henry* v. *J. Foster*, *Hunter* v. *Dewhurst* (5) ((1932), 16 Tax Cas. 605). That is a difficult case which has been the subject of a subsequent judicial comment. The part of the headnote relating to *Dewhurst's* case reads:

> ". . . the respondent desired to retire from active management of the company, but his co-directors wished to be able still to consult him, and it was agreed that he should resign the office of chairman, receive as 'compensation' a lump sum in lieu of the provision under art. 109, waiving any future claim under that article, and remain on the board . . . at a reduced rate of remuneration."

It was held in the House of Lords that, in the circumstances of that case, the sum received was not assessable to income tax. LORD ATKIN said (ibid., at p. 644):

> " This sum is expressed in the article to be 'by way of compensation for the loss of office'. I will assume, without expressing any opinion on the matter, that this sum, if received by any ex-director, would fall within the words 'salary or profit whatsoever' and would come 'from' the office of director, as being part of the remuneration which he was entitled to under his contract of employment. But the circumstances in which the first payment was made seem to me to negative the proposition that the payment was received 'from' the office. Rule 1 appears to me to indicate emoluments either received from the employer or from some third party (such as tips, permitted commission and the like) as a reward for services rendered in the course of the employment."

I think that that is a helpful expression of opinion on the general scope of r. 1.

In *Cameron* v. *Prendergast* (6) ([1940] 2 All E.R. 35) a director received £45,000, in consideration of which he did not resign from his office of director, and it was held that that sum was properly assessable as a profit arising from the office of director under Sch. E. VISCOUNT MAUGHAM said (ibid., at p. 40):

> " On these facts and findings, the question is whether the sum of £45,000 was paid to the appellant in his capacity as a director, and to induce him to continue to hold his office of a director, so that the sum comes within the charging words of Sch. E, r. 1—namely, 'all salaries, fees, wages, perquisites or profits whatsoever [from the office of a director]'—or whether the sum was paid merely to obtain his agreement not to serve the notice for, say, one day, leaving him perfectly free to retire on the next day, in which case

> the sum, as SIR WILFRID GREENE, M.R., held, would not be a profit arising from the office."

So LORD MAUGHAM is there quite clearly saying that a payment might have been made to him in connexion with his office of director which might well not fall in the category of a profit from his office at all.

In *Beak* v. *Robson* (7) ([1943] 1 All E.R. 46) the respondent director covenanted in consideration of the payment of £7,000 that he would not compete with the company when his employment had come to an end within a radius of fifty miles, and it was held on assessment under Sch. E for £7,000 that it was a payment for giving up a right wholly unconnected with his office and operative only after he ceased to hold that office, and the assessment was discharged. VISCOUNT SIMON, L.C., said (ibid., at p. 47):

> "The consideration which he has to give under the covenant is to be given not during the period of his employment, but after its termination. He is giving to the company for a sum of £7,000 the benefit of a covenant which will only come into effect when the service is concluded. I agree with the Court of Appeal in the view that to treat this £7,000 as a profit arising from the respondent's office is to ignore the real nature of the transaction. It is quite true that, if he had not entered into the agreement to serve as a director and manager, he would not have received £7,000. But that is not the same thing as saying that the £7,000 is profit from his office of director so as to attract tax under Sch. E."

So one must consider the real nature of the transaction, and not every payment that is made to a director necessarily accrues to him as a profit from his office. That actual decision is no longer the law, because the law has been altered by statute*, but that does not affect the value of LORD SIMON's statement.

In *Tilley* v. *Wales* (8) ([1943] 1 All E.R. 280) a director was assessed under Sch. E in the sum of £40,000. Part of that was to commute his salary and part was capitalisation of a pension. In the House of Lords it was held that so much of each payment of £20,000 in the years 1938-39 and 1939-40 as represented a sum paid in compromise of reduction of salary was assessable to income tax under Sch. E (*Cameron* v. *Prendergast* (6)) but so much as represented capitalisation of pension was not so assessable (*Hunter* v. *Dewhurst* (5)). The case was remitted to the Special Commissioners to apportion the two payments accordingly. Again, that is another example of a payment to a director part of which was a profit from his office and part of which was not.

Moorhouse v. *Dooland* (4) ([1955] 1 All E.R. 93) was the case of the cricketer's benefit. JENKINS, L.J., said (ibid., at p. 105):

> "I hope I will not be thought to undervalue these arguments if I say that I regard them as disposed of by the application of the principle that the question whether a given receipt is a profit of an employment must be decided from the standpoint of the recipient."

Finally, in the recent case of *Bridges* v. *Hewitt*, *Bridges* v. *Bearsley* (9) ([1957] 2 All E.R. 281), certain shares were transferred to the directors in consideration of their serving the company for four years thereafter. There was a difference of opinion in the Court of Appeal, and JENKINS, L.J., delivered a dissenting judgment agreeing with the judgment of DANCKWERTS, J., in the court below. Nevertheless, he made a helpful review of the cases (ibid., at p. 288). The first was *Herbert* v. *McQuade* (1) (4 Tax Cas. 489), the Clergy Sustentation Fund case, and the second was *Cooper* v. *Blakiston* (2) (5 Tax Cas. 347), the Easter offerings case. Reading the passages from those cases which he cited certainly affords some support for the view of the Crown that, the moment one finds a payment is made to a man qua employee, then automatically it follows that it is a profit of his employment. I venture to think, however, that the reason for that is one that

---

* See now Income Tax Act, 1952, s. 242; 31 HALSBURY'S STATUTES (2nd Edn.) 230.

I have already given, viz., that in those cases and, indeed, in the case next referred to in the judgment of Jenkins, L.J., *Seymour* v. *Reed* (3) (11 Tax Cas. 625), there were only two possible alternatives; either it was a profit from the employment or it was a personal present. In *Seymour* v. *Reed* (3) Viscount Cave, L.C., said (I am quoting from Jenkins, L.J.'s judgment, [1957] 2 All E.R. at p. 289):

> " ' These words and the corresponding expressions contained in the earlier statutes (which were not materially different) have been the subject of judicial interpretation in cases which have been cited to your Lordships; and it must now (I think) be taken as settled that they include all payments made to the holder of an office or employment as such—that is to say, by way of remuneration for his services, even though such payments may be voluntary—but that they do not include a mere gift or present (such as a testimonial) which is made to him on personal grounds and not by way of payment for his services. The question to be answered is, as Rowlatt, J., put it: " Is it in the end a personal gift or is it remuneration? " If the latter, it is subject to the tax; if the former, it is not '."

Then Morris, L.J., in *Bridges* v. *Hewitt* (9), said ([1957] 2 All E.R. at p. 301):

> " In my judgment, the shares were not a profit from the office of managing director because they were not received by way of remuneration for services rendered as managing director. They were received while Mr. Bearsley was managing director, but they represented an expression of gratitude or a testimonial for what he had done, including what he had done before ever he became a director or managing director."

Now follows, I venture to think, what is an extremely important summary of the law, a little later on that page:

> " Accordingly, the fact that someone who receives a benefit is the holder of an office does not by itself prove that what he received was a profit from the office. That has to be decided by considering on the evidence whether what was received was received as remuneration for the services rendered in the office."

That, I respectfully believe, is the true test. Sellers, L.J., said (ibid., at p. 303):

> " In this way the transfer of the shares is ' linked up ' with the respective offices, but the question is whether that necessarily or on a reasonable view involves that the transfer was a payment of remuneration for services rendered to the company or a profit of the employment. I would not regard the transfer as having those attributes or as being of such a character."

I now relate the law as I have endeavoured to state it before reviewing the authorities to the facts. The housing agreement formed no part of the employee's remuneration for services, nor did any payment made thereunder. It formed no part of his contract of service, nor was it an inducement held out to him to enter into the company's employment, for he did not know of it until he had been employed for quite a long time. Of course, the housing agreement into which he entered—he need not have entered into it, if he did not want to—was an advantage to him, and so it was to his employers, for the reasons which I have mentioned previously. The matter must, as Jenkins, L.J., said in *Moorhouse* v. *Dooland* (4), be regarded from the point of view of the employee. Save in the most general sense, it does not seem to me accurate to say that to enter into the housing agreement or to receive a payment thereunder was a profit arising from his office. Of course, in a general sense it was connected with his office; because if he had not been employed he would not have entered into it. I entirely agree that it was offered to him in his character as an employee and not because of any characteristic personal to himself, and in that sense again it did accrue to him because he was employed. In another sense also it was connected with his employment in this way, that he entered into it because he knew that he might be transferred, and in that case he would be guaranteed against loss when he wanted to sell his house on transfer. But, as LORD SIMON pointed out in *Beak* v. *Robson* (7), those considerations are not really conclusive of the matter at all. One must find, looking at the true nature of the transaction, whether it was a profit arising from his office. In my judgment, as I have said, it was not. It was in no true sense a reward for his services. It was an advantage to him but not in my judgment a profit. It was something which was wholly collateral and really had nothing to do with the office or the services which he was bound to render to his employers.

That is fatal to the Crown's claim, and I do not propose to examine the alternative claims advanced on behalf of the taxpayer on the footing that the payment does arise from the office or employment, for the simple reason that in this very technical branch of the law it is too difficult and artificial to apply the law to a payment in respect of which I at any rate am prepared to deny the major premise as to its character. Accordingly, the Crown's appeal in Mayes' case must be dismissed with costs.

In Jennings' case the Crown succeeded, but it is admittedly indistinguishable except for the application of s. 160 of the Income Tax Act, 1952. That arises in Jennings' case for this reason, that he was an employee in an altogether higher grade than Mayes, and he was at the relevant time receiving emoluments in excess of £2,000 a year. That is a condition necessary to bring s. 160 into operation*. That section provides by sub-s. (1):

> " Subject to the provisions of this Chapter, any sum paid in respect of expenses by a body corporate to any of its directors or to any person employed by it in an employment to which this Chapter applies shall, if not otherwise chargeable to income tax as income of that director or employee, be treated for the purposes of para. 1 of Sch. 9 to this Act as a perquisite of the office or employment of that director or employee and included in the emoluments thereof assessable to income tax accordingly: Provided that nothing in this sub-section shall prevent a claim for a deduction being made under para. 7 of the said Sch. 9 in respect of any money expended wholly. exclusively and necessarily in performing the duties of the office or employment."

Therefore, the whole question is whether that applies to this sum, I think in Jennings' case it was £450, paid to him by his employers. The Chapter is headed "Expenses Allowances to Directors and Others", and I approach this section with the view that " expenses " there is referring to the ordinary expenses that directors and employees incur and not to a payment such as this. Of course, that is not conclusive of the matter. First of all one has to find a sum paid in respect of expenses to an employee. The sum of £450 has been paid. But is it in respect of expenses? To what expense has the employee been put? That is plainly what the section contemplates. The answer is that in the year of assessment he has not been put to any expense at all. Unfortunately for him, he received rather less for the sale of a house than he had hoped, but he has not been put to any expense. He merely made a loss on the sale of his house, and I would have thought that that could not in any ordinary use of language be described as an expense, for the purposes at all events of s. 160 (1). The only expense to which the employee was put was when he purchased the house some years before in another year of assessment, and all that has happened is that he has not received as much as he paid for it. It does not seem to me that that payment has the character of an expense for the purposes of s. 160 at all. Accordingly, in Jennings' case I must allow the appeal, discharge the assessment, and the Crown must pay the taxpayer's costs.

---

* See Income Tax Act, 1952, s. 163 (3); 31 HALSBURY'S STATUTES (2nd Edn.) 158.

First appeal dismissed. Second appeal allowed, assessment discharged.

Solicitors: *J. W. Ridsdale*, solicitor to Imperial Chemical Industries, Ltd. (for the taxpayers); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

Re WHITE (*deceased*).
McCANN AND ANOTHER *v.* HULL AND ANOTHER.

[CHANCERY DIVISION (Wynn-Parry, J.), January 24, 1958.]

Will—Gift—Subject-matter of gift—"Business"—What assets included in gift of testator's business of house furnisher—Whether gift subject to payment of trade liabilities.

By his will, dated July 18, 1952, a testator, after giving a number of pecuniary legacies, made the following bequest: "I give and bequeath the business of a house furnisher at present carried on by me at 64 Myddleton Road, Bowes Park . . . as to two-thirds to my wife . . . absolutely and as to the other one third to [B. H.] (in consideration of her long and faithful service) for their own use and benefit absolutely and it is my wish that [B. H.] shall carry on and manage the said business as she shall think fit." The testator gave his personal chattels, his household goods and effects, and his residuary estate to his widow absolutely The premises 64, Myddleton Road, had been used by the testator exclusively for his business since 1922. Until 1943 he held the premises under a lease and in that year he purchased the freehold. From March, 1954, to March, 1956, the testator had also carried on the business of a draper and house furnisher at certain other premises in Wood Green, and when that business was given up the part of the stock relating to the furnishing side of that business was transferred to the Myddleton Road premises. The testator died on July 13, 1956. On the questions (i) what assets were included in the gift of the business, and (ii) to what liabilities the gift was subject,

Held: (i) it being the testator's expressed wish that the business should be carried on, the gift of the business included the assets treated by the testator as part of the business, namely, (a) the stock in trade, including what had been transferred to the Myddleton Road premises on the sale of the business at the other premises in Wood Green; (b) the book debts and moneys owing by trade debtors; and (c) the freehold premises at Myddleton Road.

Dicta of SIMONDS, J., in *Re Rhagg* ([1938] 3 All E.R. at p. 318) applied.

(ii) the bequest of the business was subject to the payment of the trade liabilities.

Dictum of SIMONDS, J., in *Re Rhagg* ([1938] 3 All E.R. at p. 319) applied.

[As to what is included, prima facie, in a bequest of a testator's "business", see 34 HALSBURY'S LAWS (2nd Edn.) 246, para. 298; and for cases on the subject, see 44 DIGEST 692, 693, *5333-5341.*]

Cases referred to:

(1) *Re Rhagg, Easten* v. *Boyd*, [1938] 3 All E.R. 314; [1938] Ch. 828; 107 L.J.Ch. 436; 159 L.T. 434; Digest Supp.

(2) *Re Barfield, Goodman* v. *Child*, (1901), 84 L.T. 28; 44 Digest 693, *5339*.

(3) *Re Timberlake, Archer* v. *Timberlake*, (1919), 63 Sol. Jo. 286; 23 Digest (Repl.) 485, *5523*.

(4) *Re Harland-Peck, Hercy* v. *Mayglothing*, [1940] 4 All E.R. 347; [1941] Ch. 182; 110 L.J.Ch. 81; 164 L.T. 215; 23 Digest (Repl.) 540, *6051*.

(5) *Re Abbott*, (Oct. 16, 1941), unreported.

Adjourned Summons.

The plaintiffs, as executors of the will of the testator, Horace Smith White, deceased, applied to the court by originating summons for the determination of the following questions:

1. Whether, on the true construction of the will of the testator and in the events which had happened, the bequest of the business of a house furnisher contained in cl. 7* of the will included: (i) the sum of £6,660 6s. 2d. standing to the credit of the testator's account with Barclays Bank, Ltd., Bowes Park branch, at the date of his death, or any part of such sum; (ii) stock in trade; (iii) book debts amounting to £608 8s. 9d., or any part thereof; (iv) moneys owing by trade debtors, or any part thereof; (v) a sum of £252 10s. 8d., representing part of the proceeds of sale of the testator's business of house furnisher formerly carried on by him at 350, High Road, Wood Green, Middlesex; (vi) the freehold property, 64, Myddleton Road, Bowes Park, Middlesex.

2. Whether the bequest of the testator's business was subject to the payment thereout: (i) of the trade liabilities of the testator at his death amounting to the sum of £1,247 7s. 6d.; and (ii) of the income tax payable in respect of the profits of the business down to the testator's death.

The testator made his will on July 18, 1952. The business carried on by the testator at 64, Myddleton Road, had been purchased by him in December, 1922. The purchase included the assignment of a lease of those premises, and in 1943 the testator purchased the freehold of the premises. The testator died on July 13, 1956.

Counsel for Miss Hull, the first defendant, abandoned any claim to the sums mentioned in para. 1 (i) and para. 1 (v) of the summons.

J. Monckton for the plaintiffs, the executors of the will.
G. B. H. Dillon for the first defendant, Bessie Amy Hull.
Miss B. A. Bicknell for the second defendant, the testator's widow.

WYNN-PARRY, J.: The first question with which I have to deal on this summons concerns the content of a bequest by the testator of " the business of a house furnisher at present carried on by me at 64 Myddleton Road, Bowes Park ". The items in dispute are conveniently listed in the summons. The first relates to a sum of £6,660 6s. 2d. standing to the credit of the testator's account with Barclays Bank, Ltd., Bowes Park branch, at the date of his death. On the evidence, which shows that the testator had only one banking account and used that banking account sometimes for the purpose of the business and sometimes for his private purposes, counsel for the first defendant, Miss Hull, has (in my view very properly) abandoned any claim to that amount on behalf of the first defendant, who is a co-beneficiary with the second defendant, the testator's widow, of the gift of the business. Similarly, counsel for the first defendant has abandoned any claim to an item appearing in the balance sheet as at July 13, 1956, of £252 10s. 8d.† opposite the legend "Private loan account". It is with the remaining items that I have to deal.

---

* The terms of cl. 7 are printed at p. 381, letter C, post.

† The item mentioned in question 1 (v) of the summons.

Before I come to them, it is, I think, necessary to advert shortly to the terms of the will, because both counsel for the first defendant and counsel for the second defendant asked me to consider the content of this gift having regard to the other provisions in the will. The testator, having appointed his executors, proceeds in cl. 3 to give £50 to each of them. He then, by cl. 4, gives to the second defendant all his personal chattels and household goods and effects free of duty. By cl. 5 he gives to each of his grandchildren living at his death £10 free of duty, and by cl. 6 he gives a number of pecuniary legacies, which amount to £1,250. Then comes the gift of the business in cl. 7:

> "I give and bequeath the business of a house furnisher at present carried on by me at 64 Myddleton Road, Bowes Park . . . as to two-thirds to [the second defendant] absolutely and as to the other one third to [the first defendant] (in consideration of her long and faithful service) for their own use and benefit absolutely and it is my wish that [the first defendant] shall carry on and manage the said business as she shall think fit."

Then comes the residuary gift by which everything else is given to the second defendant.

The question what is the content of the gift of the business is not free from judicial authority. The authorities were exhaustively reviewed by SIMONDS, J., in *Re Rhagg, Easten* v. *Boyd* (1) ([1938] 3 All E.R. 314), and I think it is not inaccurate to say that a perusal of that review and of the authorities comprised in the review shows that over the time which has elapsed since the earlier cases the court is inclined to take a much broader view than used to be taken, although, of course, it remains as true as ever that each case has to be decided by reference to its own particular facts and the particular language of the will in question. It is also true, as counsel for the second defendant in the present case emphasised, that, in effect, what SIMONDS, J., was dealing with was the interest of the particular testator in a share of the partnership in question. The testator had been the sole owner of the business and had made his will bequeathing the business to his clerk whom he later made his partner; but, as I read the judgment, the learned judge only used or referred to the circumstance that the testator, before his death, had brought a partner in so as accurately to define that with which he was dealing. There are certain observations to be found in the judgment which I read as intended to be of general application and as intended to represent the reasons underlying the conclusion to which the learned judge came. In the course of his judgment, SIMONDS, J., said ([1938] 3 All E.R. at p. 318):

> "I have now reviewed all the decided cases which can throw any light upon the question before me. They leave me, I think, free to form my own judgment upon the words of this will. I must in the first place reject the contention of the residuary legatees that nothing more than the testator's share of goodwill passed under the bequest. It appears to me an arbitrary and unjustifiable selection of a particular asset among the several assets of which a business is made up. The word 'business' in such a context as this bears much the same meaning as it does when it is said that a man has sold his business. It means the undertaking or enterprise itself, not the process of carrying it on. When, therefore, a solicitor bequeaths his business, or, as the bequest must in the present case be read, his share of the business carried on by him in partnership with another, I see no reason for saying that goodwill, rather than any other asset, passes. If anything passes which is an asset of the business, why should not everything pass which is an asset of the business? Equally, if a share in one asset passes, why not a share in all?"

Later in his judgment SIMONDS, J., said (ibid., at pp. 319, 320):

> "I find the same difficulty that FARWELL, J., found in *Re Barfield, Goodman* v. *Child* (2) ((1901), 84 L.T. 28) in excluding anything which was in fact treated by the testator as an asset of his business. While he carried on business by himself alone, he treated as such an asset certain sums which he had advanced to clients, actual or potential. These sums were, I think, to him as much the assets of his business as plant and stock would, to a manufacturer, be the assets of his business. I see no reason to attribute any change upon his taking Boyd into partnership. They remained assets of the partnership business, with the result that the testator is, as a matter of account between himself and his partner, to be regarded as having a sum due to him on capital account of the necessary amount."

With that guidance, I return to the consideration of the items in dispute. They are the stock in trade of the business, book debts amounting to £608 8s. 9d., moneys owing by trade debtors or any part thereof, and, lastly, the freehold property at 64, Myddleton Road.

Counsel for the second defendant urged on me this consideration. She pointed out that the testator, in addition to giving the second defendant all his personal chattels, household goods and effects, bequeathed a number of pecuniary legacies, which amount to a substantial sum, and gave his residue to the second defendant. Counsel asked me to draw from that the inference that the testator intended those gifts to result in the pecuniary legatees receiving their legacies and the second defendant receiving something under the residuary bequest. I quite appreciate the purpose of that submission; but I think, from a somewhat lengthy experience, that I am entitled to take into consideration that testators are very often optimistic and, in disposing of their property, are frequently far more generous than the amount of the property to be disposed of will effectively allow. So far as the residuary estate is concerned, residue is what it implies, namely, that which remains, if anything.

On the other hand, counsel for the first defendant relied on the closing words of cl. 7:

> ". . . and it is my wish that [the first defendant] shall carry on and manage the said business as she shall think fit."

I think that that direction in the will is a much stronger indication than that which is afforded by reference to the amount of the pecuniary legacies and the existence of a residue. The gift of residue is common form. A will would be sadly lacking if it did not contain a residuary clause; but in this will there is an express statement of the testator's wish that the first defendant should carry on and manage the business. I think that I am entitled to draw from that the conclusion (and I think it is in accordance with the trend of the modern authorities) that a broad rather than a narrow construction should be given to the bequest of "the business of a house furnisher at present carried on by me at 64 Myddleton Road". In other words, cl. 7 of the will should be so construed in relation to the available assets as to carry with the gift of the business sufficient to allow the obvious wish of the testator to be achieved, namely, that the business should be carried on. If I were to accede to the argument put forward on behalf of the second defendant, there would only pass a motor van of the value at the testator's death of £193 15s., a cash register which, taking into account the amounts written off, is of the value of £30, and the goodwill. That appears in the testator's balance sheet at £25, but I will assume for the purpose of my judgment that it is worth considerably more than that.

It is true, as counsel for the second defendant pointed out and the evidence shows, that the account kept by the testator was really an account for income tax purposes, and that is one of the reasons why counsel for the first defendant was constrained to give up any claim to the item " Cash at bank "; but nevertheless it is possible, in perusing these items in the light of the evidence which has been filed on this summons, to say which items the testator treated as part of his business. The second item, stock in trade, valued at £6,141 14s., is to be regarded, in my view, as part of the assets of the business. The evidence shows that the great bulk of that item comprised stock which was used in the business at 64, Myddleton Road. There is some dispute about stock which was used in another business, but I think that that matter is cleared up by the evidence of the first defendant and of Mr. White, the testator's son. The first defendant says in her affidavit:

> " There was only one business, the business of a house furnisher, and Wood Green [that was where the other business was carried on] was for a time a branch of that business. Stock was taken from 64 Myddleton Road to start the Wood Green branch, and when the Wood Green premises were sold the balance of stock then at Wood Green was naturally brought back to 64 Myddleton Road and mixed with the stock then at 64 Myddleton Road. Thenceforth all the stock was used interchangeably for the purposes of the business, then carried on at 64 Myddleton Road."

If that be right, it seems to me that there is no way of separating the stock which came from Wood Green from that which was already at Myddleton Road.

Mr. White, in his second affidavit, disputes that the business at Wood Green was a branch of the business at Myddleton Road, Bowes Park. He says that the business at Wood Green was

> " . . . that of a general draper selling women's and children's clothes and [the testator's] purchase [of that business*] included the stock of a general draper. The testator continued that business at Wood Green until it was sold in March, 1956. He added to the original stock of the Wood Green business a stock of furniture and floor coverings hoping to develop a business of that character there. When the Wood Green business was sold only the remainder of such latter stock was transferred to the Bowes Park business."

So be it. Accepting that, the result is that such of the stock at Wood Green as was suitable for the purpose of a furnishing business was brought back by the testator, to whom it solely belonged, and used in his business at Myddleton Road, Bowes Park. That seems to me to come exactly within what SIMONDS, J., said in *Re Rhagg* (1) ([1938] 3 All E.R. at p. 320), namely, that he shared the difficulty which FARWELL, J., found in *Re Barfield* (2), " in excluding anything which was in fact treated by the testator as an asset of his business ". So far, then, as the content of the stock is concerned, I see no difficulty by the fact of the introduction of the stock from Wood Green which Mr. White agrees was brought back to the business at Myddleton Road. On the question whether or not that composite stock passes under the gift in cl. 7, I take the view that the matter is decided by the force of the closing words of the clause, because, if the testator intended that the business should be carried on (as, in my view, he clearly did), it must follow that he intended that the stock in trade, which was then part of the business, should pass in order that the business could be carried on, because, without that stock in trade, steps would have to be taken to procure stock, and it seems to me it would produce a most unnatural result if I construed cl. 7 as not including the stock in trade.

The next item† in the testator's account is under the heading " Sundry debtors, trade accounts ". Those simply are book debts owing to the business; and it seems to me, by parity of reasoning, that, on the assumption that the testator intended the business to be carried on, those are items which must be treated as having been regarded by him as part of his business assets. There remains the item "the freehold property 64 Myddleton Road, Bowes Park". The evidence is that those premises throughout have been used by the testator to carry on his business there and for no other purpose. They are business premises. At the beginning of his interest in them he held them under a lease, but later* purchased the freehold, which fact, if anything, underlines the conclusion that he regarded the freehold property as part and parcel of the assets of his business. Some of the old cases proceed on the basis of excluding such an item, but I can see no reason for doing so in this case. The context which I find on the construction which I have given to cl. 7 really demands that they be included; and I again rely on the passage from the judgment in *Re Rhagg* (1) ([1938] 3 All E.R. at p. 318), to which I have already referred:

---

* In March, 1954.

† This is the item referred to in para. 1 (iii) of the summons (p. 380, letter D, ante).

> "If anything passes which is an asset of the business, why should not everything pass which is an asset of the business ?"

I can see no reason, therefore, for excluding from the assets of the business the freehold property in question.

Therefore, on question 1 of the summons I answer thus: para. (i) in the negative; para. (ii) and para. (iii) in the affirmative. I do not think that para. (iv) carries the matter any further, because moneys owing by trade debtors or any part thereof cannot in their content be different from book debts, and those are dealt with under para. (iii). Paragraph (v) I answer in the negative and para. (vi) I answer in the affirmative.

[His Lordship then heard argument on question 2 of the summons.]

WYNN-PARRY, J.: The last question with which I have to deal relates to two items. The first is the trade liabilities of the testator at the date of his death, amounting to £1,247 7s. 6d., and the question is whether the bequest, in cl. 7, of the business subjects the assets which, I have held, passed under the clause to the trade liabilities.

The authorities are not in a satisfactory state. The first case to which I was referred, *Re Timberlake, Archer* v. *Timberlake* (3) ((1919), 63 Sol. Jo. 286), so far as one can discover from the report, concerned an estate that was insolvent, and, as counsel for the second defendant observed and I agree, in those circumstances the question whether the bequest of the business subjected it to debts would appear to have been somewhat academic. The later case to which I was referred, *Re Harland-Peck, Hercy* v. *Mayglothing* (4) ([1941] Ch. 182) is also unsatisfactory from the point of view of this question, because it is a report of the case in the Court of Appeal, on an appeal from a judgment of Farwell, J., who decided two points, the first being a point against which no appeal was made, and being the question whether a gift of the business in that case was subject to the liabilities†. I have no indication in the report on what line of reasoning Farwell, J., proceeded.

My attention was drawn to an article in the "Law Times Journal" for Nov. 8, 1941 (192 Law Times Journal 224), where reference is made to *Re Abbott* (5) ((1941), Oct. 16, unreported), where Uthwatt, J., is stated to have expressed the view that it seemed wrong that the legatee of the business should take it free from the liability to pay debts. He inclined to the view which Farwell, J., had rejected, namely, that the gift of a business was the gift of an entity. He, however, did not decide the point, having regard to the unusual circumstances surrounding the gift in *Re Abbott* (5).

---

* In 1943.

† On this point Farwell, J., made a declaration that, on the true construction of the will of the testatrix, the debts and liabilities of the testatrix incurred in carrying on the business and subsisting at the date of her death ought to be borne by the residuary estate of the testatrix (see [1940] 4 All E.R. at p. 352, letter E).

A There is a passage—which, I agree, must be treated as obiter— in the judgment of SIMONDS, J., in *Re Rhagg, Easten* v. *Boyd* (1) ([1938] 3 All E.R. at p. 318) where he said:

> " Secondly, I must observe that somewhat different considerations may be involved where the business was that of the testator alone, and where he carried it on in partnership. In the former case, to speak of his ' capital ' B in the business, or his undrawn profits, may be wholly misleading. The substance of the bequest is the assets of the business, subject to its liabilities."

It is true that *Re Timberlake* (3) was not cited in *Re Rhagg* (1), and *Re Harland-Peck* (4) had not then been decided. I take it that, if there be no special circumstances, I should follow what I can deduce to be the rule, if any, appearing C from *Re Timberlake* (3), and apparently applied in *Re Harland-Peck* (4); but, as SIMONDS, J., said in *Re Rhagg* (1) ([1938] 3 All E.R. at p. 318), having completed an exhaustive review of the authorities: " They leave me, I think, free to form my own judgment upon the words of this will ". I find myself in the same position.

The key to the whole problem, in my judgment, is again to be found in the D latter words of cl. 7. In my view, this is a case where the business should be regarded as an entity and it is a case where the words of SIMONDS, J. ([1938] 3 All E.R. at p. 319), apply: " The substance of the bequest is the assets of the business, subject to its liabilities ". I arrive at that conclusion for the short reason that it appears to me that, on its true construction, cl. 7 contemplates a continuation of the business, lock, stock and barrel, as it existed at the date E of the death of the testator. It is true that the accounts are not confined merely to accounts of the business; but, as I have said earlier, it is easy to extract, on analysis, what the testator treated as assets of the business and what he did not. In my view, he clearly treated the amount of the trade accounts as charged on what he regarded as his business assets. Therefore, in my view, in regard to the first point raised by question 2 of the summons, the answer is F that the bequest is subject to the payment of the trade liabilities, mentioned in sub-para. (i).

The second point relates to the income tax payable in respect of the profits of the business down to the testator's death. I take those to be confined to the amount assessed on the testator under Sch. D in respect of the profits to which he had become entitled through carrying on the business. The amount involved, G I think, is very small. In my view, on a question so framed, that tax must be regarded as entirely personal to the testator and should not be paid out of the assets of the business.

Order accordingly.

Solicitors: *Waller, Neale, Houlston & Baldon,* agents for *F. E. C. Forney,* Wood Green (for the plaintiffs); *Bailey, Breeze & Wyles* (for the first defendant); *Chatterton & Co.* (for the second defendant).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

Re MOXON'S WILL TRUSTS.
DOWNEY *v.* MOXON AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), January 28, 1958.]

Trust and Trustee—Powers of trustee—Power of advancement—Statutory power—Payment to beneficiary—Money not required for specific purpose—Trustee Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 19), *s.* 32 (1).

The Trustee Act, 1925, s. 32 (1), confers power on trustees to make a payment by way of advancement directly to a beneficiary although the beneficiary may not require to be advanced for any special purpose; but it is a necessary condition for the exercise of the power in that manner that the trustees are satisfied that the payment will benefit the beneficiary.

[As to the statutory power of advancement, see 29 HALSBURY'S LAWS (2nd Edn.) 776, para. 1083.

For the Trustee Act, 1925, s. 32, see 26 HALSBURY'S STATUTES (2nd Edn.) 99.]

Adjourned Summons.

By his will dated Jan. 25, 1927, the testator, Albert Edward Moxon, deceased, who died on Mar. 21, 1939, devised his residuary real and personal estate on the usual trusts for sale and conversion, and, after giving administrative directions, the testator declared that the residue, called "the trust fund", should be held on trust to pay the income thereof to his wife, Maude Moxon, during her life. Subject to his wife's life interest, the testator directed that the trust fund should be held on express protective trusts for his son, Charles Stone Moxon, during his life, and that after the death of the said Charles Stone Moxon the trust fund and the income thereof should be held in trust for all or any of the children or child of the said Charles Stone Moxon living at the date of the death of the survivor of the testator and his said wife and the said Charles Stone Moxon who should attain the age of twenty-one years in equal shares if more than one (with a substitutional trust in favour of the issue of any child of the said Charles Stone Moxon who died before the said date). The will contained no express power of advancement, and the Trustee Act, 1925, s. 32, was not excluded.

On Nov. 22, 1952, the testator's wife died, and Charles Stone Moxon was at the date of the summons over sixty years of age. He had one child only, Bryan Moxon, who was aged thirty-three years, was married and had two infant children.

The trust fund comprised investments worth approximately £55,000. The trustees intended, with the consent of the tenant for life, if they could do so lawfully and without causing a forfeiture of the life interest of the said Charles Stone Moxon, to exercise their power under the Trustee Act, 1925, s. 32 (1), by paying a sum of £20,000 to the said Bryan Moxon for his own use and benefit out of the capital of the trust fund. The summons accordingly raised the question whether they were empowered by s. 32 to make the proposed payment. It was agreed that the life tenant's consent would not cause a forfeiture of his interest having regard to *Re Rees' Will Trusts* ([1954] 1 All E.R. 7).

It was stated in the evidence on behalf of the trustees (given by one of them): "To the best of my knowledge the said Bryan Moxon does not at present require the said sum [of £20,000] for the purpose of any specific purchase or other expenditure. But in my opinion . . . the said Bryan Moxon is a responsible and trustworthy person who can be relied on to deal with the said money in the best interests of himself and his family. We have also taken into account the fact that if the said Charles Stone Moxon lives for five years after the payment has been made a substantial saving of estate duty on his death will result".

K. J. T. Elphinstone for the plaintiff, one of the trustees.

M. B. Kelly for the first and second defendants, the tenant for life and his son.

E. J. A. Freeman for the third and fourth defendants, infant grand-children of the tenant for life.

DANCKWERTS, J., referred to the trusts of the will of the testator and continued: The trustees desire to exercise the power of advancement conferred on them by the Trustee Act, 1925, s. 32, and to make (with the consent of the tenant for life) a payment directly to the second defendant, Bryan Moxon, who is the son of the tenant for life. He is thirty-three years old, and they think that he is a responsible person, but there is no evidence as to the purposes for which he would use the money, nor, indeed, does there appear to have been any inquiry by the trustees as to what he would do with it. There is merely evidence that they believe that he does not require it for any particular purpose or expenditure at the present moment.

The provisions of s. 32 (1) of the Act of 1925 are in quite wide and general terms:

> " Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently . . ."

The second defendant is entitled contingently to the capital, and I am asked to say whether the trustees may exercise that power by making a payment directly to the beneficiary in question. The trustees say that one of the matters which has operated in their minds with regard to the proposed payment is that there may be substantial saving in estate duty on the death of the tenant for life; and that is undoubtedly a matter which will enure for the second defendant's benefit. It seems to me that the word " benefit " is the widest possible word which could be employed and must include a payment direct to the beneficiary; that, however, does not absolve the trustees from making up their minds whether the payment in the particular manner which they contemplate is for the benefit of the beneficiary. I propose, therefore, to answer the question which I am asked by saying that the power enables a payment of capital moneys to be made directly to the beneficiary, but that the trustees must satisfy themselves that it is a proper case for a payment to be made in that manner.

Declaration accordingly.

Solicitors: *Crossman, Block & Co.*, agents for *Eaton Smith & Downey*, Huddersfield (for all parties).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

NOTE.

LANCE *v.* LANCE AND GARDNER.

[Probate, Divorce and Admiralty Division (Mr. Commissioner Latey, Q.C.), December 2, 3, 4, 5, 6, 1957, January 13, 14, 15, 1958.]

Divorce—Practice—Trial—Allegation of adultery—Dismissal of co-respondent from suit at end of petitioner's case—Co-respondent submitting no case to answer and not put to election—Matrimonial Causes Act, 1950 (14 *Geo.* 6 *c.* 25), *s.* 5.

[**Editorial Note.** In the present case, unlike *Beal* v. *Beal, Reade cited* ([1953] 2 All E. R. 1228, n.) and *Gilbert* v. *Gilbert & Abdon* (*Adams intervening*) ([1957] 3 All E.R. 604), the party other than the husband or wife against whom adultery was alleged (in the present case the co-respondent) was dismissed from the suit at the close of the petitioner's case without being put to his election whether to call or not to call evidence.

As to a person, other than the husband or wife, against whom adultery is alleged being dismissed from the suit at the close of the petitioner's case, see 12 Halsbury's Laws (3rd Edn.) 387, para. 852, text and note (c).

As to putting a party to election whether to call evidence in a divorce suit, see 12 Halsbury's Laws (3rd Edn.) 387, para. 852, text and note (e).

For the Matrimonial Causes Act, 1950, s. 5, see 29 Halsbury's Statutes (2nd Edn.) 395.]

Cases referred to:

(1) *Alexander* v. *Rayson,* [1935] All E.R. Rep. 185; [1936] 1 K.B. 169; 105 L.J.K.B. 148; 154 L.T. 205; Digest Supp.

(2) *Yuill* v. *Yuill,* [1945] 1 All E.R. 183; [1945] P. 15; 114 L.J.P. 1; 172 L.T. 114; 27 Digest (Repl.) 544, *4921.*

(3) *Laurie* v. *Raglan Building Co., Ltd.,* [1941] 3 All E.R. 332; [1942] 1 K.B. 152; 111 L.J.K.B. 292; 166 L.T. 63; 2nd Digest Supp.

(4) *Beal* v. *Beal, Reade cited,* [1953] 2 All E.R. 1228, n.; [1957] 3 All E.R. 605, n.; 3rd Digest Supp.

(5) *Gilbert* v. *Gilbert & Abdon* (*Adams intervening*), [1957] 3 All E.R. 604.

Petition.

The husband and wife were married in 1941 and there were three children. In December, 1956, the husband presented a petition on the grounds of cruelty and of adultery with the co-respondent. The wife by her answer denied both the alleged cruelty and adultery, and the co-respondent entered an appearance denying the charge of adultery. The suit came before Mr. Commissioner Latey, Q.C., on Dec. 2, 1957, and on Dec. 4, 1957, at the close of the husband's case, counsel for the co-respondent submitted that there was no case for his client to answer. This submission succeeded and the co-respondent was thereupon dismissed from the suit. On Jan. 15, 1958, the commissioner gave judgment in the course of which he gave his reasons for his ruling on the submission by counsel for the co-respondent.

Harold Brown, Q.C., and *D. A. Fairweather* for the husband.
Bernard B. Gillis, Q.C., and *Kenneth Jones* for the wife.
Colin Duncan for the co-respondent.

MR. COMMISSIONER LATEY, Q.C., in the course of his judgment, said: So far as the co-respondent is concerned, I accepted the submission of his counsel, when the petitioner's case was closed, that there was no case of adultery against him to answer. Before taking that course I had to consider whether or not, following the decision in *Alexander* v. *Rayson* (1) ([1935] All E.R. Rep. 185) the court was bound to put counsel for the co-respondent to his election, viz., that, if he submits no case to answer, he must stand by his election and call no evidence if his submission were to fail. Counsel for the co-respondent urged that he was not obliged to make such election, on two grounds. The first one was that LORD GREENE, M.R., in *Yuill* v. *Yuill* (2) ([1945] 1 All E.R. 183 at p. 185), explained the practice laid down in *Alexander* v. *Rayson* (1) as follows:

> "It does not mean that counsel by submitting no case ipso facto loses his right to call evidence if his submission fails. He only loses that right if he definitely elects to call no evidence. He may make this election expressly or (as in *Laurie* v. *Raglan Building Co., Ltd.* (3), [1941] 3 All E.R. 332) impliedly. The practice which has been laid down amounts to no more than a direction to the judge to put counsel who desires to make a submission of no case to his election and to refuse to rule unless counsel elects to call no evidence. Where . . . no election in fact takes place, counsel is entitled to call his evidence just as much as if he had never made the submission."

Counsel for the co-respondent declared at the outset, after the petitioner's case was closed, that he refused to elect, and following the direction just cited in *Yuill* v. *Yuill* (2) this court might refuse to rule. But he then came to his second ground, that he was invoking s. 5 of the Matrimonial Causes Act, 1950; and he proposed to call evidence if his submission that there was no evidence on which the case could proceed against the co-respondent were rejected. This section, originally s. 11 of the Matrimonial Causes Act, 1858, later reproduced as s. 179* of the Supreme Court of Judicature (Consolidation) Act, 1925, reads as follows:

> "In any case in which, on the petition of a husband for divorce on the ground of adultery, the alleged adulterer is made a co-respondent or in which, on the petition of a wife for divorce on the ground of adultery, the person with whom the husband is alleged to have committed adultery is made a respondent, the court may, after the close of the evidence on the part of the petitioner, direct the co-respondent or the respondent, as the case may be, to be dismissed from the proceedings if the court is of opinion that there is not sufficient evidence against him or her."

It is to be observed that LORD GREENE, M.R., in his explanation in *Yuill* v. *Yuill* (2) ([1945] 1 All E.R. at p. 185), of the principle laid down in *Alexander* v. *Rayson* (1), said: ". . . I will assume that it is a proper practice to follow in the Divorce Division". In fact there was no such practice of election in the Divorce Court before the decision in *Alexander* v. *Rayson* (1). I am not quoting LORD GREENE in that. I am saying that in fact there was no such practice before *Alexander* v. *Rayson* (1). Moreover, the attention of the Court of Appeal in *Yuill* v. *Yuill* (2) was not drawn to s. 179 of the Act of 1925 for the all sufficient reason that it does not apply to husband and wife who are opposing parties in a divorce suit. This section is identical with s. 5 of the Matrimonial Causes Act, 1950, which has replaced it. It was a procedural section peculiar to the Divorce Court and it has never been repealed, and counsel for the co-respondent urged that it gave this court a discretion, which must be exercised judicially, to hold that there was no case to answer at the close of the petitioner's evidence, and that this section should be applied, notwithstanding the practice laid down in the civil suit of *Alexander* v. *Rayson* (1). Further, he referred to my own observations in *Beal* v. *Beal, Reade cited* (4) ([1953] 2 All E.R. 1228, n.), in which I allowed counsel for the party cited to submit no case, without putting him to his election, rejected his submission, and allowed him to call evidence on the strength of s. 5.

Counsel for the husband argued that it was incumbent on me under *Alexander* v. *Rayson* (1) to put counsel for the co-respondent to his election, and drew my attention to a recent decision of SACHS, J., in *Gilbert* v. *Gilbert & Abdon* (*Adams*

---

* 11 HALSBURY'S STATUTES (2nd Edn.) 824.

intervening) (5) ([1957] 3 All E.R. 604), in which the same submission of no case to answer was made on behalf of a woman intervener and the learned judge put her counsel to his election. It is clear that in that suit the learned judge, having heard all the evidence on behalf of the wife, had some doubts as to there being no case to answer, and that is why he put counsel to his election. Incidentally, his Lordship pointed out the possible inconvenience of a party being thus dismissed from the suit, and further evidence being adduced by an alleged accomplice in the adultery which would go a long way to proving the guilt of the party discharged, and counsel for the husband emphasised that point in the present case. Of course, it is not an uncommon situation in the Divorce Court, however paradoxical it may appear to the lay mind, that A is found guilty of adultery with B but B is acquitted thereof for lack of proof against B.

SACHS, J., also demurred in *Gilbert* v. *Gilbert* (5), to my suggestion in *Beal* v. *Beal* (4) that s. 5 might be obsolete, and said ([1957] 3 All E.R. at p. 606):

> "Nothing in the way of a rule of practice could prevail against the provisions of that section or take away that discretion from the courts."

I cheerfully accept his Lordship's correction, especially as I have held in this case that s. 5 is in full force in the Divorce Court.

This decision on the point of procedure having been made, counsel for the co-respondent submitted on the pleadings and on the evidence that no case at all of adultery had been made out against the co-respondent. He said that there was not a scintilla of evidence of inclination and next to nothing of association, except that of a riding master and the wife as a voluntary assistant in looking after the horses. Despite counsel for the husband's argument to the contrary, that was already the conclusion which had been forming in my mind before any submission was made. I therefore exercised my discretion under s. 5, which I could have done without any application by counsel, and I dismissed the co-respondent from the suit.

There has been nothing in the subsequent evidence, to which I shall refer later, called on behalf of the wife, to throw any doubt on that decision, which incidentally saved considerable costs of further representation of the co-respondent during the continuance of the trial, and also saved the co-respondent from anxiety with regard to his own position during the long adjournment that became necessary.

[The commissioner then found that the husband had proved his charge of cruelty but had failed to prove the charge of adultery and granted a decree to the husband on the former ground.]

Order accordingly.

Solicitors: *Smiles & Co.* (for the husband); *Preston, Lane-Claypon & O'Kelly*, agents for *D. J. R. Herbert*, Banbury (for the wife); *Stoneham & Sons* (for the co-respondent).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

ALDERMAN *v.* ALDERMAN AND DUNN (by his guardian).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), January 23, 1958.]

Divorce—Evidence—Confession—Infant co-respondent—Confession of adultery made before proceedings commenced—Admissibility in evidence of confession—Costs against co-respondent.

Divorce—Costs—Co-respondent—Infant.

Infant—Admission—Confession of adultery made prior to a divorce suit—Admissibility in evidence.

An admission of adultery made by an infant co-respondent before proceedings have been commenced is admissible in evidence in a divorce suit.

The husband and the wife were married in 1947, the wife then being seventeen years of age. They separated in January, 1956. In November, 1956, she and the co-respondent, who were living together as husband and wife, were interviewed by an inquiry agent and, after being cautioned, signed statements admitting adultery between them. In January, 1957, the husband presented a petition for divorce, alleging the wife's adultery with the co-respondent and asking that the co-respondent be condemned in costs. The co-respondent was an infant. The wife did not defend the proceedings, but the co-respondent by his answer made no admission with regard to the adultery alleged against him.

Held: evidence of the co-respondent's admission to the inquiry agent would be received and, adultery being proved, costs would be awarded against the co-respondent.

[As to an infant as party in a divorce suit, see 12 HALSBURY'S LAWS (3rd Edn.) 325, para. 662.]

Petition.

In this case the husband petitioned for divorce on the ground of the wife's adultery with the co-respondent.

On Nov. 6, 1956, both the wife and the co-respondent made statements under caution to an inquiry agent in which they admitted adultery. On Jan. 26, 1957, the husband presented his petition and asked for an order for costs against the co-respondent. The co-respondent was an infant, having been born on Sept. 22, 1937, and by an order dated Mar. 22, 1957, the Official Solicitor was appointed as his guardian ad litem. The wife did not defend the suit but on May 27, 1957, an answer was filed on behalf of the co-respondent in which it was alleged " that [the co-respondent] makes no admissions with regard to the adultery alleged against him ", and he prayed to be dismissed from the suit. The question which arose for decision in the case was whether or not the admission made by the co-respondent to the inquiry agent was admissible in evidence.

J. C. Mortimer for the husband.

B. S. Horner for the Official Solicitor as guardian ad litem for the co-respondent.

SACHS, J.: The facts of the present case are short and can be stated as follows. The husband and wife married in 1947, when, according to the marriage certificate, the husband was aged twenty-three, and the wife aged seventeen. By 1954 they had had five children, but unfortunately matters thereafter went wrong and the wife and the husband, although for a period they remained under the same roof, became estranged*.

The wife took employment as an usherette at a cinema, and during that employment she used to stay out late. Then one night during the last two months of 1955, the husband went out to look for the wife or to see what was happening when she failed to return one evening at a reasonable hour. On that occasion the husband came on the wife returning on a motor cycle ridden by the co-respondent. The husband spoke to the co-respondent, who at that time appeared to him to be aged twenty-four or thereabouts, and he informed him that the wife was a married woman with five children. Later he saw the co-respondent again and at one time it was thought that the co-respondent would cease his association with the wife, but he did not do so. In fact the wife left the matrimonial home, and the subsequent course of events appears in certain statements taken by an inquiry agent, a man of mature age, and it is right to say at the outset that everybody agrees that he made his inquiries with complete propriety. In the course of a visit to a certain address at Acton he saw both the wife and the co-respondent. There each of them after signing a caution in the words,

---

* They finally separated in January, 1956.

> " I have been warned that I need not make a statement unless I choose to do so, but what I do say will be taken down in writing and may be given in evidence ",

and, after it had been made clear to them by the inquiry agent that there were divorce proceedings in contemplation, made a statement.

According to the tenor of the wife's statement it is an unequivocal admission that adultery was committed in April, 1957, between these two people, and that a few months later they decided to live together as husband and wife. It is equally clear that they were so living together at the time that the inquiry agent took the statement and that the wife was then pregnant by reason of that adultery with the co-respondent. The co-respondent made a shorter statement after signing the words of the caution. In his statement he refers to the fact (which was also proved by the inquiry agent) that he had read what had been signed by the wife and goes on to say that what he had read was true. On those facts the husband has with complete clarity made out his case against the wife for a decree in accordance with the prayer in the petition, and that decree I accordingly grant.

There remains, however, a point taken on behalf of the co-respondent, who having been born on Sept. 22, 1937, is still under twenty-one years of age, and who having regard to the Matrimonial Causes Rules, 1950, r. 64 (now the Matrimonial Causes Rules, 1957, r. 66) is now represented by counsel instructed by the Official Solicitor. The point taken is this: as the co-respondent remains under twenty-one years of age it is submitted on his behalf first, that any admissions which he made to the inquiry agent, as given in evidence (de bene esse in the first place) by the inquiry agent, are not admissible. Secondly, that if admissible they cannot be taken into account against the co-respondent on the grounds that an infant is incapable of making an admission which is binding on him in these proceedings. Counsel informs me that this is the first occasion since 1937, when first the Official Solicitor commenced to act in the court for infants whose representation by a guardian had become mandatory under the Matrimonial Causes Rules, 1937, r. 64 (4), that this point has been raised in relation to a co-respondent who was still a minor at the date of trial; and that the point is raised on the instructions of the Official Solicitor lest it might later, when the infant co-respondent comes of age, be taken against him that he had let the matter so to speak go by default.

In support of his careful and, if I may respectfully say so, well argued submission, counsel for the co-respondent referred to statements in certain books which relate to the practice of the High Court. He referred me first to that passage in the ANNUAL PRACTICE (1958 Edn.), at p. 2012, which states generally—

> " An infant cannot make admissions, but can now be interrogated, or ordered to make an affidavit of documents "

—to R.S.C., Ord. 19, r. 13, and to the fact that R.S.C., Ord. 31, r. 29, as to discovery, was only introduced in 1893. Next he referred to Daniell's Chancery Practice (Vol. 1), p. 114, where it says:

> " Formerly an infant was not bound by admissions at any stage of the proceedings, unless, indeed, such admissions were for his benefit."

The word " formerly ", of course, referred to the state of the Rules of the Supreme Court before they were amended to enable such admissions to be made. Counsel also referred to Phipson on Evidence (9th Edn.), at p. 240, where it is stated:

> " An infant, however, cannot bind himself by any admissions made in an action."

It was submitted on behalf of the co-respondent that the word " admissions " when used in the phrases to which I have referred, and in other passages of relevant works relating to the practice of these courts, included two categories of admissions: first, those made formally in the course of proceedings, and, secondly, those made before the proceedings commenced. So far as the first category is concerned, that is a matter which does not arise in the present cause. No admissions were made by the infant co-respondent in the course of these proceedings. Accordingly, it is not necessary for me to discuss the point raised by counsel for the husband that the practice and procedure of this court on such a matter might well prove to be regulated by the old ecclesiastical practice and procedure.

As regards the second category of admissions, those made before proceedings are commenced, counsel for the co-respondent, despite the extensive searches which he had made, was unable to quote to me any authority relating either to the suggested inadmissibility of such evidence or to the court's alleged duty to attribute no weight at all to it. It was conceded in the course of argument that if there was a rule of the nature for which he contended, then on principle it would equally apply to matters of contract and tort. For instance, it would apply where an infant who had contracted to acquire necessaries made an admission that he had been supplied and that he still owed the money. It would likewise apply to an admission by an infant driver of a motor car who said after an accident, " It is all my fault ". Suffice it to say that not only does none of the textbooks of which I am aware refer to such statements on the part of an infant being inadmissible, and that I have so far never heard of the point being raised, but that I have been concerned in a number of cases in which such admissions by an infant were accepted by the court in the normal course of events. I would also mention, though counsel for the co-respondent rightly points out that there may be a distinction between civil and criminal matters, that it would seem unlikely that in a matrimonial cause evidence would be excluded by a rule which did not even exclude admissions in a criminal case. I ventured to call counsel's attention to the daily occurrence in so many courts where the young man who has been arrested after the relevant event says something of the nature of " It is a fair cop ".

It is, accordingly, enough for me to say that no authority of any sort has been quoted to me in aid of the submission that admissions in the second category should be excluded from evidence in matrimonial causes or that they should not be given whatever weight the court may consider it proper to attribute to them. Equally, on general principle, I can find no reason why there should be a rule of that nature, indeed I have only dealt with the matter in a rather more than cursory way out of respect for the care with which counsel for the co-respondent has put the matter before me. In those circumstances I admit into evidence that statement of the co-respondent without which the case against him cannot be established and find that he has committed adultery with the wife, and I hold that he is capable of being condemned in costs in the normal way.

Decree nisi and order for costs against the co-respondent.

Solicitors: *Tillson Phillips & Co.*, Southall (for the husband); *Official Solicitor* (as guardian ad litem for the co-respondent).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

NOTE.

NORFOLK COUNTY COUNCIL *v.* KNIGHTS AND OTHERS AND CAISTER-ON-SEA JOINT BURIAL COMMITTEE.

[NORWICH CONSISTORY COURT (The Chancellor (J. H. Ellison, Esq.)), August 20, September 27, 28, October 21, November 15, 1957.]

Burial—Disinterment—Re-interment in communal grave—Part of road widening scheme—Faculty sought.

Ecclesiastical Law—Consistory court—Representation of parties—Numerous parties opposing petition—Representative parties opponent.

[As to a faculty for removal of body buried in consecrated part of cemetery, see 4 HALSBURY'S LAWS (3rd Edn.) 76, para. 218, and ibid., 103, para. 294, note (x); and for cases on the subject, see 7 DIGEST 559, 560, *352-360.*]

Petition.

In this case the petitioners, the Norfolk County Council, sought a licence and faculty to enable them to use certain consecrated land in the parish of Caister-on-Sea for the purpose of a road widening scheme. The council, as the local highway authority, proposed to take a strip of land along the length of Caister-on-Sea cemetery adjacent to the Ormesby road, to widen that road by about four feet six inches and to make a footpath between the widened road and the new boundary of the cemetery. The scheme involved the interference with a large number of graves and the exhumation and subsequent re-interment of some four hundred human remains in land adjoining, but on the other side of, the cemetery. Those remains which were readily identifiable would be re-interred in separate graves but a certain number of remains could not be identified from records and it was proposed that these should be buried in a large communal grave. During March, 1954, the petitioners had published notices of the scheme in local newspapers but did not invite anyone to state an objection. On Nov. 13, 1956, the Caister-on-Sea parochial church council passed (by twelve votes to seven) a resolution objecting to the scheme (although the land in fact formed no part of the churchyard but formed part of a duly consecrated cemetery under the management and control of the Caister-on-Sea joint burial committee).

The petitioners founded their case on alleged traffic danger. In their petition dated Feb. 4, 1957, they alleged:

> ". . . the road carries very heavy traffic which at the peak of the summer season exceeds nine thousand vehicles a day. The minimum width of the road is nineteen feet six inches which is barely sufficient for two large vehicles to pass."

They alleged that there was no footpath for pedestrians and that it was not possible for them to step out of the way of traffic and that twenty-seven accidents had occurred in the last nine years. They then described the proposed plan for the provision of a twenty-four foot carriage-way with a new footpath on the cemetery side only, at a cost in the region of £3,724, which they would defray subject to any government grants. The petitioners then referred in their petition to the exhumations, movement of headstones, footstones, monuments, A etc., including the lifeboat* memorial, and their lay-out in the new piece of land which they proposed to give to the joint burial committee. It was also alleged that the scheme had received the approval of the joint burial committee. The diocesan advisory committee studied the proposals and stamped the petition with their recommendation.

Each of the representative parties opponent (except one) filed an act on B petition setting out their objections. Each act on petition was drawn in longhand by the litigant himself. In various permutations and combinations they raised five main issues. First, one and all denied the number of accidents alleged. Secondly, they contended that exhumation and removal of human remains was an unsuitable and unbecoming procedure at any time, and in particular when on the large scale proposed. Thirdly, it was contended that the C lifeboat memorial was essentially a national memorial as well as being of local importance and that it should not be removed. Fourthly, on the question of pedestrians, they said in effect that if certain limited improvements were made many more people would use the footpath through the cemetery. Fifthly, on the question of the carriage-way, they said that it was feasible to widen the road at the southern end. They set out their suggestions which, they said, would D overcome the risks and dangers about which the petitioners might feel anxious without recourse to disturbing the graves in the cemetery. The Caister-on-Sea joint burial committee in their act on petition confined themselves to the fourth and fifth points and produced an alternative scheme.

By an order dated Mar. 7, 1957, citation was directed by notices on the church door and by advertisements in local newspapers. A large number of persons E entered an appearance to oppose the petition, as also did the joint burial committee. Subsequently the court issued of its own motion a summons requiring all the persons concerned to attend in open court and be heard primarily for the purpose of determining how a case involving so many parties might best be dealt with, and as a result by an order dated Aug. 20, 1957, the twenty-seven individual parties opponent were formed into seven groups and each group F was ordered to be represented by a "representative party opponent". It was also agreed and ordered by consent that future pleadings, directions and orders should be deemed to have been served on each representative party opponent by affixing one copy to the door of the parish church and by sending another copy to the incumbent for inspection at all times at the rectory. After the close of the pleadings the representative parties opponent instructed the same solicitor, G by whom they were represented at the hearing although on the first day of the hearing one of the seven groups withdrew from the proceedings for personal reasons.

D. E. H. James, solicitor for the petitioners.

R. C. Killin, solicitor for the representative parties opponent.

The joint burial committee were represented by a member† nominated to H act on their behalf.

Cur. adv. vult.

Nov. 15. **MR. CHANCELLOR ELLISON** read a judgment in which he referred to the features of the site which was the subject-matter of the proceedings and to the pleadings and continued: I think that this would I be a convenient stage for me to make one or two general observations. The contention of the parties opponent that exhumation and re-interment is an unsuitable or unseemly procedure was developed during the evidence of some of them into the much wider contention that once land was consecrated it should never be interfered with in any circumstances and that re-interment of unidentifiable remains in a communal grave should not be permitted. I think that this proposition needs some qualification. Consecration has of course a spiritual significance but the act of consecration is essentially judicial and becomes manifest when, pursuant to a petition to consecrate and after due consideration, the ordinary pronounces a sentence dedicating and setting apart the lands from all common and profane uses. Once consecrated the land falls within the jurisdiction of the ordinary exercised through the medium of the consistory court. Subsequently, consecration can only be rendered nugatory or its effect taken away by legislative means such as an Act of Parliament. Although the consistory court is an ecclesiastical court it is nevertheless a court of the realm and one of the Queen's courts and not infrequently it is called on to do justice between the church authorities and others of the Queen's subjects. The court has long assumed a jurisdiction to permit within its discretion the user of consecrated land for purposes such as road widening schemes where it has been satisfied that it is necessary for public good that such user should be allowed, and many are the examples in the text-books and reports. In my judgment there is no doctrinal or other rule which says in effect that the dead once buried in consecrated land shall for ever after take absolute priority over the compelling needs of the living. If I were satisfied in any case that there were a substantial need based on danger to the living or other cogent reasons why a road should be widened at the expense of using consecrated land it would be my duty to grant a faculty to enable that to be done. Under powers granted by the Faculty Jurisdiction Rules, 1939, this court of its own motion summoned the Archdeacon of Norwich, the Venerable Robert Meiklejohn, LL.B., B.D., to assist on these and other aspects. In his evidence the archdeacon expressed the opinion that there was no general rule or doctrine of the Church of England against exhumation and subsequent re-interment of human remains elsewhere. He emphasised, however, that in his opinion this course should only be taken when it was proved to be necessary and in other cases it should be avoided. On the question of interment in a communal grave he again knew of no doctrinal objection and he was unable to see any other practical way of interring large numbers of unidentified remains. I accept those views entirely. In my judgment they are sound. Although communal burial may seem distasteful to some yet that practice has long been adopted particularly in cases of national disaster. It followed often as a consequence after heavy bombing raids during the war, and in cases of serious aircraft accidents and where, for one reason or another, the remains have not been identifiable communal interment has taken place. I think that it is most unfortunate that this question of communal re-interment should ever have arisen and it is certainly no fault of the petitioners that they have been obliged to put it forward in their proposals. It seems that when the petitioners made inquiries there were no proper records of the names of those buried in eighty graves out of two hundred. Since this case started I understand that a further thirty have been identified but one witness thought there were still more remains not yet accounted for. It seems that at some not too recent period the joint burial committee were grossly negligent and allowed their records to get into a complete muddle. I am told that none of the present officers is in any way responsible, so I will say no more than that such events are unfortunate and as a result the petitioners have been put to a great deal of unnecessary trouble. It is the parishioners' own responsibility for they elected the parish council which virtually constitutes the burial committee and any criticisms that have in consequence been levelled against the petitioners by reason of their lack of details as to identity of graves are wholly unjustified. Finally, the archdeacon

---

* This memorial was erected after a lifeboat disaster some fifty or more years ago to commemorate the lifeboatmen who died and whose graves were beneath the memorial. The memorial would have had to be removed if the road-widening scheme had been carried out.

† There was doubt whether the committee could appear otherwise than by solicitor having regard, among other considerations, to the Norwich Consistory Court Rules, 1956, r. 2. To avoid any difficulty on this point the solicitors representing other parties agreed on behalf of their clients to raise no objection to the committee's appearing by a person who was not a solicitor.

A also said that whilst he and the diocesan authorities were very sympathetic to all persons concerned they did not feel that there was any cause why they should intervene in these proceedings.

That leads me to my next observation, namely, that although the parochial church council expressed an opinion at their meeting to which I have referred, neither they, nor the rector, nor the churchwardens nor in fact any church body B at all are parties to these proceedings. The rector was called as a witness but otherwise the church authorities have played no part at all. The issues lie essentially between a local authority on the one hand, and the burial committee, which to all intents and purposes is the same as the parish council, together with a number of resident parishioners, on the other hand. This is an unusual state of affairs in an ecclesiastical court and bearing in mind the nature of the issues C it is not surprising that the evidence followed a pattern more usually found in public planning inquiries or inquiries arising out of the proposed compulsory acquisition of land.

[THE CHANCELLOR considered the evidence and concluded:] I have come to the conclusion, and I am left in no doubt about it, that the petitioners have not made out a sufficient case and they have not proved to my satisfaction that such D weighty reasons exist on the grounds of danger, past, present, or potential, or for that matter any sufficiently weighty ground which would justify my granting a faculty to permit the large upheaval which would follow.

The application accordingly failed and the petition would be dismissed with court costs to be paid by the Norfolk County Council, the council paying the costs of all parties except those of the joint burial committee.

E *Order accordingly.*

Solicitors: *D. E. H. James*, Norwich (for the petitioners); *Ruddock, Middleton & Killin*, Norwich (for the representative parties opponent).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

F

KINGSTON *v.* KINGSTON (GILDER—Party Cited).

[COURT OF APPEAL (Hodson and Pearce, L.JJ., and Harman, J.), January 22, 1958.]

Divorce—Appeal—Costs—Order made on decree nisi—Whether part of decree— G *Whether appeal lies after decree made absolute—Fresh evidence—Supreme Court of Judicature* (*Consolidation*) *Act*, 1925 (15 & 16 *Geo.* 5 *c.* 49), *s.* 31 (1) (*e*).

An order for costs made on the grant of a decree nisi of divorce does not merge with the order nisi in the subsequent decree absolute: an appeal after decree absolute against such an order for costs is not, therefore, an H "appeal from an order absolute for the dissolution or nullity of marriage", and so is not subject to the restriction on appealing imposed by s. 31 (1) (e)* of the Supreme Court of Judicature (Consolidation) Act, 1925.

The wife petitioned for divorce on the ground of cruelty. The husband denied the cruelty, alleged adultery by the wife with a party cited and cross-prayed for divorce. The husband had himself committed adultery I with another woman but, although this occurred before the hearing, he did not disclose it to the court. At the hearing the wife's petition was dismissed, the husband obtained a decree nisi and the party cited was condemned in costs. In April, 1957, the decree nisi was made absolute. In July, 1957, the wife discovered that the husband had committed adultery before the hearing. The party cited obtained leave to appeal against the order for costs.

---

* The relevant words of s. 31 (1) (e) are printed at p. 400, letter A, post.

Held: the order for costs would be discharged, leaving each party to bear his own costs. A

Per Hodson, L.J.: the same principles should be applied in dealing with applications of this kind as are adopted in all applications to an appellate court when considering whether fresh evidence should or should not be allowed, and, following these principles, the fresh evidence should be admitted in the present case (see p. 400, letter G, post). B

Appeal allowed.

[As to appeals from decree absolute, see 12 Halsbury's Laws (3rd Edn.) 422, para. 942, and as to appeals on costs, see ibid., para. 944; for cases on the subject, see 27 Digest (Repl.) 592, 593, *5543-5550*.

For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (e), see 5 Halsbury's Statutes (2nd Edn.) 359.] C

Case referred to:

(1) *O'Neill* v. *O'Neill & Piggott*, [1949] 2 All E.R. 649; 27 Digest (Repl.) 593, *5548*.

Appeal.

In 1955 a wife presented a petition for divorce on the ground of cruelty. D The husband denied the cruelty and cross-prayed for divorce on the ground of the wife's adultery with the party cited, which had commenced a year before the presentation of the wife's petition. This adultery was not disputed, but the party cited supported the wife's charge of cruelty by his pleadings, and by his evidence at the trial, which lasted several days. Mr. Commissioner Blanco White on Mar. 7, 1957, dismissed the wife's charge of cruelty, made a decree E nisi in favour of the husband on the ground of the wife's adultery, and condemned the party cited in all the costs of the proceedings. The decree was made absolute on Apr. 25, 1957. The husband had made no discretion statement or admission of adultery, but in fact he had then been living in adultery with another woman, who on May 27, 1957, gave birth to his child, since before the trial took place. The wife did not discover these facts until July, 1957, whereupon the party F cited applied to the trial judge for, and was granted, leave to appeal against the order for costs made against him. On the hearing of this application for leave, the trial judge made it clear that had he known of the husband's adultery he would not have condemned the party cited in the costs. The party cited appealed against the order for costs.

A. L. J. Lincoln and *F. M. Drake* for the party cited, the appellant. G
E. V. Falk for the husband, the respondent.

HODSON, L.J.: The circumstances in this case are that after the commissioner had made his order of Mar. 7 information came to the knowledge of the present appellant which led him to make application to the learned commissioner for leave to appeal, which was granted. On the hearing of the application the H learned commissioner said that, had he known the facts, which were then no longer in dispute, he would have made a different order as to costs from the order which he did in fact make.

The appeal is in a divorce case. The petition for divorce was presented in 1955 by the wife, the position being that a year previously she had begun to commit adultery with the party cited, who is the present appellant. Her I husband had by that time considered taking proceedings for divorce, but was hampered by delay in obtaining legal aid, so that the wife was first in the field, and she put in a petition of divorce asking for relief on the ground of cruelty. At the trial she failed to establish that charge. It is to be noticed—because this no doubt affected the judge in the order he made—that the charge of cruelty was supported in his pleadings by the present appellant, the party cited, with whom the wife had committed adultery. He supported her also as her witness at the trial. The husband, when proceedings were launched against him, denied cruelty and alleged the adultery of the wife with the party cited from April, 1954, to November, 1954, at the matrimonial home, and thereafter from Nov. 20, 1954, at another address. That adultery was not in dispute.

At the conclusion of the case, the learned commissioner made a decree in favour of the husband on the ground of the wife's adultery with the party cited, the present appellant, and condemned him in all the costs of the proceedings. He made that order although the real fight between husband and wife had been about the cruelty. The trial lasted a very long time, but the party cited did not increase the length of the trial except so far as he supported the cruelty charge in his pleading and by such evidence as he was able to give in support of the wife's case. However that may be, in the exercise of his discretion, the learned commissioner made that order which involved the party cited in a very substantial liability as to costs.

The decree nisi pronounced on Mar. 7, 1957, was made absolute on Apr. 25, 1957, but it was not until July, 1957, that the wife discovered what is now, and has been since its discovery, an undisputed fact, namely, that the husband had committed adultery with another woman, and had committed adultery with that other woman before the hearing. In fact he was living with her, and on May 27, 1957, she gave birth to a child, which must have been conceived before the hearing, of which the husband has declared himself over his own signature to be the father. The husband had never disclosed this fact to the court. He has never pretended that he did not realise that his own adultery which had been committed was a relevant matter for the court's consideration, and he does not seek to say that he did not grossly deceive the court in regard to the concealment of this matter. It is not that he has committed perjury. He was not asked to swear one way or the other about this matter either in the interlocutory proceedings or when the suit was tried; but he has kept back this fact and misled the commissioner into believing a state of facts existed which did not exist, namely, that the wife had committed adultery whereas he had not, the fact being that they had both committed adultery. Indeed, he so far misled the commissioner as to lead him to say in his judgment that, so far as he could see, the husband's attachment to the wife remained intact up to that moment, whereas the truth was he had set up another establishment with another woman.

It would be wholly wrong for this court to lend countenance to such deception by giving the husband any relief, in those circumstances, against the party cited. The decree absolute stands, and it cannot be altered or appealed against. Of course, the case might have taken many different courses if this adultery had been disclosed. The petition might have been dismissed. It may be that that was the reason why the husband kept this matter back. A decree nisi might have been made against him. He might have been anxious to avoid that consequence because he thought that he might have a better chance in the proceedings for custody which ensued—there are five children—if he had not himself been found guilty of having committed adultery. A decree might have been made in favour of both parties, and, as happened here, a different approach might have been made on the question of costs. The commissioner made it clear that if he had found that this husband had committed adultery, let alone if he had been told at the last minute at the end of his judgment, or immediately before giving his judgment, he would not have condemned the party cited in costs. I should point out that no blame is to be attached in any way to the learned commissioner who acted on the materials that he had before him. He was grossly deceived. The court was deceived, and it has now been enlightened. It has now to do what it can to put the matter right by altering the order in the way the party cited asks, and making no order as to costs, leaving each party to bear his own costs.

An objection was made on behalf of the husband, the respondent to this appeal, that in any event this court could not take any such course. It depends on a section of the Supreme Court of Judicature (Consolidation) Act, 1925, which is designed to prevent appeals from decrees absolute. Section 31 (1) (e) of the Act of 1925 provides that there shall be no appeal

> " from an order absolute for the dissolution or nullity of marriage in favour of any party who having had time and opportunity to appeal from the decree nisi on which the order was founded, has not appealed from that decree ".

This is not an appeal from a decree absolute. That is the answer to that contention; the contention being that, although this is not a direct appeal from a decree absolute, it is an appeal from a decree nisi, and this was merged in the decree absolute, and, accordingly, the order for costs contained in the decree nisi is in effect part of the decree absolute. I find it difficult to follow that argument, and I am quite unable to accept it. If one looks at the form of the decree nisi itself it becomes absolute without any order under the present procedure. It is divided into several parts, only one of which is the order nisi, namely, that part which dissolves the marriage. It contains other provisions, one of which is a provision as to costs, and another of which is a provision as to the custody of children. The decree nisi is not made operative until it is made absolute, which takes place nowadays by a more or less automatic process unless there is any intervention. I do not accept the argument that the order for costs is in such a way ancillary to the decree nisi as to merge with it in the decree absolute. The taxation takes place on the direction given in the decree nisi itself. So far as I can see, if a decree nisi is awarded without any limitation as to taxation, there would be no objection to taxing costs thrown away if the decree nisi had not been made absolute. The rules* provide for the order for payment of costs contained in the decree nisi, if it is drawn up before the decree nisi is made absolute, to direct payment into court, which indicates to my mind that the court in these rules was alive to the difference between the order for costs and the decree which was what actually dissolved the marriage.

There is no substance in the point. It is unnecessary to consider further whether the appellant here had " time and opportunity " to appeal from the decree nisi. If it is necessary so to decide, I am inclined to the view that it would be right to say on the material we have had before us that the appellant had no " time or opportunity " to appeal against this decree. Indeed, I am of opinion that the same principles should be adopted in dealing with applications of this kind as are adopted in all applications to an appellate court when considerations of whether or not fresh evidence should be allowed are before the court. Following these principles the fresh evidence should be admitted. I would, therefore, allow the appeal.

PEARCE, L.J.: I agree. In my view, the restriction of appeals contained in s. 31 (1) (e) of the Supreme Court of Judicature (Consolidation) Act, 1925, has no application here. This is not an appeal against an order absolute. It is an appeal against an order for costs made on a decree nisi. The natural meaning of the words in s. 31 (1) (e) does not restrict such an appeal: nor do I think that *O'Neill* v. *O'Neill & Piggott* (1) ([1949] 2 All E.R. 649), to which we have been referred, compels us to put that gloss on the words " appeal from an order absolute ".

I, too, if it were necessary, would be inclined to hold that in this case the appellant party cited had no opportunity for appealing from the decree nisi since the true facts were concealed from him by the deceit of the respondent husband.

So far as the merits are concerned, the husband concealed his adultery from the court in order to obtain from it a decree as of right instead of a decree in the discretion of the court. Part of the fruit of that deceit is the order for

---

*This provision is made by r. 69 (2) of the Matrimonial Causes Rules, 1957 (S.I. 1957 No. 619).

A costs and now that that deceit has been discovered, it seems to me wrong that the order should stand. For these reasons, I agree that the appeal should be allowed.

HARMAN, J.: I agree. It must be a universal rule in all divisions of the court that serious notice will be taken of attempts to deceive it. It would be contrary to all principle to allow a litigant who has deceived, and deliberately B deceived, the court to obtain from that deceit an advantage which, if the truth had been known, he would never have had. That is the reason why the appeal should be allowed.

As to the point of law, it seems to me that that is answered, as my Lord has said, by the simple submission that it is not the fact that this is an appeal from an order absolute, and that is the end of it.

C *Appeal allowed.*

Solicitors: *Field, Roscoe & Co.*, agents for *Cave & Co.*, Luton (for the party cited, the appellant); *Peacock & Goddard*, agents for *Cooke & Sons*, Luton (for the husband, the respondent).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

D

Re ALLAN'S WILL TRUSTS.
CURTIS AND ANOTHER *v.* NALDER AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), January 24, 1958.]

Perpetuities—Rule against perpetuities—Will—Residue given on trust for sale—
E *Settled shares—Discretionary trusts during life of any widow of named person —Void limitation—Effect on subsequent gifts of capital.*

A testatrix by her will gave her residuary trust funds to her trustees on trust (a) as to one moiety of the income for her sister A.B.N. during her life, and on her death, on the same trusts as the second moiety thereof, and (b) as to the second moiety on trust during the life of her brother N.N. on dis-F cretionary trusts for the persons therein mentioned, and thereafter (c) during the widowhood of any wife of N.N. who might survive him, on discretionary trusts for the benefit of the widow and children of N.N. and any person or persons in whose house or apartments or in whose company or under whose care or control or by or with whom the widow of N.N. might from time to time be employed or residing and any other person or persons for the time G being entitled or interested to or in the said second moiety after the death of N.N. and the death or re-marriage of his widow. On the determination of the said trusts relating to income, the testatrix gave a legacy of £7,350 to one charity, and subject thereto she directed her trustees to pay the balance of the trust funds to a second charity. On Feb. 15, 1938, the testatrix died, and on Feb. 27, 1954, A.B.N. died. N.N. died on May 27, H 1956, leaving a widow. The clause declaring discretionary trusts during the life of the widow of N.N. ((c) above) was void for uncertainty and was also invalid as infringing the rule against perpetuities. On the question as to the validity of the charitable bequests of the corpus,

Held: the charitable bequests were valid because they had become vested in interest within the perpetuity period, and, not being capable of being I divested by the prior invalid discretionary trust during the life of the widow of N.N. of which they were independent, were not affected by its invalidity; but, as the charitable bequest did not take effect until the death of the widow of N.N., there was in the meantime an intestacy as to the income.

Re Coleman ([1936] 2 All E.R. 225) applied.

[As to the effect of invalidity on subsequent limitations, see 25 HALSBURY'S LAWS (2nd Edn.) 147, 148, para. 247; and for cases on the subject, see 37 DIGEST 117, 118, *481-493*.]

Cases referred to:

(1) *Re Gresham's Settlement, Lloyds Bank, Ltd.* v. *Gresham,* [1956] 2 All E.R. 193; 3rd Digest Supp.

(2) *Re Coleman, Public Trustee* v. *Coleman,* [1936] 2 All E.R. 225; [1936] Ch. 528; 105 L.J.Ch. 244; 155 L.T. 402; Digest Supp.

(3) *Re Canning's Will Trusts, Skues* v. *Lyon,* [1936] Ch. 309; 105 L.J.Ch. 241; 154 L.T. 693; Digest Supp.

Adjourned Summons.

By her will dated Apr. 21, 1933, a testatrix, Evelyn Julia Allan, who died on Feb. 15, 1938, constituted a fund which she called " the trust funds ", and (by cl. 4) directed that her trustees should stand possessed of the income arising therefrom on the following trusts:

> " (a) As to one moiety of the income of the trust funds upon trust to pay the same to my said sister Alice Beatrice Nalder during her life and upon her death to hold the income of such first mentioned moiety of the income of the trust funds upon the trusts hereinafter declared as regards the second moiety of the income of the trust funds
>
> " (b) My trustees shall hold the other or second moiety of the income of the trust funds (hereinafter called the Noel Nalder share) upon trust during the life of my brother Noel Francis Nalder or during such shorter period (either continuous or discontinuous) as my trustees shall in their absolute discretion think fit to pay all or any part of the Noel Nalder share for the maintenance and personal support or benefit of all or any one or more to the exclusion of the others or other of the following persons namely :—the said Noel Francis Nalder and his wife and children or remoter issue for the time being in existence whether minors or adults and any person or persons in whose house or apartments or in whose company or under whose care or control or with whom the said Noel Francis Nalder may from time to time be employed or residing and the other person or persons who for the time being would be entitled to or interested in the Noel Nalder share if the said Noel Francis Nalder were then dead in such proportions and manner as my trustees shall in their absolute discretion at any time or times think proper Subject to the discretionary trust or power hereinbefore contained my trustees shall during such period of the life of the said Noel Francis Nalder as aforesaid hold the Noel Nalder share or so much thereof as was not being paid or applied under such discretionary trusts or power upon trust and for the purposes upon and for which the same would for the time being be held if the said Noel Francis Nalder were then dead
>
> " (c) After the death of the said Noel Francis Nalder my trustees shall apply the Noel Nalder share during the widowhood of any wife of the said Noel Francis Nalder who may survive him for the maintenance and personal support or benefit of all or any one or more to the exclusion of the others or other of the following persons namely:—the widow and children of the said Noel Francis Nalder for the time being in existence whether minors or adults and any person or persons in whose house or apartments or in whose company or under whose care or control or by or with whom the widow of the said Noel Francis Nalder may from time to time be employed or residing and the other person or persons for the time being entitled or interested (whether absolutely contingently or otherwise) to or in the Noel Nalder share or any of them under the trusts herein contained to take effect after the death of the said Noel Francis Nalder and the death or second marriage of any wife who may survive him in such proportions and manner as my trustees shall in their absolute discretion at any time or times think proper
>
> " (d) On the determination of the trusts of the Noel Nalder share

hereinbefore declared my trustees shall pay the Noel Nalder share to the said Alice Beatrice Nalder during the remainder of her life "

The testatrix then provided (by cl. 5) that

> " on the determination of the trusts hereinbefore declared of the income of the trust funds I give and bequeath to the Royal National Life-boat Institution for the Preservation of Life from Shipwreck . . . the sum of £7,350 "

to be used for the provision of a lifeboat, and, subject to the payment of that legacy, the testatrix directed her trustees

> " to pay any balance of the trust funds and the income thereof to the Royal Society for the Prevention of Cruelty to Animals . . ."

On Feb. 27, 1954, Alice Beatrice Nalder, the sister of the testatrix, died, and on May 27, 1956, Noel Francis Nalder, the brother of the testatrix, died, leaving a widow but no issue.

The plaintiffs, the trustees of the will, by their originating summons dated Sept. 12, 1957, asked for the determination, among others, of the following questions: (i) whether on the true construction of the said will the discretionary trust during the widowhood of any surviving wife of Noel Francis Nalder declared by cl. 4 (c) of the will was valid or was void either for uncertainty, or as infringing the rule against perpetuities, or for any other reason; (ii) if the said discretionary trust was void on any of such grounds, whether the trust declared by cl. 5 for the benefit of the second and third defendants (the charities) was valid or was void having regard to the failure of the prior discretionary trust; (iii) if and so far as either of the aforesaid trusts were void whether the income and capital respectively affected by such trusts devolved as on the intestacy of the testatrix or in any other and if so what way.

D. A. Ziegler for the plaintiffs, the trustees.

J. L. Arnold for the first and fourth defendants, the widow of the testatrix' brother and the residuary legatee of the sister's estate.

R. R. A. Walker for the second and third defendants, two charities.

DANCKWERTS, J., read the relevant trusts of the will of the testatrix and continued: Both the sister and the brother are dead, and under the trusts which I have read the result is that the whole of the trust fund is subject to the discretionary trusts contained in para. (c) of cl. 4 of the will, if they are valid. It is plain that they are void for uncertainty, because the form is in substance exactly the same as that which was considered by HARMAN, J., in *Re Gresham's Settlement, Lloyds Bank, Ltd.* v. *Gresham* (1) ([1956] 2 All E.R. 193), and though counsel who appears for the first and last defendants has submitted that that case was wrongly decided, in order to keep the point alive, I ought to follow the decision in question and apply it in the present case. The clause, however, also seems plainly to offend against the rule against perpetuities, because Noel Francis Nalder might have married a woman who was not in being at the date of the testatrix' death, and, therefore, the discretionary trusts are invalid on that ground, as has been recognised in a number of cases*. The question which then remains is a difficult one: is the effect also to render invalid the provisions which are contained in cl. 5 of the will in favour of the two charitable bodies which I have mentioned ?

The principle is stated in JARMAN ON WILLS (8th Edn.), at p. 365, in this way:

> " . . . it is submitted that if the ulterior limitation must become vested in interest (though not necessarily in possession) within the perpetuity period and cannot be divested, accelerated or postponed by any event operating under the earlier void limitation, then the ulterior limitation is independent and valid."

On the other hand, if it is dependent on the earlier limitations, then it is well settled that the ultimate limitation is also void under the rule against perpetuities. There is no other gift of capital in this will except that which is contained in cl. 5. All the other provisions which preceded that gift are limited to the income.

---

* See, for example, *Re Vaux, Nicholson* v. *Vaux*, [1938] 4 All E.R. 297.

I have been referred very properly to a number of cases, but it seems to me that there is one case which, on the construction that I put on this will, decides the matter. It is not correct to say that the provisions of cl. 5 of the will operate without regard to the earlier provisions at all, as in effect was contended by counsel on behalf of the two charitable institutions. His contention was that as the provisions in question and discretionary trusts were void for uncertainty, they disappeared from the will, and there remained in the end only a gift of the capital, carrying the intermediate income, to these charitable institutions. It seems to me that the words " On the determination of the trusts hereinbefore declared " mean " on the death of such widow, being the widow mentioned in cl. 4 (c) of the will." The trusts are limited during, first of all, the life of the testatrix' sister as regards one half; then during the life of the brother as regards the other half, and in the event which happened of him surviving, as regards the whole; and then after his death the trusts operate during the lifetime of his widow whoever she may be. *Re Coleman, Public Trustee* v. *Coleman* (2) ([1936] 2 All E.R. 225), really covers that situation. In that case under the will of a testator a share of residue given to one of his sons, W., was settled on discretionary trusts for W. during his life, and after his death on similar discretionary trusts for any widow W. might leave and for all or any of the children of W., and after the death of such widow, on trust for the children of W. at twenty-one or marriage, in equal shares and it was held that though the discretionary trust in favour of W.'s widow was void for remoteness, as W. might marry a woman who was not born at the death of the testator, the ultimate trust in favour of W.'s children being vested, and not contingent or dependent on the void trust, was valid. In that case it will be observed that the children had to attain twenty-one or marry under that age, but presumably they had already attained the age and, therefore, the persons had attained vested interests; otherwise it is difficult to follow how CLAUSON, J., could refer to them as having " vested shares ". In the present case that difficulty, at any rate, does not arise, because the two charitable institutions are, of course, well-established bodies and there is no doubt that they have vested interests. The key to the matter is stated where CLAUSON, J., says (ibid., at p. 231):

> " Where, as in the present case, with which I am dealing, the limitation which it is sought to impeach creates a future interest which becomes vested in interest (though not in possession) within the limits of the rule against perpetuities and cannot in any event be subsequently divested by the operation of the earlier trust, it would be entirely inconsistent with the principle on which the decision in *Re Canning's Will Trusts, Skues* v. *Lyon* (3) ([1936] Ch. 309) proceeds to hold such a future interest to be adversely affected by the invalidity of the trusts which it follows, but of which it is wholly independent."

Applying that to the present case, it seems to me that while the trusts during the lifetime of the widow are invalid, the gifts of the capital which take effect on the widow's death are unaffected and are perfectly valid.

The result is that while the gift of capital is valid, it does not take effect in possession until the death of the widow who is referred to in the preceding paragraphs. That must, therefore, cause an intestacy as regards the income during that period.

Declaration accordingly.

Solicitors: *Collyer-Bristow & Co.* (for the trustees); *Nicholl, Manisty & Co.* (for the first and fourth defendants); *Clayton, Leach, Sims & Co.* (for the second and third defendants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

NOTE.

INLAND REVENUE COMMISSIONERS *v.* WOOD BROS. (BIRKENHEAD), LTD. (In Liquidation).

[HOUSE OF LORDS (Lord Reid, Lord Tucker and Lord Somervell of Harrow), December 10, 1957.]

House of Lords—Appeal to—Leave to appeal—Surtax—Company in liquidation —Amount of tax in dispute deposited with Board of Trade—Low rate of interest—Terms on which leave to appeal granted.

Petition for leave to appeal.

Petition by the Crown for leave to appeal to the House of Lords from an order of the Court of Appeal (JENKINS, PARKER and PEARCE, L.JJ.), dated Oct. 4, 1957, and reported [1957] 3 All E.R. 314, affirming an order of HARMAN, J., dated July 16, 1957, and reported [1957] 3 All E. R. 147, on an appeal by the Crown by way of Case Stated. The taxpayer company, Wood Bros. (Birkenhead), Ltd., which was in voluntary liquidation, had deposited about £9,300, being the amount of tax in dispute, with the Board of Trade, on which the rate of interest was 2½ per cent.

A. S. Orr for the Crown, the petitioners.

P. Shelbourne for the taxpayer company.

LORD REID: Their Lordships have read the petition and all the documents and leave to appeal will not be granted unless the petitioners undertake two things—first, not to disturb the order for costs in the courts below and, secondly, in any event to pay the taxpayer company's costs in the House on a solicitor and client basis.

A. S. Orr: The Board of Inland Revenue will submit to whatever terms your Lordships think appropriate.

P. Shelbourne: The petition is being opposed on the practical ground that, the taxpayer company being in liquidation, it has had to reserve the amount of money in dispute, which was about £9,300. That sum is deposited with the Board of Trade in accordance with the rules* and 2½ per cent. interest is being paid. Therefore, if leave to appeal is granted, the taxpayer company will be deprived of two or three per cent. interest for possibly a year. It is part of the rules attached to a winding-up that the money has to be deposited with the Board of Trade when one year has elapsed, and apparently the Board of Trade does not pay more than 2½ per cent. interest.

LORD SOMERVELL OF HARROW: The bank rate is seven per cent. and, by the appeal being pursued, the money is being kept idle and is earning a ludicrous rate of interest.

A. S. Orr: We will expedite the appeal, but the most that we can do to reduce time will bring the period before decision down to about six months. Although I am unable to make any offer regarding this interest yet if your Lordships think it right to impose a term as to that, then, if the Board of Inland Revenue, on reference to them are prepared to accept that term, we shall be able to prosecute the appeal.

LORD REID: The details can be adjusted, but there will have to be an undertaking to pay, substantially, three per cent. interest in addition to the 2½ per cent. interest already being paid. If the Board of Inland Revenue are willing that an undertaking to pay that shall be given, then leave to appeal can be given, subject to an order being drawn up which can be left in the office to settle terms. No term about celerity will be imposed, but we hope that this will be pressed on quickly.

---

* The Companies Act, 1948, s. 343, and the Companies (Winding-up) Rules, 1949 (S.I. 1949 No. 330), r. 199.

Leave to appeal to the House of Lords granted on terms.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Simmons & Simmons*, agents for *March, Pearson & Green*, Manchester (for the taxpayer company).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

ESCOIGNE PROPERTIES, LTD. *v.* INLAND REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Viscount Simonds, Lord Reid, Lord Keith of Avonholm, Lord Somervell of Harrow and Lord Denning), November 20, 21, 1957, January 23, 1958.]

Stamp Duty—Transfer of property from one associated company to another—Contract by original owner to sell freehold and leasehold properties to a company—Purchase price received but no conveyance or transfer executed by owner—Death of owner—Subsequent sale by company to associated company—Conveyance, transfer and assignment executed by deceased's personal representatives—Whether exempt from ad valorem stamp duty—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *s.* 54, *s.* 58 (4)*—Finance Act,* 1930 (20 *&* 21 *Geo.* 5 *c.* 28), *s.* 42*—Finance Act,* 1938 (1 *&* 2 *Geo.* 6 *c.* 46), *s.* 50 (1) (*b*).

In 1950 C., the owner of freehold and leasehold properties, contracted to sell them to S. Co., a newly formed limited company, for £9,998, the price to be satisfied by an issue of the company's shares to him. At that time the formation of a second company, E. Co., which was subsequently formed, was not in contemplation. The shares in S. Co. were allotted, but no conveyance or transfer of the properties was executed by C. who died in 1951. In 1954 a second company, E. Co., was incorporated and shortly afterwards S. Co. made arrangements to sell the properties to E. Co. of which S. Co. owned not less than ninety per cent. of the issued share capital. Five separate instruments of conveyance or transfer were executed to give effect to the sub-sale to E. Co. In these instruments the executors of C. joined and, by the direction of S. Co., conveyed or assigned the properties to E. Co. E. Co. claimed that each of the instruments was exempted from stamp duty by the Finance Act, 1930, s. 42 (2)*, as being a conveyance or transfer on sale " the effect " whereof was " to convey or transfer a beneficial interest in property from one company " to another associated with it within s. 42 (2). On that question, and on the further question whether relief under s. 42 was excluded by s. 50 (1) (b) of the Finance Act, 1938†, on the footing that the instruments were executed in connexion with arrangements whereby the beneficial interest had been previously transferred by a person other than an associated company,

Held: the instruments were chargeable with ad valorem stamp duty as conveyances or transfers on sale for the following reasons:

(i) (VISCOUNT SIMONDS and LORD REID dissenting) section 42 of the Finance Act, 1930, did not exempt the instruments because (per LORD

---

* The relevant terms of s. 42 (2) are set out at p. 408, letter H, post.

† The relevant terms of s. 50 (1) are printed at p. 410, footnote, post.

A KEITH OF AVONHOLM) the conveyance or transfer of a beneficial interest in the property from one company to another was not " the " effect of each of the instruments, but merely " an " effect of each of them and (per LORD SOMERVELL OF HARROW and LORD DENNING) the instruments were transfers by individuals, the executors of C., to E. Co. as sub-purchaser and were not merely transfers by one associated company to another; and

B (ii) the instruments were in any event excluded by s. 50 (1) (b) of the Finance Act, 1938, from exemption under s. 42 of the Act of 1930 because they could not realistically be regarded as unconnected with the previous sale by C. to S. Co.

Decision of the COURT OF APPEAL ([1957] 1 All E.R. 291) affirmed.

C [As to relief from stamp duty on transfers between associated companies, see 6 HALSBURY'S LAWS (3rd Edn.) 786, para. 1585.

For the Stamp Act, 1891, s. 54 and s. 58, see 21 HALSBURY'S STATUTES (2nd Edn.) 627, 628.

For the Finance Act, 1930, s. 42, and the Finance Act, 1938, s. 50, see 21 HALSBURY'S STATUTES (2nd Edn.) 959, 1196.]

D Cases referred to:

(1) *Goodrich* v. *Paisner*, [1956] 2 All E.R. 176; 3rd Digest Supp.

(2) *River Wear Comrs.* v. *Adamson*, (1877), 2 App. Cas. 743; 47 L.J.Q.B. 193; 37 L.T. 543; 42 J.P. 244; 41 Digest 974, *8643*.

(3) *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents*, [1898] A.C. 571; 67 L.J.Ch. 628; 79 L.T. 195; 42 Digest 642, *464*.

E (4) *Heydon's Case*, (1584), 3 Co. Rep. 7a; 76 E.R. 637; 42 Digest 614, *143*.

(5) *Caledonian Ry. Co.* v. *North British Ry. Co.*, (1881), 6 App. Cas. 114; 42 Digest 638, *410*.

Appeal.

Appeal by Escoigne Properties, Ltd. from an order of the Court of Appeal F (LORD EVERSHED, M.R., BIRKETT and ROMER, L.JJ.), dated Dec. 17, 1956, and reported [1957] 1 All E.R. 291, reversing an order of VAISEY, J., dated June 28, 1956, and reported [1956] 3 All E.R. 33, on a Case Stated by the Crown under the Stamp Act, 1891, s. 13, for the opinion of the court as to the stamp duty chargeable on five instruments presented to them by the appellant company for adjudication under s. 12 of that Act. The facts are set out in the opinion of G VISCOUNT SIMONDS.

J. Pennycuick, Q.C., and *J. P. F. E. Warner* for the appellant company.
Geoffrey Cross, Q.C., and *E. Blanshard Stamp* for the Crown.

The House took time for consideration.

H Jan. 23. The following opinions were read.

VISCOUNT SIMONDS: My Lords, in my opinion, this appeal should be dismissed. The appellant company claims that five instruments, to which I shall refer in greater detail, are not subject to the stamp duty payable on conveyances or transfers on sale. It can only succeed if it establishes, first, that the instruments fall within s. 42 of the Finance Act, 1930, and, secondly, I that they are not excluded from relief by the provisions of s. 50 of the Finance Act, 1938. In my opinion, whatever conclusion may be reached on the first point, it must fail on the second.

In the year 1950 the late Samuel Cohen was the owner of a number of freehold and leasehold properties in the counties of London and Middlesex. On June 30 of that year he entered into an agreement with Samuel Cohen (Properties), Ltd., which I will call " the old company ", for the sale to it of such properties subject to the incumbrances then affecting them. The agreement was stamped with a 10s. stamp and was adjudged duly stamped. The consideration, apart from the liabilities assumed by the old company, was £9,998 to be satisfied by the allotment to Mr. Cohen or his nominees of 9,998 fully paid shares of £1 each of the old company. These shares were duly allotted on or about June 30, 1950, but no conveyance or assignment of any of the properties was executed by Mr. Cohen. He died on July 21, 1951, and his will was duly proved on Feb. 29, 1952. On Aug. 26, 1954, the appellant company, Escoigne Properties, Ltd., was incorporated with a capital of £10,000 divided into ten thousand shares of £1 each, and shortly thereafter entered into separate bargains with the old company for the purchase of the said properties, or some of them, for shares of the appellant company. The value of these shares far exceeded their nominal value and were issued at a premium of £10 per share. Five separate instruments were accordingly executed to give effect to these bargains, the executors of Mr. Cohen joining in them by the direction of the old company as beneficial owners in order to convey or transfer the still outstanding legal estate or interest to the appellant company. These instruments were then presented for adjudication, the appellant company claiming that they were not liable to any stamp duty under the heading " Conveyance or transfer on sale " in Sch. 1 to the Stamp Act, 1891. Immediately before the execution of these instruments the old company owned not less than ninety per cent. of the issued share capital of the appellant company.

This claim was rejected by the respondents, the Commissioners of Inland Revenue. On a Case Stated for the opinion of the court, their determination was reversed by VAISEY, J., but his decision was in turn reversed by the Court of Appeal. The determination, therefore, stands unless this appeal succeeds.

I must now look at the relevant sections and, first, at s. 58 (4) of the Stamp Act, 1891, which provides that:

> " Where a person having contracted for the purchase of any property, but not having obtained a conveyance thereof, contracts to sell the same to any other person, and the property is in consequence conveyed immediately to the sub-purchaser, the conveyance is to be charged with ad valorem duty in respect of the consideration moving from the sub-purchaser."

I refer to this sub-section because, apart from the section of the Finance Act, 1930, on which the appellant company relies, each of the instruments in question would clearly be liable to stamp duty under the heading " Conveyance or transfer on sale " in Sch. 1 to the Stamp Act, 1891, and the duty chargeable would be an ad valorem duty in respect of the consideration moving from the appellant company to the old company. I turn next to s. 42 of the Finance Act, 1930, which, by sub-s. (1), provides that the stamp duty to which I have referred shall not be chargeable on an instrument to which that section applies, namely (by sub-s. (2)) to any instrument

> " as respects which it is shown to the satisfaction of the Commissioners of Inland Revenue—(a) that the effect thereof is to convey or transfer a beneficial interest in property from one company with limited liability to another such company ; and (b) that . . . (i) one of the companies is beneficial owner of not less than ninety per cent. of the issued share capital of the other company . . ."

On this section, the appellant company relies. It is common ground that the second condition is satisfied. Issue is joined on the first.

My Lords, the case for the appellant company can be stated very shortly and simply. Here are instruments prima facie liable to conveyance stamp duty. But they have this operation, that they convey or transfer the beneficial interest in the several properties from the old to the appellant company. I have used the word " operation ", but I might as well have used the word " effect " which is found in the section. They are, therefore, instruments the effect whereof is as stated; the first condition also is, therefore, satisfied. This contention is countered by the Crown in two or more ways which do not, I think, when analysed, materially differ. The primary argument before the Court of Appeal I take from the judgment of the Master of the Rolls (LORD EVERSHED) ([1957] 1 All E.R. at p. 295):

> " There is no doubt that the transactions are within the terms of the sub-section if the words ' the effect thereof is ', as [the appellant company] submits, are equivalent to ' it is effective '. The Crown, pointing to the definite article, contend that the words signify that the true and real effect or purpose of the instruments must be the specified result achieved; in other words, that the phrase ' the effect thereof ' means ' the substantial effect thereof '."

This contention or, I should perhaps say, this way of stating their contention was, if not abandoned, relegated to second place by learned counsel for the Crown on this appeal. But, whatever place it takes, I do not see how it can be supported. The language of the statute is clear. It demands nothing more than an answer to the simple question: " Does the instrument have the prescribed effect ? " If it has, then the condition is satisfied. It need not be asked what is the main, or real, or substantial effect, or whether it has any other effect. If such a question were asked, it would often be so difficult to answer that I should hesitate to say that such a test had been laid down by Parliament unless I was driven to it by unambiguous language. So far is this from being the case that the difficulty is only created by an illegitimate introduction of words not to be found in the sub-section.

Before I come to what I conceive to be nothing else than another way of stating the same argument, I would remind your Lordships that instruments, not transactions, are liable to stamp duty, that the instruments here in question would be liable to conveyance or transfer duty and (so far as is relevant) to no other duty but for s. 42 of the Act of 1930, and that counsel for the Crown rightly disavowed any claim to invoke s. 4 (a) of the Stamp Act, 1891, under which a single instrument may be deemed for purposes of stamp duty to be several instruments.

I will state the argument in the words of ROMER, L.J. ([1957] 1 All E.R. at p. 298):

> " The conveyances and assignments were certainly effectual to pass Samuel Cohen (Properties), Ltd.'s beneficial interests in the properties to [the appellant company]. They achieved, however, in addition to this, another and different purpose, viz., to complete the 1950 contract (which would, as an independent transaction, have attracted ad valorem stamp duty) and to introduce [the appellant company] as sub-purchasers. This involved the joinder of Mr. Cohen's executors as parties to the instruments and the vesting by them in [the appellant company] of the legal estate in the properties. The instruments accordingly had a dual effect, the conveyance or transfer of a beneficial interest by one associated company to another and the getting in of the legal title, in completion of the earlier contract of sale, which was still outstanding in a third party. By reason of this composite object of the relevant instruments, and their consequent width and scope, it cannot, therefore, be said, in my judgment, that ' the effect ' thereof was that envisaged by s. 42."

My Lords, no one could fail to be impressed by the cogency of this statement. But I think that, when analysed, it comes to this, that the instruments do not have the prescribed effect because they have some other effect also. In other words, the true construction of the section demands the writing in before " effect " of " main ", or " real ", or " substantial " or " only ". As I have already said, I see no justification for doing so. Nor can I accept the view that it is relevant what other effect the instrument has. It was, I think, conceded that the operation of the section would not be ousted if its further effect was to convey the legal estate outstanding in a trustee third party. It appears to me to be altogether too fine a distinction to say that it is ousted because the legal estate is conveyed in pursuance of some antecedent bargain. And it is, of course, quite irrelevant that, if the parties had carried out the transaction or transactions by a different instrument or instruments, other duties might be exigible.

The argument for the Crown assumed yet another form before this House. Learned counsel referred to the fourth of his formal reasons in the Crown's case, and said that that was what he really relied on. I quote it :

> " Because on its true construction s. 42 operates only to exempt an instrument from such an ad valorem duty as it would otherwise attract as an instrument the effect whereof is to transfer a beneficial interest in property from one associated company to another: it does not exempt an instrument from such ad valorem duty as it attracts as a conveyance or transfer by a third party."

He expanded this reason by saying that the sub-section was to be read as if it ran as follows:

> " This sub-section applies to any instrument *in respect of the conveyance or transfer or sale of such a beneficial interest as is hereinafter mentioned* as respects which . . ."

My Lords, I can see as little justification for writing in these as any other words. I do not think that their inclusion has any different effect from that of writing in any of the adjectives I have indicated before the word " effect ". But the argument in this form does serve to expose what is, in my opinion, its flaw. The instrument is ex concessis a single instrument, and is not to be deemed anything but a single instrument. As such, it would bear one stamp, the ad valorem conveyance stamp. But the words which it is proposed to write in can only proceed on the basis that there is one stamp in respect of the conveyance or transfer on sale of the sort of beneficial interest to which the section relates, and another stamp in respect of something else; from the former the instrument is free, to the latter it becomes subject. This denies the concession that it is a single instrument subject to one stamp only.

I conclude, then, that the appellant company is right on its first contention, but that does not mean that it succeeds in this appeal, for it has also to establish that the relief given by the earlier Act is not taken away by s. 50 of the Finance Act, 1938*. In my opinion, it fails to do this. For, under the latter section, the relief in question is not given to any instrument unless it is shown to the satisfaction of the commissioners that the instrument was not executed in pursuance of, or in connexion with, an arrangement whereunder the beneficial interest in the property was previously conveyed or transferred directly or indirectly by a person other than a company which at the time of the execution of the instrument was associated with either the transferor or the transferee, that is to say, by a person who can conveniently be called a stranger, in this case Mr. Cohen or his representatives.

---

* The relevant terms of s. 50 of the Finance Act, 1938, are as follows:—

" (1) Section 42 of the Finance Act, 1930 . . . shall not apply to any . . . instrument, unless it is shown to the satisfaction of the Commissioners of Inland Revenue that the instrument was not executed in pursuance of or in connexion with an arrangement whereunder—(a) the consideration for the transfer or conveyance was to be provided directly or indirectly by a person other than a company which at the time of the execution of the instrument was associated with either the transferor or the transferee; or (b) the beneficial interest in the property was previously conveyed or transferred directly or indirectly by such a person as aforesaid."

A My Lords, in my opinion, the commissioners were well justified in not being satisfied that the instruments in question were not executed in pursuance of, or in connexion with, an arrangement whereunder the ensuing result followed. I do not ignore that they found as a fact that, at the date of the agreement of 1950, the appellant company was not in contemplation as sub-purchasers of the property. But I respectfully agree with the Master of the Rolls ([1957] B 1 All E.R. at p. 296) that it is non-realistic to suppose that Mr. Cohen intended that the legal estate should remain outstanding indefinitely in himself or his representatives. The old company was formed very shortly before the contract for sale. The arrangement was thus initiated. It would, I think, be unreasonable to regard the final transaction by which Mr. Cohen's executors joined in the instruments in question to convey the legal estate as unconnected C with the earlier transactions. The words " or in connexion with " are wider than " in pursuance of ", and appear to me to be well chosen to cover such a series of acts in the law as are to be found here. It was, however, urged that the section did not apply, inasmuch as the beneficial interests in question were not previously conveyed or transferred directly or indirectly by a stranger. I lay no stress on the words " directly or indirectly ", but I cannot avoid the D conclusion that, when Mr. Cohen entered into the contract of 1950 and received the consideration therefor, and the beneficial interest in the property accordingly passed to the old company, it was his act by which it passed and it would be too narrow a construction to say that, nevertheless, it was not conveyed or transferred by him.

On this ground, I think, the appeal should be dismissed.

E

LORD REID: My Lords, I agree with the speech which has just been delivered by my noble and learned friend, LORD SIMONDS, but, as there is a difference of opinion among your Lordships on the first point, perhaps I ought to state my reasons shortly in my own words. The question turns on the proper interpretation of the words " the effect ". There are many contexts in F which these words could properly be held to mean " the only effect ", or even " the only substantial effect ", using the word " substantial " as meaning something which is not negligible. But that interpretation is not possible here. Where a company which already has the legal title conveys property to an associated company, s. 42 admittedly applies, although the conveyance, besides conveying or transferring the beneficial interest, also conveys the legal title G and contains covenants which may be of great importance. These other effects are not negligible, but, admittedly, their presence does not exclude the operation of the section. It appears to me that " an effect " or " the only effect " are the only two possible interpretations of the words " the effect ", unless one is to write in qualifying words, which seems to me to be unwarranted. Therefore, as " the only effect " is excluded, I must choose the other possibility " an effect ".

H These instruments have a twofold effect; they transfer the beneficial interest from the old company to the appellant company and they convey the legal title from Mr. Cohen's executors to the appellant company. Instruments having a twofold effect are dealt with by s. 4 of the Stamp Act, 1891; an instrument coming within that section is treated as two separate instruments. Admittedly, s. 4 cannot be applied to this case but, nevertheless, the Crown is I seeking to have the matter decided as if it did, and as if the exemption in respect of one of the effects left the other subject to stamp duty.

Section 42 of the Finance Act, 1930, is plainly a defective section. To cure one defect it was found necessary to pass s. 50 of the Finance Act, 1938. I see no reason to strain the language of the section to prevent the emergence of another defect.

LORD KEITH OF AVONHOLM: My Lords, I would, if necessary, be prepared to hold that the terms of s. 42 of the Finance Act, 1930, do not relieve the appellant company from liability to pay ad valorem stamp duty.

In any event, I agree that the appellant company is caught by the terms of s. 50 of the Finance Act, 1938.

My Lords, under s. 42 of the Act of 1930, we are concerned only with stamp duty in respect of conveyance or transfer on sale. An instrument which comes into this category may contain other clauses which will attract additional stamp duty under the schedule to the Stamp Act, 1891, but we are not concerned with any such question in this case. The only question under s. 42 is whether the instrument here is one the effect whereof is to convey or transfer a beneficial interest in property from one company with limited liability to another such company. Now, if one is asked what is the effect of the instrument here, it would only be a half answer to say that it conveys a beneficial interest in property from one company with limited liability to another such company. It also conveys the legal title to the property from Samuel Cohen's executors to the appellant company. It thus fails in two respects to meet the words of the statute. It introduces a third party, who is neither an agent nor a trustee of the old company, into the instrument of conveyance, and it conveys the legal title as something separate from the beneficial interest. The question, then, is whether such an instrument is within the statutory provision. I have come to the view that the learned lords justices of the Court of Appeal were right in holding that it does not. When the facts are considered, it is seen that they are not apt to fit *the* effect of the instrument and fit only *an* effect of the instrument, speaking again solely from the point of view of a conveyance or transfer on sale. That is not, I think, sufficient to satisfy the statute. I find some support also for this view on a consideration of the terms of sub-s. (4) and sub-s. (6) of s. 58 of the Stamp Act, 1891. These sub-sections show that, where an original seller is introduced to complete a sale to a sub-purchaser, the legislature is concerned to secure that ad valorem duty is paid on the consideration moving from the sub-purchaser. The transaction embodied in the instrument here is truly, as I see it, a conveyance or transfer from the original seller to a sub-purchaser which attracts duty under sub-s. (4) of s. 58. The instrument of conveyance is not, in my opinion, brought within the exemption in s. 42 of the Act of 1930 and duty is, therefore, payable.

On the questions arising on s. 50 of the Act of 1938, I have nothing to add to what has already been said.

I would dismiss the appeal.

LORD SOMERVELL OF HARROW: My Lords, under s. 13 of the Stamp Act, 1891, the determination of the court was required on the stamp duty chargeable on five instruments of conveyance and assignment, particulars of which are set out in the Case Stated. By an agreement dated June 30, 1950, Samuel Cohen agreed to sell to Samuel Cohen (Properties), Ltd., freehold and leasehold properties (subject to certain incumbrances), which included the subject-matter of the instruments in question. The consideration was to be satisfied by the issue of shares. These shares were allotted, but the contract was not completed by any conveyance or transfer. The beneficial interest passed to the purchaser. Samuel Cohen died on July 21, 1951. In 1954 the appellant company, Escoigne Properties, Ltd., was formed and terms were arranged without there being any written contract for the sale to it of the properties in question. The beneficial interest was in Samuel Cohen (Properties), Ltd., the legal estate in the personal representatives of Samuel Cohen. The instruments transfer both these interests to the appellant company.

The first question is whether these instruments are exempted from stamp duty under the provisions of s. 42 of the Finance Act, 1930. If they are so exempted, then is that exemption taken away by s. 50 of the Finance Act, 1938 ?

I can state quite shortly my reasons for agreeing with the Court of Appeal that these instruments were not exempted under s. 42 of the Finance Act, 1930.

A It is common ground that the agreement of June 30, 1950, did not require an ad valorem stamp either when it was signed or when, the consideration being paid, the equitable interest passed under it to the old company. It is also common ground that, if it had been later completed by a conveyance of the legal estate, that conveyance would have been subject to an ad valorem stamp, although the conveyance did not itself pass the interest valued. In B other words, the conveyance on completion is stampable in respect of the value and transfer of the equitable interest, although that has already been transferred and does not require the conveyance to vest it in the purchaser. In the present case, the conveyance and other instruments come within s. 58 (4) of the Stamp Act, 1891. But for that sub-section, it might have been suggested, or held, that double duty was payable, first on the completion of the sale to C the purchaser, and secondly on the completion of the sale to the sub-purchaser although carried out by the same instrument. Both transfers are covered by the one conveyance and the one stamp.

Section 42 of the Finance Act, 1930, in my opinion, relieves an instrument which would otherwise be stampable in respect of the transfer of the equitable interest from one associated company to another. That interest might have D already passed under an agreement for sale prior to the instrument of conveyance or transfer. The instrument would be relieved because, in such a case, as I have said, the instrument is to be stamped in respect of the value and transfer of the equitable interest although that has previously passed. In the present case, therefore, the instruments are stampable in respect of the transfer of the equitable interest as passing from the original vendor to the sub-purchaser. E That is the effect of the instrument in relation to stamp duties. It is, therefore, not within the relieving words, which must be confined to instruments which attract duty by reason of the transfer from one associated company to another. This attracts duty by reason of the transfer from the original vendor to the sub-purchaser.

If I am wrong about that, then the appellant company fails under s. 50 of the F Finance Act, 1938. I think that the instruments in question were executed in pursuance of, or in connexion with, an " arrangement ". The onus is on the appellant company to satisfy the commissioners that they were not so executed. There is the further question referred to by ROMER, L.J. ([1957] 1 All E.R. at p. 299). Was the equitable interest conveyed or transferred by Samuel Cohen ? The agreement, it is said, on its face was an agreement to sell under which the G property would not pass until completion. Therefore, it cannot be said there was a transfer of the equitable interest by Mr. Cohen; it passed by operation of law. I cannot accept this line of reasoning. In some cases the law prescribes the conditions which must be fulfilled for property to pass from vendor to purchaser. Subject to this, parties may make express provision as to the passing of property from vendor to purchaser, or, if no such provision is made, leave H it to be dealt with by implication of law. In all cases, however, the transfer is, in my opinion, a transfer by the vendor within the ordinary meaning of these words.

I would dismiss the appeal.

LORD DENNING: My Lords, in order that any of these five instruments should be exempt from stamp duty under s. 42 of the Finance Act, 1930, it must I be shown that " the effect thereof " is to convey or transfer a beneficial interest from the old company to the new company. What is the meaning of the words " the effect thereof " ? Various interpretations are suggested. Do they mean " the *only* effect thereof ", or " the *substantial* effect thereof ", or " *an* effect thereof " ? I do not think that they mean any of those things. It is a mistake to dignify these suggestions by calling them " interpretations ". They are only substituted words; and, as soon as you start substituting words for those used by Parliament, you run into difficulty. If you say that the words " the effect thereof " mean " the *substantial* effect thereof ", you lay yourself open to the criticism that you are writing into the statute qualifying words which are not to be found there. If you say that the words " the effect thereof " mean " *an* effect thereof ", you can be accused of altering the words of the statute which no one has a right to do.

I prefer to start with the proposition affirmed by my noble and learned friend, Lord Reid, in *Goodrich* v. *Paisner* (1) ([1956] 2 All E.R. 176 at p. 185): " No court is entitled to substitute its words for the words of the Act ". I look on the suggested interpretations only as attempts to elucidate it. When searching for the meaning of a statute, it is natural to try to put it into your own words—so as to express its meaning as it appears to you. But you must be careful not to write your own words into the statute as if they were part of it. It may well be that no words of yours convey the meaning of Parliament quite so well as the words which Parliament itself has chosen. You can often appreciate the meaning of a section—get the feel of it, so to speak—without being able to translate it into other words with exactly the same meaning. At the conclusion of the argument, the function of the court is to apply, not its own words, but the words of the statute to the given situation.

I return, therefore, to the question: What is the true meaning of s. 42 as it stands ? This cannot be answered by simply looking at the words of the statute and nothing else. A statute is not passed in a vacuum, but in a framework of circumstances, so as to give a remedy for a known state of affairs. To arrive at its true meaning, you should know the circumstances with reference to which the words were used; and what was the object, appearing from those circumstances, which Parliament had in view. That was emphasised by Lord Blackburn in *River Wear Comrs.* v. *Adamson* (2) ((1877), 2 App. Cas. 743 at pp. 763-765) and by the Earl of Halsbury, L.C., in *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents* (3) ([1898] A.C. 571 at pp. 575, 576) in passages which are worth reading time and again. But how are the courts to know what were the circumstances with reference to which the words were used ? And what was the object which Parliament had in view ?—especially in these days when there are no preambles or recitals to give guidance. In this country we do not refer to the legislative history of an enactment as they do in the United States of America. We do not look at the explanatory memoranda which preface the Bills before Parliament. We do not have recourse to the pages of Hansard. All that the courts can do is to take judicial notice of the previous state of the law and of other matters generally known to well-informed people. Thus, one of the best ways I find of understanding a statute is to take some specific instances which, by common consent, are intended to be covered by it. This is especially the case with a Finance Act. I often cannot understand it by simply reading it through. But when an instance is given, it becomes plain. I can say at once " Yes, that is the sort of thing Parliament intended to cover ". The reason is not far to seek. When the draftsman is drawing the Act, he has in mind particular instances which he wishes to cover. He frames a formula which he hopes will embrace them all with precision. But the formula is as unintelligible as a mathematical formula to anyone except the experts; and even they have to know what the symbols mean. To make it intelligible, you must know the sort of thing Parliament had in mind. So you have to resort to particular instances to gather the meaning.

I would apply this method to discover the meaning of s. 42 of the Finance Act, 1930. Two instances spring to mind which, by common consent, are covered by that section. The first instance is where a company, which is the absolute owner of property, sells it to an associated company in which it holds more than ninety per cent. of the shares. The transfer is effected by a simple conveyance by the one company to the other. Such a conveyance is exempt from stamp duty because " the effect thereof " is to transfer the beneficial interest in the property from the one company to the other. The means of achieving that effect is by conveying the legal estate. The second instance is when the one company is not the absolute owner of property, but has only the equitable interest with the legal estate outstanding in a trustee ; and the company then transfers its equitable interest to its associated company. Such a transfer is exempt from stamp duty because " the effect thereof " is to transfer the beneficial interest from the one company to the other. The means of achieving it is by a transfer of the equitable interest. Those instances show what was the object of s. 42. It was to give relief from stamp duty on an instrument by which one company transfers property to its associated company; provided that the association is so close that the transfer is little more than a change in the nominal ownership, with the underlying control remaining the same; and a ninety per cent. shareholding is made the test of closeness.

The object of the statute being thus ascertained, it is plain, to my mind, that the present instruments do not come within it. None of them is a transfer from one associated company to another. Each is a conveyance of property by a third person—by a seller who had contracted to sell it for value to one of the companies. If it were conveyed by the seller to the original purchasing company, it is clear that stamp duty would be payable on the conveyance. Why should there be any difference when it is conveyed, not to the purchasing company, but to its associated company at its direction ? There is no possible reason for Parliament exempting any of these instruments from stamp duty. No one can suppose that it intended to do so. If these instruments do not come within the class of instrument which Parliament had in view—as I am clear they do not—then we should not hold them to be exempt from stamp duty unless the words compel it—and I am clear that they do not. I find myself, therefore, in agreement with the Court of Appeal that these instruments are not exempt under s. 42.

Even if this view were wrong, there remains s. 50 of the Finance Act, 1938. This is a section which I would not be able to understand unless I was first given an instance of what it was intended to cover. Counsel for the appellant company provided this by telling us of the device of the " dummy bridge company " which some people had evolved to avoid paying stamp duty. They took advantage of s. 42 by forming a small company which was a puppet in their hands. It was done in this way: If company A wished to sell property to company B for £100,000 and avoid stamp duty, company A would form a small " bridge " company of one hundred £1 shares in which it held all the shares. Company A would convey the property to the " bridge " company for £100,000, but the price would be left owing. By reason of s. 42, that conveyance would be exempt from stamp duty. Then company A would sell the hundred shares in the " bridge " company to company B for £100; and stamp duty of a trifling amount would be paid on that transfer. The " bridge " company would then convey the property to company B for £100,000 on the terms that the £100,000 should be paid direct to company A. By reason of s. 42, no stamp duty would be payable on that conveyance. So the sale from company A to company B was completed without paying any stamp duty on the £100,000. The success of that device was not due to any defect in s. 42. It was due to the cleverness of the persons who managed to bring the conveyances within s. 42 beyond any doubt. The object of s. 50 was to put a stop to that device; and it succeeded. If anyone were to resort to it after 1938, both conveyances would be liable to stamp duty. The first conveyance would be caught by sub-s. (1) (a), the second by sub-s. (1) (b).

The question is whether s. 50 is effective to catch the five instruments in the present case. ROMER, L.J., thought it was not. He did not think these instruments came within sub-s. (1) (b), because the beneficial interest was not previously transferred " by " Mr. Cohen. All that Mr. Cohen did was to contract to sell the legal interest. The beneficial interest passed by operation of law. That, in a sense, is true. If I were to look at the words of the statute alone and take the word " by " literally, I might be of the same opinion as ROMER, L.J. But, when I look at the mischief which this section was passed to remedy, I come to a different conclusion. The mischief was that some people had resorted to various devices by which they took advantage of s. 42 to avoid stamp duty. I do not think the courts should give a narrow construction to s. 50 so as to make room for another such device. The word " by " is capable of a wider construction which we should adopt. If these instruments were exempt, it would open the door to widespread avoidance of stamp duty on property deals. All that would be necessary would be to incorporate two puppet companies, make the contract in the name of one and take the conveyance in the name of the other, and no stamp duty would be payable. Faced with this device, I call to mind the resolution of the judges in *Heydon's Case* (4) ((1584), 3 Co. Rep. 7a at p. 7b): " . . . the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy . . .;" and the words of LORD SELBORNE, L.C., in *Caledonian Ry. Co.* v. *North British Ry. Co.* (5) ((1881), 6 App. Cas. 114 at p. 122): " The more literal construction ought not to prevail if . . . it is opposed to the intentions of the legislature, as apparent by the statute." It is not so much a choice between a literal construction and a liberal construction. It is rather a case of remembering that every statute must be read in the light of the circumstances in which it was made, and the object it was passed to achieve. When that is borne in mind, I have no doubt these instruments, if within s. 42, are, nevertheless, caught by s. 50.

I would, therefore, dismiss this appeal.

Appeal dismissed.

Solicitors: *Nicholson, Graham & Jones* (for the appellant company); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

CLUEIT *v.* CLUEIT.

[BIRMINGHAM ASSIZES (Davies, J.), December 4, 5, 19, 1957.]

Divorce—Discretion—Discretion statement by husband disclosing adultery—Amendment of wife's petition at trial by adding charge of adultery based on facts disclosed in discretion statement—Desertion alleged originally in petition and answer not proved at trial.

Divorce—Practice—Amendment—Petition—Amendment at trial by adding charge of adultery based on facts disclosed in other spouse's discretion statement.

The wife petitioned for divorce on the ground of desertion. The husband cross-prayed for divorce on the ground of desertion and for the exercise of the court's discretion in respect of his own adultery. He filed a discretion statement disclosing adultery with a named woman. The husband's discretion statement was put in evidence at the trial after the conclusion of his evidence as a witness. Counsel for the wife then sought leave to amend the petition by adding a charge of adultery based on the facts disclosed in the discretion statement.

Held: leave to amend would be granted so as to avoid the expense of further proceedings by the wife in the event of neither party obtaining a decree in the present proceedings.

Burford v. *Burford* ([1955] 3 All E.R. 664) considered.

[As to the evidential effect of discretion statement, see 12 HALSBURY'S LAWS (3rd Edn.) 320, para. 644, notes (p) and (r).]

Case referred to:

(1) *Burford* v. *Burford*, [1955] 3 All E.R. 664; 3rd Digest Supp.

Petition.

In this case the wife petitioned for divorce on the grounds of cruelty and desertion. The husband by his answer cross-prayed for a decree on the ground of desertion and asked for the court's discretion to be exercised in his favour notwithstanding his own adultery.

The parties were married in March, 1951, and there were two children, one born in May, 1951, and the other born in May, 1952. After the marriage the parties lived for a short while at the wife's parents' home but the husband went back to live with his mother before the birth of the first child. The parties did, however, spend a holiday together in the summer of 1951. Shortly after the birth of the second child the husband returned to the wife's parents' home and lived with the wife there. In April, 1953, the wife's father told the husband to leave, which he did and returned to his mother's home. In October, 1954, the wife caused a summons to be issued against the husband on the ground of his desertion. The summons was adjourned, and on Jan. 26, 1955, the husband obtained the key of a house which he had rented and asked the wife to join him there bringing the children with her. She refused and on Jan. 27, 1955, she withdrew her complaint of desertion. Instead she applied for and obtained by consent an order under the Guardianship of Infants Acts, 1886 and 1925, for the custody and maintenance of the children. In the course of those proceedings she stated that she was not willing to live with her husband any more.

In August, 1956, she filed a petition for divorce on the grounds of cruelty and desertion, though the charge of cruelty was not pressed at the hearing.

By his answer, dated Apr. 30, 1957, the husband denied both charges and cross-prayed for a divorce on the ground of the wife's desertion (i.e., desertion from Apr. 30, 1954) and asked for the exercise of the court's discretion in his favour notwithstanding his own adultery. The husband filed a discretion statement dated Sept. 18, 1957, in which he disclosed that he had committed adultery with one Miss O. between September and December, 1956, and that she was expecting a baby by him in September, 1957.

At the hearing of the suit the husband's discretion statement was put in evidence at the very end of his evidence after he had been cross-examined, and counsel for the wife then sought leave to amend the petition by adding a charge of adultery based on the facts disclosed in the discretion statement and now admitted by the husband in the witness-box. The case is reported for the judge's ruling on this point.

P. J. Cox for the wife.
F. Blennerhassett for the husband.

Counsel for the wife referred to *Burford* v. *Burford* (1) ([1955] 3 All E.R. 664) and submitted that if the wife had known of the husband's adultery she would have made an allegation to that effect in her petition and the fact that until the contents of the discretion statement had been disclosed she was unaware of the circumstances should not prevent her from charging adultery even at that stage in the proceedings. Counsel for the husband opposed the application for amendment and submitted that since the offence of adultery had been disclosed because of the duty to do so under the Matrimonial Causes Rules, 1957, r. 28 (1), any admissions made by the husband in his discretion statement should not be used against him. Counsel conceded that should neither party succeed in the present suit, the wife would be entitled subsequently to institute further proceedings for divorce based on this adultery but submitted that the court ought not to assist the wife to make a charge in the present suit based on the facts disclosed in the discretion statement, since (i) that would enable her to obtain a decree even if the husband were also successful and would then entitle her to apply for maintenance and (ii) the result would be that where one party asks for the discretion of the court in respect of his or her adultery the other party will of necessity be enabled to seek a decree.

Dec. 5. **DAVIES, J.:** This is a very interesting point. There is no reason to give a full judgment on it. At the end of the husband's evidence, after he had been cross-examined under pressure from the wife's counsel, counsel for the husband put in the husband's discretion statement. In it the husband admits having committed adultery in 1956, some three years after the parties finally separated, and says that the woman named in his discretion statement expected a baby in September, 1957. Counsel for the wife has asked leave to amend the petition to include an allegation of adultery, the adultery being admitted in the discretion statement.

My attention was called by counsel for the wife to *Burford* v. *Burford* (1) ([1955] 3 All E.R. 664) where the judgment of the court was given by HODSON, L.J. This is a course which, to my own personal knowledge, has been taken when I was at the Bar, and it has certainly happened while I have been on the Bench.

Counsel for the husband has taken what I must say is an extremely attractive point in asking me to reject leave to amend. The disclosure by the husband of his own adultery was a compulsory disclosure under the rules and practice of the court. It is argued that it is a principle of our law, which is exemplified in a number of other compartments of law, that if a man is compelled to make a disclosure or admission, that disclosure or admission must not be used against him to his prejudice thereafter. I think that it is an attractive argument, but it seems to me to break down from the practical point of view in this way. This is in effect a case of cross-allegations of desertion. I have not heard the concluding speeches of counsel yet and I have not come to any decided view about this case, but supposing that I were to come to the view that neither party was to have a decree, that neither party was in desertion of the other, then there would, as I think and as counsel for the husband admits, be nothing in the world to prevent

A another petition being filed by the wife immediately to allege adultery basing it on the information contained in the discretion statement. If she could not prove it any other way, she would be enabled, at the hearing of the supposed new petition, to bespeak the file in the present suit and prove her husband's adultery by identifying his signature to his discretion statement. So that, in the ultimate result, the principle put forward by counsel for the husband in opposition to this B application could not operate to protect the husband from being prejudiced by his admission.

That being so, it seems to me that to provide against that possibility, it is right and proper to give the wife leave to amend now, because obviously there would be a great saving of expense for this application to be made and granted in the present suit rather than to bring in a separate petition. It is suggested that C the only merit of this application is that the wife wishes to strengthen her hand on an application for maintenance. I am not sure that I agree with that. Whatever happens in the result of this case, in any application for maintenance, the whole of the wife's conduct in the suit will be investigated and will be taken into account by the registrar.

In all the circumstances it is right and proper for me to grant the wife leave to D amend. The petition must be amended and I dispense with re-service on the husband, but it must, of course, be served on the woman to be named. What line she will take, one does not know; but perhaps one can hazard a guess. The usual time for clearance is fourteen days. I think that in the circumstances I should abridge the time to seven days, and I direct that the amended petition be served tomorrow.

E

[The woman named in the amended petition, Miss O., acknowledged service but took no further part in the proceedings. The suit came before DAVIES, J., again on Dec. 19, 1957. When HIS LORDSHIP gave judgment he found that the husband had not deserted the wife but that she had deserted him in and since January, 1955, though desertion by her from an earlier date, April, 1953, or April, 1954, was not proved. Three years' desertion by the wife prior to the presentation of F the petition was, therefore, not proved. The wife had pressed her charge of adultery by reason of the husband's admissions and in the exercise of the court's discretion (in respect of her desertion from January, 1955) the wife was granted a decree.

Counsel for the wife then applied for costs. The sum of £10 had been paid into court as security.]

G

Dec. 19. **DAVIES, J.:** The wife has obtained a decree on the ground of adultery which was not part of her original case. The overwhelming costs have been incurred on the issue of desertion on which she had failed. There was no order for alimony pending suit. There would be an order, therefore, for payment of her costs only up to the amount in court which should be paid out to her forthwith.

Order accordingly.

Solicitors: *H. B. Keight & Co.*, Birmingham (for the wife); *Philip Baker & Co.*, Birmingham (for the husband).

[*Reported by* GWYNEDD LEWIS, *Barrister-at-Law.*]

HEAVEN & KESTERTON, LTD. *v.* SVEN WIDAEUS A/B.

[QUEEN'S BENCH DIVISION (Diplock, J.), January 23, 24, 1958.]

Arbitration—Costs—Discretion of arbitrator—Judicial exercise—Successful party ordered to pay total costs of reference—Discretion judicially exercised although founded on mistake in law—Misconduct.

The buyers under a contract for the sale of timber claimed the right to reject certain quantities of " 2 ex log " timber on the ground that they did not comply with the contract specification. This claim amounted to £573 8s. 4d.; alternatively, if the claim for rejection were disallowed, the buyers claimed damages amounting to £231 4s. They also claimed damages amounting to £455 4s. 4d. for alleged defects of quality in other timber. The contract contained an arbitration clause which provided that the award should be final and binding on both parties, that the costs of the arbitration should be left to the discretion of the arbitrator or umpire, and that, in deciding as to costs, the arbitrator or umpire should take into consideration the correspondence between the parties relating to the dispute and their respective efforts to arrive at a fair settlement. The arbitrators appointed by the parties having failed to agree, the dispute was referred to an umpire who awarded £73 to the buyers and ordered them to pay the total costs of the arbitration amounting to £179 10s. The buyers having served a notice of motion to set aside the award on the ground that the arbitrator had misconducted himself in that, among other matters, he did not exercise his discretion over costs in a proper judicial manner, the umpire filed an affidavit in which (i) he deposed that he had readily found that part of the " 2 ex log " timber was not of the contract description and that he had awarded accordingly, and (ii) he gave reasons for his decision on costs. These reasons were—" (a) I had found against [the buyers] upon their claim for rejection; (b) in respect of their total claim for damages amounting to £686 8s. 4d. I had only found them entitled to recover £73; (c) I formed the view that the buyers had presented an exaggerated claim; (d) it was my view that if [the buyers] had only put forward a claim for a sum approximately equivalent to that which I had awarded it is unlikely that the substantial cost of this arbitration would have been incurred ".

Held: (i) on motion to set aside an arbitrator's or umpire's award of costs for misconduct the court had jurisdiction to do so if it was shown that he had exercised his discretion unjudicially.

Smeaton Hanscomb & Co., Ltd. v. *Sassoon I. Setty, Son & Co.* (*No. 2*), ([1953] 2 All E.R. 1588) and *Lewis* v. *Haverfordwest Rural District Council* ([1953] 2 All E.R. 1599) considered.

(ii) the award of costs would not be set aside for the following reasons—

(a) although the award on the substance of the dispute was shown to be in error (in that the buyers had been entitled in law to reject a part of the " 2 ex log " timber), yet the error did not amount to misconduct and the award on the substance of the dispute was binding.

(b) the question whether the umpire had exercised judicially his discretion as to costs must be approached on the basis of fact and law on which (even though in part erroneous) his award on the substance of the dispute had been made.

(c) on that basis it was not shown that the umpire had exercised unjudicially his discretion as to costs.

(iii) an umpire who had not been asked to state his award in the form of a Special Case was not bound to give reasons for his award; but as the umpire in the present case had given his reasons in an affidavit the court

A was entitled to look at his reasons to see whether he had exercised his discretion judicially.

[**Editorial Note.** If an award is in the form of a Special Case, reasons for an unusual award of costs would be stated in the Special Case. If, where an award is not in the form of a Special Case and is not a speaking award, the umpire does not give reasons for his award of costs (whether in the award or subsequently), B it would seem that the award of costs cannot readily be impugned, because there will not be material before the court on which to decide whether or not the discretion over costs has been judicially exercised.

As to the award of costs by an arbitrator, see 2 HALSBURY'S LAWS (3rd Edn.) 47, para. 103; and as to misconduct as a ground for setting aside an award, see ibid., 57-60, para. 126.]

C Cases referred to:

(1) *Smeaton Hanscomb & Co., Ltd.* v. *Setty* (*Sassoon I.*), *Son & Co.* (*No. 2*), [1953] 2 All E.R. 1588; 3rd Digest Supp.

(2) *Re Fearon & Flinn*, (1869), L.R. 5 C.P. 34; 2 Digest 588, *2210*.

(3) *Foster* v. *Great Western Ry. Co.*, (1882), 8 Q.B.D. 515; 51 L.J.Q.B. 233; 46 L.T. 74; 38 Digest 371, *736*. D

(4) *Gray* v. *Ashburton* (*Lord*), [1917] A.C. 26; 86 L.J.K.B. 224; 115 L.T. 729; 81 J.P. 17; 2 Digest 585, *2187*.

(5) *Lewis* v. *Haverfordwest Rural District Council*, [1953] 2 All E.R. 1599; 3rd Digest Supp.

(6) *Harris* v. *Petherick*, (1879), 4 Q.B.D. 611; 48 L.J.Q.B. 521; sub nom. *Harris* v. *Patherick*, 41 L.T. 146; Digest (Practice) 848, *3948*. E

Motion.

This was a motion to set aside an award made by an umpire, Mr. Norman A. G. Davis, in a dispute which had arisen between the applicants, Heaven & Kesterton, Ltd. (referred to hereinafter as " the buyers "), and the respondents, Sven Widaeus A/B, a Swedish company (referred to hereinafter as " the sellers ").

F By a contract, dated Mar. 8, 1957, the buyers ordered from the sellers various quantities of redwood timber of specified dimensions and, in the case of one particular dimension (namely, three inches by five and a half inches) of a particular quality (namely, " 2 ex log "). The contract was subject to the " Albion " General Terms, Conditions and Warranties, 1955, which contained no provision affecting the normal rights of the buyers to the rejection of goods for failure to G comply with the description. Under the terms any dispute regarding shipped goods which could not be settled amicably was to be referred to arbitration in the country of the destination of the goods and according to the law of that country, and the arbitration clause contained this provision:

> " An award shall be final and binding upon both parties. The costs of such arbitration shall be left to the discretion of the arbitrator(s) or umpire. H In deciding as to costs, the arbitrator(s) or umpire shall take into consideration the correspondence between the parties relating to the dispute and their respective efforts to arrive at a fair settlement."

On receiving delivery of the goods in August, 1957, the buyers made a claim against the sellers relating to two matters, the first being defects of quality. I This part of the claim was quantified at £455 4s. 4d. In the second part of the claim the buyers claimed the right to reject certain quantities of two of the sizes ordered (one being the three inches by five and a half inches, sold as " 2 ex log "), for failure to comply with the contract specification. This part of the claim was quantified at £573 8s. 4d. (the buyers, in this case, to return the goods), and, in the alternative, if the claim for rejection was not upheld, the buyers claimed damages amounting to £231 4s. for breach of warranty.

The parties being unable to settle the dispute, an arbitrator was appointed by each party, and, on the failure of the arbitrators to agree, the dispute was referred to an umpire. By his award, dated Sept. 14, 1957, the umpire awarded that the sellers should pay to the buyers £73 and that the buyers should pay the total costs of the arbitration amounting to £179 10s. By their notice of motion, dated Oct. 23, 1957, the buyers stated that they would move to have the award set aside on the grounds of misconduct by the umpire in that (a) at the time of the reference to him and before publishing his award he had been closely associated with the arbitrator appointed by the sellers; (b) he had not made a proper judicial inspection of the goods; and (c) in dealing with the costs of the reference he did not exercise his discretion in a proper judicial manner in that he made an award in favour of the buyers but ordered them to pay the whole costs of the reference and stated no reason therefor. The umpire filed an affidavit, dated Dec. 28, 1957, dealing with the allegations of misconduct and stating the reasons for his award as to costs. In regard to ground (a) of the grounds of misconduct alleged by the buyers, His Lordship (Diplock, J.), found that there had been no improper conduct on the part of the umpire. His Lordship further held that the award could not be set aside on the ground alleged in (b). The report is confined to the judgment on the question of the umpire's award as to costs.

M. R. E. Kerr for the applicants, the buyers.
Mark Littman for the respondents, the sellers.

DIPLOCK, J., after reviewing the facts and holding that there was no misconduct on the part of the umpire to enable the award to be set aside on either of the first two grounds relied on by the buyers, continued: The third ground on which it is sought, not that the award should be set aside (although that is how it is put in the notice of motion), but that that part of the award should be set aside which directed the buyers to pay all the costs of the arbitration, is on the ground:

> " That the said umpire misconducted himself in that he did not in dealing with the costs of the reference exercise his discretion in a proper judicial manner in that he made an award in favour of the applicants but nevertheless ordered them to pay the whole costs of the reference and stated no reason therefor."

I will first deal with the last four words which I have read, " and stated no reason therefor ". This is not an award in the form of a Special Case, and I see no reason why an umpire who has not been asked to state an award in the form of a Special Case should give any reasons for any part of his award, whether the substantive part or the costs part. I suspect that that particular part of the objection is founded on the words of Devlin, J., in *Smeaton Hanscomb & Co., Ltd.* v. *Sassoon I. Setty, Son & Co.* (*No. 2*) (1) ([1953] 2 All E.R. 1588), in which he was dealing with a Special Case in which an unusual award as to costs had been made. Devlin, J., said ([1953] 2 All E.R. at p. 1591) that, where an arbitrator who was making an award in the form of a Special Case had made an unusual award as to costs, he should set out in the Case his reasons for doing so. I certainly do not understand those words as applying to ordinary awards as well as to awards in the form of a Special Case. I have no doubt that the umpire in an arbitration of this kind has power to deprive a successful claimant of his costs and, indeed, to order a successful claimant to pay the costs of the other side in appropriate circumstances. The mere fact, therefore, that on the face of the award the buyers have succeeded as to the sum of £73 but have nevertheless been ordered to pay the costs of the sellers would, in my view, of itself be no ground for setting aside the award. If, in reply to this notice of motion, nothing had been said by the umpire (who is, of course, not a party to these proceedings) as to the reasons why he had made an award of that kind, I do not think that there would have been any grounds on which I could have interfered with his award. In *Re Fearon & Flinn* (2) ((1869), L.R. 5 C.P. 34), the question arose whether an umpire was entitled, having made an award in favour of the claimant, to direct him to pay the respondent's costs. BOVILL, C.J., said (L.R. 5 C.P. at p. 36):

> "The parties have selected the tribunal which is to settle the disputes between them, and have agreed that the costs of the submission, reference, and award shall be in the discretion of the arbitrators or umpire. The umpire, who had all the facts before him, has exercised his discretion. Assuming his judgment to be wrong, what power have we to interfere? or how can we exercise a discretion in the matter? I am far from saying that the umpire has not arrived at a just conclusion. It may be that there was no dispute about the smaller sum, and that all the costs incurred in the reference resulted from the excessive claim made by Fearon: and in that case the umpire might well be justified in imposing all the costs upon him. But, be that as it may, we cannot sit in judgment upon his decision."

KEATING, J., came to the same conclusion.

Counsel for the buyers submitted that since that decision, which was in 1869, the law has changed in that the court has used a wider power to interfere with the exercise by an arbitrator of his discretion as to costs. To a certain extent I think that that is true because in *Foster* v. *Great Western Ry. Co.* (3) ((1882), 8 Q.B.D. 515), the Court of Appeal accepted the view that an arbitrator or umpire must exercise his discretion in awarding costs judicially on the same principles, subject to any exceptional circumstances, as a judge must do. *Foster* v. *Great Western Ry. Co.* (3) was certainly not referred to with any great enthusiasm by the House of Lords in *Gray* v. *Lord Ashburton* (4) ([1917] A.C. 26), but it is an authority which is still binding on me, and which was followed recently in two cases in the Queen's Bench Division, *Smeaton Hanscomb & Co., Ltd.* v. *Sassoon I. Setty, Son & Co.* (*No. 2*) (1), to which I have already referred, and *Lewis* v. *Haverfordwest Rural District Council* (5) ([1953] 2 All E.R. 1599), a decision of LORD GODDARD, C.J. In each of those cases, on which counsel for the buyers strongly relied, the court set aside an award of an arbitrator in so far as it related to costs on the ground that it appeared from the material before the court that the arbitrator had exercised his discretion unjudicially; in *Smeaton Hanscomb & Co., Ltd.* v. *Sassoon I. Setty, Son & Co.* (*No. 2*) (1), he failed to have regard to an important matter to which he should have had regard, namely, who won or who lost the case; and in *Lewis* v. *Haverfordwest Rural District Council* (5), he had had regard to something to which he ought not to have had regard, namely, that he had no evidence that during the long time between the event, which was compulsory acquisition, and the date of the arbitration, any serious effort had been made by either party to settle the question.

Therefore, two things are clear from those authorities. The first is that, where it appears on the material before the court that an arbitrator has exercised his discretion as to costs in a non-judicial manner, the court has jurisdiction to set aside the award so far as it relates to costs. The second proposition which follows from those cases, and, I think, also from *Gray* v. *Lord Ashburton* (4), is that it matters not whether the material on which the court comes to the conclusion that there has been a non-judicial exercise of discretion appears on the face of an award which is in the form of a Special Case, as it was in *Smeaton Hanscomb & Co., Ltd.* v. *Sassoon I. Setty, Son & Co.* (*No. 2*) (1), or appears by affidavit evidence which comes before the court, as I have ascertained, from looking at the official file, that it did in *Lewis* v. *Haverfordwest Rural District Council* (5) and, indeed, as it appears that it did in *Gray* v. *Lord Ashburton* (4). Had the umpire in the present case put in no affidavit and given no reasons, there might have been little that the buyers could have said to me, but, as he has in fact filed an affidavit in which he has given his reasons for making his award as to costs, I am entitled to look at those reasons and see whether he has exercised his discretion judicially.

Before I look at those reasons, I think it is desirable to consider what is the principle that lies behind the now established right of the court to interfere with the exercise of the discretion of an arbitrator in regard to costs. The basis and utility of arbitration as a method of determining disputes is that the parties select their own tribunal and agree to be bound by its decision on fact and, in so far as they do not take advantage of the special remedies by way of a Special Case, on questions of law. In general, an award of an arbitrator cannot be set aside for error whether of fact or of law except by the machinery which is supplied through a Special Case, or if he chooses to make a speaking award, when it may be set aside for error on its face. An award can always be set aside, however, for misconduct. That word, as many judges have pointed out, is rather an unfortunate word in that it suggests moral blame, whereas it covers irregularities of a kind which involve no moral blame, conduct which is not proper in relation to a quasi-judicial proceeding. It seems to me that misconduct in that wide sense in which it is used in relation to arbitration is also a ground on which the court can interfere with the exercise by the arbitrator of his discretion as to costs. Indeed, I am inclined to think that, as a matter of practice, an appellate court, in interfering with the exercise by an inferior court of its discretion as to costs, interferes only in the sort of case in which there has occurred what is known in arbitration law as " misconduct ", but with the difference, that an appellate court can always correct an inferior court on matters of law. Perhaps one should add that in the case of an inferior court there may be misconduct in the technical sense of making a mistake in law.

I think, therefore, that, in considering whether I have a right to set aside the umpire's award in regard to costs in this case, I must apply the same principles as those which I would apply in setting aside any other part of the award, reminding myself, however, that if the umpire exercises his discretion as to costs in a way in which a High Court judge ought not to do, that would amount to misconduct; subject to this, that, if the terms of reference direct him that he may or should take into consideration matters which a High Court judge should not take into consideration, he can and, indeed, if so directed, must do so.

The umpire's reasons for making the award which he did as to costs in this case are set out in his affidavit. He says:

> " I gave considerable thought and attention to the question of costs and I had clearly in mind that normally it would be right to award the whole or part of the costs of the arbitration to the successful party. In the present arbitration in coming to my decision upon costs I had regard to all the facts and circumstances of the case including the following: (a) I had found against [the buyers] upon their claim for rejection; (b) in respect of their total claim for damages amounting to £686 8s. 4d. I had only found them entitled to recover £73; (c) I formed the view that the buyers had presented an exaggerated claim; (d) it was my view that if [the buyers] had only put forward a claim for a sum approximately equivalent to that which I had awarded it is unlikely that the substantial costs of this arbitration would have been incurred."

So far as the first three reasons are concerned, they are really to this effect: " I came to the conclusion that the buyers had put forward an unjustifiable claim for rejection and that they had put forward a claim for damages exaggerated by nearly ten times ". That to fail on one important issue in a case is a matter which can and should be taken into consideration in dealing with costs needs no authority; and to put forward an exaggerated claim on which the claimant succeeds on only a small part is a matter which can result in his being ordered to pay the costs, despite his success as to a small part, again, I think, needs no authority, but, if authority be needed, it is to be found as long ago as 1879 in *Harris* v. *Petherick* (6) ((1879), 4 Q.B.D. 611).

A The fourth ground put forward, namely, that the umpire thinks that the matter
could have been settled if what he regards as an unexaggerated claim had been
put forward, is a matter which counsel for the buyers suggested was an extraneous
matter which ought not to be taken into consideration. Counsel relied in that
respect on the decision in *Lewis* v. *Haverfordwest Rural District Council* (5).
I think that there would be a good deal to be said for that submission if it were
B not for the special terms of the arbitration clause relating to the umpire's discretion as to costs:

> "In deciding as to costs, the arbitrator(s) or umpire shall take into consideration the correspondence between the parties relating to the dispute and their respective efforts to arrive at a fair settlement."

C If the umpire took the view, as it appears from his affidavit that he did, that this
was a grossly exaggerated claim, and if he looked at the correspondence in which
such a claim was put forward, I think that he might legitimately take the view
that the putting forward of an exaggerated claim of the kind which he thought it
was, was a matter which made it highly unlikely that any fair settlement could
be arrived at by the sellers, and that is a matter which he was entitled to take
D into consideration. It seems to me that, taking the view that he did as to the
failure of the right to reject and as to the amount of damages, he was entitled on
that view to make the award as to costs which he in fact made. I am not saying
for a moment that it is the same award that I should have made, but the umpire
has a discretion in the matter and it does not seem to me that there is shown here
sufficient ground for saying that I should interfere with his discretion on the
E facts as he found them.

Counsel for the buyers submitted that, assuming my decision on the last point
to be right, nevertheless it was apparent on the material before the court that
the umpire was wrong in law in deciding that there was no right to reject a
part of the goods, the claim in respect of which formed something more than
half the total amount claimed by the buyers. Counsel relied on passages in the
F affidavit which were put in by the umpire in order to deal with the allegation
that he had not inspected the goods properly. The chief passage relied on was:

> "Regarding the 3 inches × 5½ inches sold as 2 ex log . . . I readily found that part of them were not 2 ex log and awarded accordingly."

Counsel for the buyers submitted that if that was what the umpire found, there
G was an elementary error of law in that the umpire found against the right to
reject the goods which he, in terms, found did not comply with the description.
It seems fairly clear that the umpire has made an error of law in regard to the
timber sold as "2 ex log". Counsel for the buyers contended that, if the umpire
had corrected that error of law, then probably all four of his reasons* for awarding
costs against the buyers would go. The first must go because he should not have
H found against the buyers on their claim for rejection. The second must also go
because on the buyers' total claim for damages he would have found a much
larger sum in their favour. The third must go, or at any rate must go in part,
because he formed the view that the buyers presented an exaggerated claim.
The fourth, I think, must go because he says it was his view that, if the buyers
had only put forward a claim for a sum approximately equivalent to that awarded,
I it is likely that the costs of the arbitration would not have been incurred. If
they had put forward such a claim, they would have put forward a claim for less
than that to which they were entitled. On the true position in law, therefore, the
reasons for ordering the buyers to pay the costs of the sellers disappear. I do not
know what the umpire would have done with regard to costs if he had not made
that mistake, but, if I am entitled to look at the real position in law, then I
should set aside the award and, I think, probably remit it back to the umpire

---

* See p. 424, letter G, ante.

to deal with the costs, but I do not think that I have all the material on which I could do so.

Counsel for the buyers submitted that, in exercising my jurisdiction to set aside the award as regards costs, I am entitled to look at the real position and to ask myself whether, on the true position in law, it was a judicial exercise of his discretion by the umpire. Counsel for the sellers, on the other hand, perhaps encouraged by me, submitted that arbitrators were entitled to make mistakes of fact and of law, and that, in considering whether or not there has been a proper exercise of judicial discretion, the court had to put itself in the position of the arbitrator at the time at which he was making his award and had to make the same errors in law and the same errors of fact, if there were any, as the arbitrator had done. I think that the matter can be tested in this way. Assume that the only issue which had gone to arbitration in this case was whether or not the buyers were entitled to reject the 3 inches × $5\frac{1}{2}$ inches 2 ex log timber and the umpire had made the same mistake in law as he has made in the present arbitration and, accordingly, had awarded that the buyers were not entitled to reject and had awarded that the sellers should have their costs of the arbitration. If, then, on a motion—not on a Special Case—to set aside the award as respects costs for misconduct there appeared on the evidence before the court what appears now in this case, that there was an error in law on the part of the arbitrator in deciding in favour of the sellers, I find it very difficult to see how I could have any jurisdiction to set aside the award as to costs when quite plainly I would have no jurisdiction to set aside the award as to the substance. The reason why I should have no jurisdiction to do so would be because there would be nothing, in the case which I have assumed, which amounted to misconduct on the part of the arbitrator. There would be merely a mistake and the mistakes of arbitrators are what the parties agree to accept when they go to arbitration. I think, therefore, that in the present case I am not entitled to say: " With the material before me it is apparent that the umpire has made a mistake as to his award, and that that mistake which he has made has also affected his judgment as to costs ". I must judge his exercise of discretion as to costs by putting myself in the position in which he was when he made his award with all the errors in law or of fact which he was entitled to make when he was appointed as umpire. If I do that, for the reasons which I have already given, I cannot say that the umpire, on the facts and law as he understood them, exercised his discretion unjudicially, or, as I would prefer to say because I think that it is the right way of looking at it, was guilty of misconduct in the way in which he exercised his discretion as to costs. This motion, therefore, fails.

Motion dismissed.

Solicitors: *Theodore Goddard & Co.*, agents for *Andrew M. Jackson & Co.*, Hull (for the applicants); *William A. Crump & Son* (for the respondents).

[*Reported by* E. Cockburn Millar, *Barrister-at-Law.*]

Re D. (an infant).

[COURT OF APPEAL (Lord Evershed, M.R., Parker and Sellers, L.JJ.), January 27, 1958.]

Adoption—Dispensing with consent to order—" Consent . . . unreasonably withheld "—Illegitimate child—Refusal by putative father—Child's welfare paramount consideration—Adoption Act, 1950 (14 *Geo.* 6 *c.* 26), *s.* 2 (4) (*a*), *s.* 3 (1).

The applicants, a husband and his wife, sought to adopt a boy, aged nearly three years, who was an illegitimate child. After the birth of the child, the mother had obtained an order on the respondent, as the putative father, that he should pay a weekly sum for the child's maintenance. The respondent made the weekly payments for some time, but then ceased payment at the mother's suggestion. The respondent was convicted of murdering the mother and was sentenced to death, but he was reprieved and was at the date of the present application serving a life sentence in prison. The respondent opposed the application for an adoption order, and stated in evidence that his unmarried sister would come to England from India and would arrange for the child to be cared for. He also said that he wanted his sister to have the child " because he is my son, and I love him. That is the sole reason I oppose the adoption ". The Court of Appeal assumed for the purposes of their decision that the respondent was a person whose consent to the adoption was required by virtue of the Adoption Act, 1950, s. 2 (4) (a)* in consequence of the maintenance order made against him, subject to the court's power under s. 3* of the Act to dispense with his consent if it was unreasonably withheld.

Held: a putative father had not the rights of a lawful parent, and the primary consideration governing the question whether or not the adoption order should be made was the welfare of the child; judged by that test, the adoption order should be made, the respondent's consent being dispensed with as being unreasonably withheld.

Hitchcock v. *W.B. & F.E.B.* ([1952] 2 All E.R. 119) distinguished.

Appeal allowed.

[As to dispensing with consent to an adoption order, see 21 HALSBURY'S LAWS (3rd Edn.) 232, 233, para. 506, particularly note (p).

For the Adoption Act, 1950, s. 2 and s. 3, see 29 HALSBURY'S STATUTES (2nd Edn.) 468-471.]

Cases referred to:

(1) *Hitchcock* v. *W.B. & F.E.B.*, [1952] 2 All E.R. 119; [1952] 2 Q.B. 561; 116 J.P. 401; 3rd Digest Supp.

(2) *Re M.* (*an infant*), [1955] 2 All E.R. 911; [1955] 2 Q.B. 479; 119 J.P. 535; 3rd Digest Supp.

Appeal.

This was an appeal by the applicants from an order of His Honour JUDGE HARCOURT BARRINGTON, Woolwich County Court, dated July 24, 1957, dismissing their application to adopt an infant. The facts appear in the judgment of LORD EVERSHED, M.R.

A. L. Stott for the applicants.

J. Sofer for the respondent.

LORD EVERSHED, M.R.: In the very strange circumstances of the present case I have come to a clear conclusion that the learned county court judge, with all respect to him, fell into error and misdirected himself on a vital matter. The case is one which arises under the Adoption Act, 1950, two paragraphs of which require some consideration. The case concerns a little boy who will shortly be three years old. He was, unhappily for him, the fruit of an illicit union between his mother and the respondent. The application which has given rise to this appeal is an application by two persons, husband and wife, for an order under the Act of 1950 for the adoption of this child. It is right that it should be said at once, as the learned judge said, that there is nothing whatever that could be said against these two applicants; and, indeed, as it seems to me, much that could be said for them. The respondent (the putative father) opposed the application, and according to the judge's note he did so apparently on two grounds, though the second ground was that which he himself put in the forefront of his opposition.

---

* For the relevant provisions of these enactments, see p. 428, letter I, to p. 429, letter A, post.

The respondent came from India, being one of a substantial family with four brothers and four sisters. He told the learned county court judge that his " big sister ", a lady aged about thirty, who was unmarried, intended, in connexion with a business with which she was concerned, to come over to England, that she would work here and get someone to look after the boy while she was at work, and that she would be in effect the child's foster mother. At the end of his evidence the respondent used this phrase: " I want my sister to have the child because he is my son, and I love him. That is the sole reason I oppose the adoption ". At this stage I must advert to certain other very lamentable circumstances in the case. It appears that after the birth of this child, the mother applied to the Fulham magistrates in June, 1955, who made an order on the respondent that he pay 30s. a week for the infant's maintenance. He did so for some time, and then ceased. According to his evidence (and, as the learned judge points out, it is not controverted) he ceased to pay because the mother said: " Don't go on paying because I am going to Scotland on a visit and shall be leaving the child with somebody in Earls Court. When I come back, we will be married ". She did not come back and marry the respondent. She appears to have married someone else, and the respondent murdered her. He was convicted of that murder, but the capital sentence was not carried out. He is now serving a life sentence in Her Majesty's prison. It is, no doubt, true that in the case of a man serving a life sentence, it does not at all follow that he will remain in prison for the rest of his days. He said somewhat blandly in the course of his evidence: " I have not been told when I can expect release from prison ". Indeed, I have been forced to wonder if he regards murder as a really serious matter—as serious, say, as dipsomania, which might in certain cases deprive the father of a legitimate child of the right to look after it. It is, however, quite certain that, having murdered the child's mother, he is (and in the foreseeable future is likely to remain) in a position in which he would be quite unable to perform any parental obligations towards the child, or in which any ties of affection could conceivably flourish at all. Still, he opposed the application, and I have referred to the reason for his opposition. On his behalf it may perhaps fairly be said that the mother did not do well by him; that, of course, cannot possibly excuse his conduct.

Two points arise on the paragraphs in the Act, and before I state them I must refer to the paragraphs themselves. By s. 2 (4) of the Act it is provided:

> " Subject to the provisions of s. 3 of this Act, an adoption order shall not be made—(a) in any case, except with the consent of every person or body who is a parent or guardian of the infant or who is liable by any order or agreement to contribute to the maintenance of the infant . . ."

Section 3, which was anticipated in the paragraph that I have read, provides in sub-s. (1), so far as relevant:

> " The court may dispense with any consent required by para. (a) of sub-s. (4) of s. 2 of this Act if it is satisfied . . . (c) in any case, that the

> person whose consent is required cannot be found or is incapable of giving his consent or that his consent is unreasonably withheld."

The first question which was before the learned judge, and which counsel for the applicants intimated that he would desire to put before us, is whether on the facts of this case the respondent is a person " who is liable by virtue of any order to contribute to the maintenance of the infant ". He puts forward the point that at the relevant date the respondent, having murdered the mother, had ceased, therefore, to be under an obligation to pay the maintenance. It was, therefore, questioned what was the effect of the murder of the mother on the obligations under the order on the father: did they survive, or did they not ? If the true view is that at the relevant date the respondent could not be said to be a person " liable by virtue of any order to contribute to the maintenance of the infant ", then his consent was no longer required under the section. We have not heard argument on that point, which the judge decided or assumed in the respondent's favour, and, therefore, I say nothing further about it, because in my judgment it is sufficient to say that if the father is a " person " within s. 2 (4) (a), on the facts of this case his consent was unreasonably withheld within the terms of s. 3 (1) (c); and it is on that point—whether consent was or was not unreasonably withheld—that the present argument has been put before us.

The learned judge in concluding, as he did, that the refusal on the respondent's part was not unreasonable, directed himself as follows. He said that since the respondent is within s. 2 (4) (a)—i.e., that he was a " person " comprehended by that paragraph—" he must qua parent be treated on the same footing as a legal parent for the purpose of deciding whether his consent is being unreasonably withheld; that is, the principle of *Hitchcock* v. *W.B. & F.E.B.* (1) ([1952] 2 All E.R. 119) applies, and the test is whether his attitude, as a father, in refusing consent, is unreasonable ", and the learned judge referred to a passage in the judgment of DEVLIN, J., in that case. With the greatest respect to the learned judge, I think it is at that point that he fell into error, for I do not agree that the principle of *Hitchcock* v. *W.B. & F.E.B.* (1) applied, and I do not agree that because the respondent was (as we assume) a " person " within s. 2 (4) (a), for the reasons that I have stated, he must, therefore, qua parent be treated on the same footing as a legal parent. *Hitchcock* v. *W.B. & F.E.B.* (1) was that of a legitimate child. It was a case in which an order for custody had been made by justices in favour of the child's mother, and thereafter application was made for the child's adoption. Having become separated from the mother, the father objected. The magistrates had taken the view that by reason of the order for custody, the father's objection should be disregarded, and held unreasonable. The Divisional Court did not take that view; they came to the conclusion on the evidence that this was a case in which, though the father had had in the past a somewhat shady career, he had pulled himself together, was working well and satisfactorily, and was in a position to make proper provision for the child and look after him. More important than that, however, the court observed that the father was the child's father, having the rights of parenthood which belonged to the father of a legitimate child; and, there being no disqualification—for it was at this point that reference by way of example was made to dipsomania being a disqualification which might prevent the father prima facie from exercising those natural and legal rights—therefore it was not right that his consent should be disregarded. In my judgment, that case, and the principle of it, has no application to the present. It depended first and last on the circumstance that the father in *Hitchcock* v. *W.B. & F.E.B.* (1) was the father of a legitimate child, claiming as such to exercise his parental rights. In the present case, the respondent is not here as the father of a legitimate child, but as the putative father of an illegitimate child; and this court has decided in *Re M.* (*an infant*) (2) ([1955] 2 All E.R. 911) that the putative father of an illegitimate child, for the purpose of the Adoption Act, 1950, has not the rights of a parent. More precisely, the word " parent " in s. 2 does not comprehend the father of an illegitimate child, and so he cannot come to court and claim (as could the father of a legitimate child) to exercise the parental rights which would then belong to him. As PARKER, L.J., pointed out in the course of the argument, that position under the Act is emphasised if one looks, e.g., at s. 5 of the Act where parental rights are spoken of in circumstances which quite clearly exclude the consideration of someone in the situation of the respondent in this case. Indeed, counsel for the respondent has not argued to the contrary so far; he concedes that the learned judge at this point fell into error in saying that the principle of *Hitchcock* v. *W.B. & F.E.B.* (1) applied. But counsel has, none the less, contended that one cannot sensibly treat the respondent as though he was a total stranger. He observes that had the respondent taken steps to make the child a ward of court, the views that he put forward for the child's welfare would be entitled to receive consideration from the court. That, no doubt, is so. The respondent has not in fact taken any such step. I venture to think that at the most that argument cannot get counsel beyond this point, that, since we are not here concerned with any parental rights which would be taken away by the adoption, the primary test at any rate (without putting it any higher) of the right order to make is that of the welfare of the infant; and again in that I think I am saying no more than counsel for the respondent has said.

Looking at the matter from that point of view, therefore, what is the answer ? It will be recalled that in putting his case before the learned county court judge, the respondent had informed the court of the pending arrival in England of his sister. For some reason that did not take place; the sister appears still to be in India, and all we know is that she has suggested that the child might be sent to India. Counsel for the respondent says that he has some further information, and his suggestion was that, in the interests of the child, it was desirable that this matter should be re-heard. I am not persuaded that that is so. I think that in the circumstances of this case an end should be made of this matter, and that an order should be made in favour of the applicants. One reason for that view (and it will suffice) is that so far as I can see in the very peculiar circumstances of this case, where nothing whatever can be said, from the child's point of view, against the adopters, the welfare of the child seems to me almost overwhelmingly to point in favour of an order being made, and made now. After all, if such an order is not made, what is going to be this child's future ? He is going to be brought up by some relative of the respondent. He will clearly not at any relevant age, so far as I can see, be able to enjoy anything comparable to a father's affection and protection. On the contrary, he will inevitably find out sooner or later (and probably sooner) that he is the illegitimate child of a union, the mother of which was murdered by the father, which father is serving a life sentence for that offence. I cannot think that bringing the child up in that state of affairs would be to his advantage. Indeed, it may well be that here, even if the respondent could assert the rights of what I will call a legitimate father, the fact of his having murdered the boy's mother (for which offence he was imprisoned for life) would itself—the other circumstances in this case being the same—disqualify the father from successfully refusing his consent. But it is unnecessary to go so far because, as I have more than once said, the respondent here can assert no parental rights; and, once that is out of the way, it appears to me, I confess, tolerably plain in the very singular, indeed very distressing, circumstances of this case that there is an overwhelming advantage from the infant's point of view in taking advantage of the generous offer of the applicants, and making an order in their favour. I would, therefore, allow this appeal, and make an adoption order accordingly.

PARKER, L.J.: I entirely agree. It seems to me clear that the learned county court judge, in considering whether consent had been unreasonably withheld, fell into error in treating the test as the same in this case as in the case of a parent. He approached the matter on the principles laid down in *Hitchcock* v. *W.B. & F.E.B.* (1) ([1952] 2 All E.R. 119), which was the case of a parent as opposed to a putative father, and, applying that test, held that consent was not unreasonably withheld. I think it is clear that in a case, such as this, of the putative father, the primary consideration, if not the only one, must be the welfare of the infant; and as to that, it appears to me that the case is overwhelmingly made out in favour of adoption. I would add that if one applied the tests laid down by DEVLIN, J., in *Hitchcock* v. *W.B. & F.E.B.* (1) ([1952] 2 All E.R. at p. 123), it seems to me that, even if this respondent had been the parent, he would certainly still have unreasonably withheld consent. Accordingly, I would allow the appeal.

SELLERS, L.J.: I entirely agree, and I do not think that I can usefully add anything to the reasons given by my Lords.

Appeal allowed. Adoption order made.

Solicitors: *Braund & Fedrick* (for the applicants); *Pratt & Sidney Smith* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

UNION CASTLE MAIL STEAMSHIP CO., LTD. *v.* UNITED KINGDOM MUTUAL WAR RISKS ASSOCIATION, LTD.

[QUEEN'S BENCH DIVISION (Diplock, J.), January 20, 21, 22, 1958.]

Insurance—Marine insurance—War risks time policy on vessels' hull and machinery—Insurance against expenses incurred by "prolongation" of voyage in compliance with orders or directions or with approval of a government department or insurers—Admiralty warning issued advising merchant shipping to avoid Suez Canal area as a result of hostilities—Vessels diverted round Cape because of warning—Diversions notified to insurers—Whether assured entitled to recover expenses incurred in diversions—Whether voyages prolonged.

The hull and machinery of the plaintiffs' vessels, the Dunnottar Castle and the Rhodesia Castle, were insured under standard war risks time policies issued by the defendants, a mutual insurance company. The policies covered, by cl. 1 (1) (F) of the policies, "expenses incurred by [the plaintiffs] by reason of:—(1) the detention of the insured ship in pursuance of the orders or directions or with the approval of the committee or of any British government department . . . given in order to avoid loss of or damage to the insured ship by any peril hereby insured; (2) prolongation of the voyage arising out of compliance with such orders or directions, or with such approval as aforesaid". Nothing, however, was payable under cl. 1 (1) (F) in respect of the first seven days of each such period of detention or prolongation.

The Dunnottar Castle sailed from England on Oct. 17, 1956, on a voyage round Africa in a clockwise direction and arrived at Port Said on her outward voyage on Oct. 30, 1956; she was due back at London on Dec. 21, 1956. The Rhodesia Castle sailed from England on Sept. 26, 1956, on a voyage round Africa in an anti-clockwise direction and was due to enter the Suez area on Nov. 15, 1956, and to be at London on Dec. 1, 1956. On Sept. 13, 1956, the directors of the defendants (who were the committee referred to in the policies) authorised the defendants' managers, in the event of a government department's recommending that ships should not pass through the Suez Canal, to direct the defendants' members accordingly and to notify them that failure to comply with the direction would be a breach of warranty under the policies. Hostilities between Egypt and Israel broke out on Oct. 29, 1956, and on Oct. 30, 1956, the Admiralty advised merchant shipping " for the time being and until further notice to keep clear of the Suez Canal and Egyptian and Israeli waters ". The Suez Canal was blocked early in November, 1956, and thereafter remained blocked for many months. At no time did the United Kingdom government exercise statutory emergency powers and no direction legally binding in law on shipowners was given by a government department. On Oct. 30, 1956, the plaintiffs gave instructions for the Dunnottar Castle to sail forthwith via the Cape of Good Hope, and on Nov. 2, 1956, further instructions were given for her to sail on to Mombasa and to return thence to London sailing round the Cape. Certain ports of call were altered. The Rhodesia Castle was instructed to turn at Mombasa and to return to London. In her case also certain ports of call were altered. The defendants were informed of these diversions on or before Nov. 6, 1956. Each vessel arrived in London more than seven days later than she originally had been due. In each case the diversion from the original voyage resulted, among other results, in the vessel's not calling at some (four and five, respectively) ports at which she had been due to call, in calling twice at others (six and four ports) and in embarking freight and passengers carried in a reverse direction to that originally intended. The plaintiffs incurred expenses in the diversions of the ships and also effected some savings (e.g., Suez Canal dues) and earned some benefits (e.g., additional freight or fares of passengers) which they would not otherwise have done.

Held: (i) the plaintiffs were not entitled to recover the expenses that they had incurred from the defendants under the policies for the following reasons—

(a) the phrase " orders or directions " in cl. 1 (1) (F) (1) referred only to such instructions as had legal force and the Admiralty's advice was not a " direction " within cl. 1 (1) (F) (1) because disregard of the advice would not have given rise to legal sanctions (see p. 436, letter F, post).

(b) although steps taken in order to give heed to the Admiralty's advice would be acts done " with the approval " of a British government department within cl. 1 (1) (F) (2) and some at any rate of the steps in fact taken by the plaintiffs were steps within the limits of such approval, yet other steps taken went beyond what was necessary to meet the Admiralty's advice and, in substance, each vessel had undertaken a new or changed voyage, as distinct from a continuation of the original voyage, and thus there had not been a " prolongation " within cl. 1 (1) (F) (2) (see p. 439, letters F to I, post).

(c) the steps taken by the plaintiffs were not taken with the approval of the committee (i.e., the directors of the defendants) within cl. 1 (1) (F) (2) (see p. 438, letter B, post).

(ii) (*Obiter*) on the assessment of an amount recoverable under cl. 1 (1) (F) of the policies—

(a) only such expenses as were incurred after the expiry of seven days from the date on which a voyage should have ended would be recoverable under cl. 1 (1) (F) (2), because the word " prolongation " there bore a temporal, not a geographical, meaning, and did not refer to an increase in the distance travelled by the vessel (see p. 440, letter D, post).

A (b) neither the savings made by deviations within cl. 1 (1) (F) (1) (2) of the policies nor the benefits gained thereby ought to be taken into consideration in assessing any amount payable under cl. 1 (1) (F) (2) in respect of a prolongation of a voyage within that paragraph (see p. 440, letters E to H, post).

[As to marine insurance and war risks, and the f.c. and s. clause, see 22
B HALSBURY'S LAWS (3rd Edn.) 76, para. 135; and as to the causation of loss by war risks, see ibid., p. 79, para. 138.

As to reinsurance agreements with mutual insurance companies undertaking the insurance of war risks, see 22 HALSBURY'S LAWS (3rd Edn.) 411, 412, para. 838; and as to the risks undertaken by mutual insurance companies, see ibid., p. 178, para. 342.]

C **Action.**

In this action the Union Castle Mail Steamship Company, Ltd., the plaintiffs, claimed to be entitled to recover, under standard forms of war risks time policies issued to them by the United Kingdom Mutual War Risks Association, Ltd., the defendants, in respect of two vessels owned by the plaintiffs, certain expenses which the plaintiffs incurred when the vessels were diverted from their scheduled
D voyages as a result of a crisis arising in 1956 in the Suez Canal area.

The plaintiffs were at all material times the owners of the vessels Dunnottar Castle and Rhodesia Castle, cargo and passenger liners, and by contracts contained in two policies of marine insurance dated Nov. 3, 1956, in the form of 1956/57 Standard Form of War Risks Time Policy, the defendants agreed to insure the plaintiffs and their vessels in respect of the hull and machinery of the
E vessels from noon on Feb. 20, 1956, until noon on Feb. 20, 1957, against the risks set out in the policies. Clause 1 (1) of the policies provided as follows:

> "This insurance is only to cover the following, namely:— . . . (F) Expenses incurred by the assured by reason of:—(1) the detention of the insured ship in pursuance of the orders or directions or with the approval of the committee* or of any British government department or official or British
> F military authority given in order to avoid loss of or damage to the insured ship by any peril hereby insured; (2) prolongation of the voyage arising out of compliance with such orders or directions, or with such approval as aforesaid; (3) detention of the insured ship by persons engaged in war, civil war, rebellion or revolution or by military or usurped power; (4) detention by an official acting or purporting to act on behalf of any foreign
> G government or authority not engaged in war, civil war, rebellion or revolution when such detention is considered by the committee in its absolute discretion to have been in furtherance of the political aims of such government or authority. Nothing shall be payable in respect of the first seven days of each such period of detention or prolongation and the amount recoverable shall be assessed by the committee, whose decision shall be in
> H all respects final."

The facts relating to the claim were as follows. Hostilities between Israel and Egypt having broken out on Oct. 29, 1956, and an ultimatum having been given by the governments of the United Kingdom and France to the Israeli and Egyptian governments on Oct. 30, 1956, requesting them to stop all warlike
I action and to withdraw their military forces ten miles from the Suez Canal failing which the British and French forces would intervene, Her Majesty's Board of Admiralty (hereinafter referred to as "the Admiralty") issued the following statement at 4.30 p.m. on Oct. 30, 1956:

> "In view of the situation between Israel and Egypt, merchant shipping is advised, for the time being and until further notice, to keep clear of the Suez Canal and Egyptian and Israeli waters."

---

* By the defendants' rules, their directors were referred to as "the committee" in policies issued by the defendants.

Egypt rejected the Franco-British ultimatum and hostilities, involving the armed forces of Britain, France, Egypt and Israel continued in the area covered by the Admiralty warning until Nov. 6, 1956. On Nov. 1, 1956, the Egyptian authorities announced that the Suez Canal was blocked and on Nov. 2, 1956, the Admiralty confirmed that the canal was blocked; it remained blocked for many months thereafter. On Oct. 30, when the Admiralty warning was issued, the Dunnottar Castle was at Port Said having sailed from London on Oct. 17, 1956, on a scheduled round-Africa voyage; her scheduled voyage was in a clockwise direction via Gibraltar, Marseilles, Genoa, Port Said, Suez, Aden, Mombasa and other ports in Africa to Capetown and thence, via St. Helena, Ascension and Las Palmas back to London where she was due on Dec. 21, 1956. The Rhodesia Castle on Oct. 30, was at Beira having sailed from London on Sept. 26, 1956, on a scheduled round-Africa voyage in an anti-clockwise direction via Rotterdam, Las Palmas, Ascension, St. Helena, Capetown and other South African ports, Beira, Dar-es-Salaam, Zanzibar, Tanga, Mombasa, Aden, Port Sudan, Suez, Port Said, Genoa, Marseilles and Gibraltar, being due to arrive back in London on Dec. 1, 1956. The plaintiffs, on learning of the warning issued by the Admiralty, cabled to the master of the Dunnottar Castle that, in view of the warning, the vessel was to keep clear of Suez and Egyptian waters, but, on being informed that the Dunnottar Castle was at Port Said, the plaintiffs cabled further instructions directing the vessel to proceed with her voyage via the Cape of Good Hope and stating that instructions would follow regarding bunkers and ports of call. Accordingly, the Dunnottar Castle left Port Said on Oct. 31, 1956, and on the same date, the plaintiffs informed their office at Mombasa that the vessel had turned at Port Said, was proceeding via the Atlantic and that the office would be advised as to amended schedules as soon as possible. As a result of the diversion of the Dunnottar Castle at Port Said she arrived in London on Jan. 10, 1957, viz., twenty days later than was scheduled: and compared with the scheduled voyage, of the fourteen intermediate ports at which the Dunnottar Castle was due to call at the time of her diversion, she omitted to call at four ports, Suez, Aden, St. Helena and Ascension, and she called twice, once in each direction, at six ports, Las Palmas (for bunkers and water only), Capetown, Port Elizabeth, East London, Durban and Beira. She embarked additional passengers on the first call at the last five ports and loaded additional freight, the passengers being carried in the reverse direction to that of the scheduled voyage; other passengers who were booked on the Dunnottar Castle, however, were carried by the Rhodesia Castle, and passage money was returned to passengers travelling to Capetown and elsewhere who, in effect, were carried by a shorter route. As regards the Rhodesia Castle which was at Beira on Oct. 30, the plaintiffs, as a result of the Admiralty warning, ordered her to continue on her intended voyage as far as Mombasa and there to turn round and carry out her intended voyage to Genoa and Marseilles and return to London via the Cape. As a result of the diversion of the Rhodesia Castle at Mombasa, she arrived back in London on Dec. 11, 1956, viz., ten days later than was scheduled. As compared with her scheduled voyage, of the seven intermediate ports at which the Rhodesia Castle had still to call at the time of her diversion, she omitted to call at five ports, Aden, Port Sudan, Suez, Port Said and Gibraltar and called a second time at four ports which she had already visited, Dar-es-Salaam, Durban, Capetown and Las Palmas; she called, to embark or disembark passengers and to load freight, at Dar-es-Salaam, Durban and Capetown and passengers disembarked at these ports were carried in the reverse direction to that of the scheduled voyage. The plaintiffs notified the defendants of the diversion of the Dunnottar Castle by a letter dated Nov. 2, 1956, which read:

> "For your information and records we have to give you formal notification that, following the Admiralty advice with regard to shipping likely to be affected by operations in the Egyptian crisis, the Dunnottar Castle, which

> arrived at Port Said on [Oct. 30] en route for East and South Africa via Suez Canal, was turned round and is now proceeding back through the Mediterranean and will make her passage via the Cape."

The diversion of the Rhodesia Castle was notified to the defendants by letter dated Nov. 5 which read:

> "We understand that the war risks association have agreed to meet, to some extent, the additional expenses incurred by owners through diversions owing to the Egyptian hostilities . . . we now give you formal advice that the Rhodesia Castle . . . which [was] already on [a] round-Africa voyage, out via the Cape and home via the Suez Canal, will be turned round at Mombasa."

The plaintiffs did not, however, inform the defendants that both vessels would be making calls additional to the scheduled calls, for passengers and freight, and, while the defendants raised no objections to the alterations in the scheduled voyages, they did not expressly approve them. The defendants acknowledged both notifications in letters dated Nov. 6, 1956. The possibility of a crisis arising in the Middle East had been foreseen by the defendants, whose committee, viz., the directors, had passed a resolution on Sept. 13, 1956, in the following terms:

> "By virtue of the powers afforded under r. 10 of the [defendants'] rules, the committee hereby authorise the managers, in the event that any department of H.M. Government recommends that ships shall not pass through the Suez Canal, to direct all members accordingly and to notify them that failure to comply with such direction will be considered as a breach of warranty under cl. 5* of the [defendants'] policy."

As a result of the alteration in the voyages of the Dunnottar Castle and the Rhodesia Castle the plaintiffs incurred certain expenses, but they also effected certain savings, e.g., the dues which would have been payable on passing through the Suez Canal, further, they received certain benefits by way of additional freights and passenger fares. The plaintiffs now sought declarations that the defendants were liable to pay the expenses so incurred but that the plaintiffs were not obliged to give credit for the savings effected, contending that the voyages were prolonged in excess of seven days, in compliance with the orders and directions of a British government department within the meaning of cl. 1 (1) (F) (2) of the policies, viz., the Admiralty; alternatively, that the voyages were prolonged with the approval of the Admiralty within cl. 1 (1) (F) (2), or, in the final alternative, that the prolongations were with the approval of the defendants' committee within cl. 1 (1) (F) (2), as the committee in fact knew and approved of the prolongations, would have given its approval expressly if asked to do so, would have disapproved of the continuation of the voyages without regard to the Admiralty warning and at no time raised any objection to the prolongations. The plaintiffs also relied on the resolution passed by the committee on Sept. 13, 1956, as constituting the committee's approval.

A. A. Mocatta, Q.C., and *M. R. E. Kerr* for the plaintiffs.
Eustace Roskill, Q.C., and *S. Terrell* for the defendants.

Cur. adv. vult.

Jan. 22. **DIPLOCK, J.**, read the following judgment: I am informed that the action is a friendly action, and that it is brought with the object of obtaining the guidance of this court, and may be of superior courts, as to the true construction of the relevant clauses of the policy, and their application in the circumstances which arose in the Suez crisis; the parties have accordingly waived the arbitration clauses in the policies. Furthermore, while not strictly a test action, the cases of the Dunnottar Castle and the Rhodesia Castle have been selected as raising a variety of questions, one or more of which are likely to arise in respect of other vessels insured by the defendants or by other mutual insurance associations who, I am informed, have issued policies in similar terms. I have accordingly been invited to deal with the various contentions of the parties as to the true construction of the relevant clauses in the policy both as to liability and as to quantum, notwithstanding the fact that some of the views which I express may, as a result of the decision at which I have arrived, be obiter dicta, and notwithstanding, as regards quantum, the provision in the policy that "the amount recoverable shall be assessed by the committee* (of the defendants), whose decision shall in all respects be final". Before turning to the words of the policies which I have to construe, it is convenient that I should set out the relevant facts to which those words have to be applied. [His Lordship then considered the facts and continued:] In construing the policy there are three general matters to be borne in mind: First, that it is primarily a war risks policy and that it contemplates the possibility of a war in which the British government may be engaged; secondly, that it also covers allied risks from hostilities (civil war, rebellion, etc.) in which Her Majesty's Government may not be engaged. Thirdly, it is a policy on hull and machinery, not on freights or profits.

---

* Clause 5 of the policies contained a warranty by the assured, viz., the plaintiffs, to comply with certain directions of the committee.

[His Lordship then read cl. 1 (1) (F) of the policies, on which the plaintiffs relied, and stated the plaintiffs' contentions; he continued:] Was the Admiralty warning a "direction" of a British government department? In terms it purports to be no more than "advice"; and indeed neither the Admiralty nor any other British government department had power to do any more than to advise as to action to be taken to avoid loss of or damage to a British merchant vessel. Such advice has no legal sanction behind it. The words "orders or directions" of any British government department or official or British military authority have, however, a familiar and indeed an ominous ring. During the last war very wide powers to make orders, by statutory instrument, and to give directions by less formal documents enforceable by sanctions were granted to government departments and officials, and bearing in mind that this is a war risks policy, which contemplates the possibility of a state of war, I should have little hesitation in holding that the words "orders or directions . . . of any British government department or official or British military authority" applied only to instructions, the ignoring of which gives rise to legal sanctions and did not include advice, warnings or exhortations which the shipowner was at liberty to accept or disregard as he pleased.

In cl. 1 (1) (F), however, the expression "orders or directions" does not apply merely to those given by governmental authorities, but also to "orders or directions" given by the committee. Should this fact widen the meaning of the word "directions" to include advice the ignoring of which gives rise to no legal sanction? I think not. "Orders and directions" and indeed "recommendations" of the committee do give rise to sanctions. Clause 2 of the policy incorporates the rules of the defendants, r. 10 of which requires each member to comply with "all orders, directions and recommendations" of the committee. I pause to glance briefly to see whether any light can be thrown on the meaning of the words "orders or directions" by their use in other clauses of the policy, for it is a sound rule of construction that prima facie the same expressions are used in the same sense wherever they appear in the same policy. Little assistance is available from this source. Clause 1 (1) (E) refers to "orders directions or recommendations" of the committee, but it does not appear from the rules that there is any real distinction between these; all must equally be complied with by members. Clause 5 (A) (b) contains a warranty to comply with "orders" given by or on behalf of the government and "directions" given by the defendants: cl. 5 (B) (c) to "orders" given by or on behalf of the government, and "orders, directions and recommendations" of the committee. It is thus difficult, if not impossible, to find any systematic distinction drawn between the words " orders " and " directions ", but it affords perhaps some little support to the view which I have expressed as to the meaning of the word " directions " in cl. 1 (1) (F) (1) that the word " recommendations " is used in relation to instructions of the committee, which have a sanction, in cl. 1 (1) (E), but is omitted in the immediately succeeding clause which deals with instructions by government authorities as well as by the committee, which governmental instructions, if merely in the form of " recommendations " would give rise to no sanctions if ignored.

---

* Viz., the directors of the defendant association.

I hold, therefore, that in the context of cl. 1 (1) (F) the word " directions " does not include advice, warnings, recommendations or " authoritative guidance " (a dictionary definition relied on by counsel for the plaintiffs—whatever the adjective in this context may mean) the ignoring of which gives rise to no sanctions. The Admiralty warning of Oct. 30, 1956, was not therefore an order or direction of any British government department within the meaning of cl. 1 (1) (F) (1) of the policy.

Then there is the other limb of the clause [cl. 1 (1) (F) (2)] to be considered. As I have indicated, I think that the reference to " orders or directions " in relation to governmental authorities contemplates a state of war in which the government will assume emergency powers to give orders and directions for the safety of British shipping; but the risks covered by the policy include risks which may arise—as they in fact arose—without any such emergency powers being assumed. In such circumstances the government can only express views, whether classed as advice, warnings or exhortations, as to the steps to be taken by shipowners for the safety of their ships; and it seems to me that this is the state of affairs contemplated by the latter part of the clause which is cast in wide terms and covers steps in fact taken with the approval of a government department, in so far as their object is, in the view of the government department, directed to avoid loss of or damage to the ship by one of the perils insured. Whether a particular step is taken with the approval of the government authority is a question of fact. The approval need not be given in any particular form. It may be given in advance; it may be given, I think, retrospectively, although that does not arise in this case; it may be given generally to all ships or specifically to individual ships. If advice given by the Admiralty to ships generally is taken, then steps taken in accordance with that advice are, in my view, taken with the approval of the Admiralty within the meaning of the clause.

The plaintiffs are entitled, therefore, to rely on the Admiralty warning as constituting approval by a British government department of such of the steps taken by them as were taken to heed the advice contained in the warning. Whether those steps constituted, or caused, a prolongation of the voyage within the meaning of the policy is another question, which will involve consideration of the terms of the Admiralty warning; but before I turn to that I must deal with the third contention of the plaintiffs, namely, that the prolongation of the voyages was with the approval of the committee.

No express approval is relied on; none was sought.

[His Lordship then referred to the terms of the letters* which were sent by the plaintiffs to the defendants notifying them of the diversions of the Dunnottar Castle and the Rhodesia Castle from their scheduled voyages, and the letters of acknowledgment from the defendants. His Lordship continued:] The information as to the change of plans for the Dunnottar Castle and the Rhodesia Castle was noted by the defendants' managers—not by the committee—on Nov. 6. The defendants were not informed of the plaintiffs' intentions that both the Dunnottar Castle and the Rhodesia Castle should make calls additional to the scheduled calls for passengers or freight at various African ports, calls which would affect the delay in the vessel's return to her final port in the United Kingdom. There is nothing here approaching approval—as contrasted with mere knowledge—and the resolution[*] of Sept. 13, 1956, on which the plaintiffs A also rely, seems to me to give rise to no inference either favourable to the plaintiffs or against them, since it was directed not to cl. 1 (1) (F) (2), but to the warranty in cl. 5.

---

* For the terms of these letters see p. 434, letter I, to p. 435, letter B, ante.

I hold that there was in fact no approval, express or implied, by the committee within the meaning of the policy of any of the steps taken by the plaintiffs, nor can the committee's failure to raise objections to those steps give rise to any B estoppel, since I can see no duty on them to speak.

The only matter which has given me some trouble is the admission in the defence that if the plaintiffs had asked for the committee's approval, they would in fact have approved the instructions given to the masters of the vessels, which I understand to mean the full re-routing instructions, including the additional calls at the various African ports and the omission of calls at other scheduled C ports. I do not, however, read this admission as including an admission that the approval of the detailed re-routing instructions would have been given "in order to avoid loss of or damage to the insured ship by any peril insured"; but in any event the fact that the committee would have approved, if asked, appears to me to be irrelevant. It cannot amount to an implied approval when none was in fact sought or given, any more than a contract for the sale of goods D could be implied from an admission that a potential buyer would have accepted an offer if it had been made when in fact it was not.

I come next to the questions: (1) Which, if any, of the steps in fact taken by the plaintiffs in relation to each vessel were taken in compliance with the Admiralty warning? (2) Did those steps constitute or cause a prolongation of the voyage within the meaning of cl. 1 (1) (F) (2) ? E

As regards the first question, the Admiralty warning merely advised ships to keep clear of a defined area in the Mediterranean and the northern part of the Red Sea. It was plainly given to avoid loss of or damage to merchant ships by perils which were in fact covered by the policies which I am construing. In turning the Dunnottar Castle back from Port Said out of the area covered by the warning, and in preventing her proceeding further into the area to Suez and F through the canal, the plaintiffs were acting with the approval of the Admiralty; and indeed the orders to this ship to turn about were given in consequence of the warning and for no other reason. So, too, in preventing the Rhodesia Castle from proceeding into the area covered by the warning, the plaintiffs were acting with the approval of the Admiralty, and I think it matters not if their motive in so acting was a mixed one, and influenced by the probability that the G canal was already blocked when the decision so to act was taken, and the even greater probability that it would be blocked by the time the Rhodesia Castle was scheduled to arrive at the canal. In turning round the Rhodesia Castle at Mombasa instead of at Port Sudan, and her failing to proceed to Aden and Port Sudan, which were scheduled calls on her voyage, the plaintiffs were not complying with the Admiralty warning or acting with Admiralty approval. To H turn round at Mombasa, however, did not increase, but decreased, the delay in the vessel's return to her final port in the United Kingdom.

As regards the second question, the defendants say: Even assuming those particular steps were taken as respects one or other vessel with Admiralty approval, it does not follow that the delay in the return of that vessel to London, which in fact occurred, was a prolongation of the voyage with Admiralty approval, I a fortiori, with Admiralty approval given in order to avoid loss of or damage to the vessel by an insured peril. All that concerned the Admiralty was that the vessel should not be in the danger area. The Admiralty's approval was in fact limited, and its relevant approval under the policy must, in law, be limited to that. The actual amount of delay in the return of the Dunnottar Castle to its final port in the United Kingdom was due to a number of factors, with many of

---

[*] For the terms of the resolution see p. 435, letter D, ante.

A which the Admiralty were not concerned—the owners' decision to go round the Cape to Mombasa, to call at intermediate ports on the way to disembark passengers and to embark them for onward carriage to Aden, St. Helena and Ascension, and similarly with the case of the Rhodesia Castle.

The defendants put their contention in a variety of ways. They say that the Admiralty approval was merely to keeping away from a particular area; that B it did not operate on anything done outside that area. They say that there was no sufficiently approximate connexion between the Admiralty approval of keeping out of the area and the voyage actually undertaken round the Cape. They say that the original voyage was not prolonged, but abandoned, and that a new voyage was undertaken; that the voyage was changed.

I think that the first view, namely, that the Admiralty approval did not C operate on anything done outside the area of the warning, puts the matter too high. If the result of keeping away from the defined area is necessarily to cause a deviation which prolongs the length of the voyage on which an insured vessel is engaged, the expenses incurred as a result of that prolongation would, in my view, be recoverable, subject to the franchise, under the policy. I gave in the course of the argument the example of a vessel on a voyage to Bombay which, as D a result of the Admiralty warning, went round the Cape instead of through the canal. The expenses incurred by the prolongation of the voyage to Bombay would, in my view, be recoverable, subject to the franchise. The second and third contentions are, I think, two different ways of expressing the same thing. The peril insured against is a prolongation of " the voyage "; that is, the voyage on which the vessel is engaged at the moment at which the steps are taken with E the Admiralty approval in order to avoid loss of or damage to the insured ship by a peril insured. At that stage it is open to the owner to continue the voyage with a deviation, in which case he may have a claim under the policy, or to abandon the voyage, or to change the voyage, in which case he has no claim under the policy. Which of these courses he has in fact adopted is in each case a question of fact, and indeed may be one of degree.

F In each of the present cases I hold that the voyage on which the vessel was engaged at the moment at which steps were taken to avoid the area referred to in the Admiralty warning, was changed.

In the case of the Dunnottar Castle it does not seem to me that the movements she in fact undertook after turning back from the Suez area can be considered as a continuation of the same voyage on which she was engaged when she turned G back. A call at Las Palmas for bunkers would no doubt not affect the identity of the voyage; nor would an omission to call at ports within the area to which the Admiralty warning applied; nor should I be understood as saying that some minor variation in the order of calling at scheduled ports must necessarily amount to a change of voyage. Calls at four South African ports and one Portuguese East African port to carry new passengers in the reverse direction H from the original voyage, the omission to call at Aden and two other ports (I exclude Suez which was in the warning area) however sensible they may be as a matter of commercial common sense, seem to me, however, to amount to a new or changed voyage, and not to a prolongation of the voyage within the meaning of the policy. I am fortified in this view by the impossibility of saying to what extent the actual delay in the arrival of the vessel at her final port in the United I Kingdom was due to these different calls and omissions to call, which the owners undertook for their own commercial convenience and which bore, so far as I can see, no causal relation to the Admiralty warning, save that that warning was no doubt a causa sine qua non. Similar considerations appear to me to apply to the Rhodesia Castle, and I do not think that it is necessary to deal with the detailed calls and omissions to which I have already referred.

I, therefore, find that the plaintiffs are not entitled to recover under either of the policies. I have, however, been asked to deal—as it turns out in this case, obiter—with certain questions of principle as to the method of assessing damages in cases where there is a valid claim under a policy in these terms. The matter has been pleaded in a number of different ways, but the real issues are whether, in quantifying the claim the assured must give credit for any savings of expenses as a consequence of the deviation which results in prolongation of the voyage (such as savings of Suez Canal dues or port charges at ports omitted), and for any financial benefits which accrue as a consequence of such deviation (such as additional freight or fares earned).

What he is entitled to recover is: " Expenses incurred by reason of the prolongation of the voyage ". If those words stood by themselves, " prolongation " might conceivably be construed in a geographical sense, although this is not the primary sense in which I would read it. Alternatively, it might be construed as meaning that the assured could recover the difference between the expenses actually incurred by him during the whole of the prolonged voyage and those which would have been incurred if the voyage had been carried out as originally contemplated. These words, however, do not stand alone. That " prolongation " is used in a purely temporal sense appears from the reference to " period of prolongation " in the last part of the clause; there may be deviation without " prolongation ". The provision that nothing shall be payable in respect of the first seven days of such period of " prolongation " seems to me to make two things plain: first, that " prolongation " does not start until the date on which the voyage normally would have ended; and secondly, that it is the actual expenses incurred during the voyage after the expiry of such seven days which are recoverable, although no doubt this is a figure which may in practice have to be estimated. It does not seem to me that any savings made in consequence of the deviation which resulted in the prolongation of the voyage have any relevance to this calculation, any more than any additional expenses which may have been incurred before the expiry of the seven days after the date on which the voyage would normally have ended. The policy is not one against loss of profits or on freight; nor is the clause analogous to a sue and labour clause, and the highly theoretical possibility that the assured might, as a result of savings, be in a better position than if there had been no deviation, does not persuade me to place any other construction than I have on the words.

The same considerations apply to benefits. The clause relates to expenses only; but the kind of benefit which has been discussed in the present cases seems to me to be unlikely to accrue except in cases where there has been a change of voyage, in which case, as I have held, there is no claim under the policy. It is, I suppose, possible that by reason of late arrival at intermediate ports consequent on deviation, a shipowner might obtain additional passengers or freight for onward carriage, but it does not seem to me that the policy or the clause is concerned with such matters, any more than it is concerned with loss of booked passengers or freight for onward carriage which results from such delay.

I hold, therefore, that neither savings in dues before prolongation, nor benefits which accrued as a result of the prolongation, should be taken into consideration in assessing the claim under the policy.

Judgment for the defendants.

Solicitors: *Holman, Fenwick & Willan* (for the plaintiffs); *Richards, Butler & Co.* (for the defendants).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

HAYNES *v.* QUALCAST (WOLVERHAMPTON), LTD.

[COURT OF APPEAL (Lord Evershed, M.R., Parker and Sellers, L.JJ.), January 23, 24, 1958.]

Safe System of Working—Extent of master's duty—Duty to give information or advice—Availability of protective clothing insufficient—Foundry—Injury to experienced moulder.

The plaintiff was employed at the defendants' foundry as a moulder. He was thirty-eight years of age and an experienced moulder. While he was handling a ladle containing molten metal, the ladle slipped, the metal splashed on to his left foot and, as he was not wearing protective spats or special boots, the foot was burnt. There was a notice in the foundry that protective boots could be bought from the defendants at the price which the defendants had paid for them. The defendants also kept in their stores a stock of spats which were available free to any workman who asked for a pair, but they had not put up any notice regarding the spats. The plaintiff knew that the spats and boots were available, but the defendants took no steps to advise, or warn, or induce him to wear them. In an action for damages against the defendants the plaintiff alleged negligence on their part in failing to provide a safe system of work. The county court judge found that there had been a breach of duty at common law by the defendants to the plaintiff, but that the plaintiff was guilty of contributory negligence, and that the plaintiff's share of the responsibility was seventy-five per cent. On appeal by the defendants, and cross-appeal,

Held: (i) the defendants were in breach of duty to the plaintiff because, having regard to the nature of the hazard involved, their obligation to their workmen to provide a safe system of work was not fulfilled merely by their having protective clothing available if the workmen chose to obtain it.

(ii) causation was a question of fact and the county court judge's apportionment of liability as to twenty-five per cent. to the defendants and as to seventy-five per cent. to the plaintiff should not be disturbed.

Appeal and cross-appeal dismissed.

[**Editorial Note.** It appears from the judgments of LORD EVERSHED, M.R., and SELLERS, L.J., that, although there has been a breach of duty by employers towards an employee by failing to warn or advise, yet if it be the fact that he would not have heeded advice, if tendered, causation of damage by the breach of duty would not be established (see p. 446, letter B, and p. 448, letter F, post).

As to a master's duty to provide a safe system of work, see 22 HALSBURY'S LAWS (2nd Edn.) 188, para. 314; and for cases on the subject, see 34 DIGEST 194, 195, *1580-1595*.]

Cases referred to:

(1) *Paris* v. *Stepney Borough Council,* [1951] 1 All E.R. 42; [1951] A.C. 367; 115 J.P. 22; 2nd Digest Supp.

(2) *Bonnington Castings, Ltd.* v. *Wardlaw,* [1956] 1 All E.R. 615; [1956] A.C. 613; 3rd Digest Supp.

(3) *Roberts* v. *Dorman Long & Co., Ltd.,* [1953] 2 All E.R. 428; 3rd Digest Supp.

(4) *Drummond* v. *British Building Cleaners, Ltd.,* [1954] 3 All E.R. 507; 3rd Digest Supp.

(5) *Smith* v. *Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 34 Digest 202, *1657*.

(6) *Underwood (A. L.), Ltd.* v. *Bank of Liverpool. Same* v. *Barclays Bank*, [1924] 1 K.B. 775; 93 L.J.K.B. 690; 131 L.T. 271; Digest Supp.

Appeal.

The defendants, Qualcast (Wolverhampton), Ltd., appealed from a decision of His Honour JUDGE NORRIS, at Wolverhampton County Court, dated Aug. 16, 1957, whereby he held that the defendants were liable in damages, to the extent of twenty-five per cent., in respect of injuries suffered by the plaintiff, John Henry Haynes, in the course of his employment by the defendants. The plaintiff cross-appealed against the decision of the county court judge that the plaintiff was guilty of contributory negligence and that his share of the blame was seventy-five per cent.

The facts are stated in the judgment of LORD EVERSHED, M.R.

Marven Everett, Q.C., and *H. J. Garrard* for the defendants.

John Thompson, Q.C., and *G. F. I. Sunderland* for the plaintiff.

LORD EVERSHED, M.R.: The plaintiff in this action, Mr. Haynes, suffered an injury on Sept. 16, 1954, the circumstances of which and the nature of which were as follows. He was then, and had been for some three months, employed in the foundry of the defendants, as a moulder. In the course of that day he was handling a ladle containing molten metal which he was seeking to pour into another receptacle, and, according to the finding of the learned judge, the ladle slipped and the metal splashed on to the plaintiff's left ankle and foot. The story which the plaintiff put forward to the learned judge gave a different account, for he said that he was not pouring from the ladle into the moulding boxes but was carrying the ladle along a passage in the foundry, and that the spillage was caused by an obstruction over which he stumbled. That account of the misfortune was entirely disbelieved by the learned judge. Still, the injury was sustained. The claim was made up of loss of wages, together with general damages, and the total sum found as compensation for the injury was £233—£133 being special damage and the balance general damage. The judge found, however, that responsibility for the accident, although in part properly laid at the defendants' door, was, for the greater part, that of the plaintiff himself; he apportioned the blame as to twenty-five per cent. to the defendants and seventy-five per cent. to the plaintiff. Thus, the sum actually awarded to the plaintiff was £58 5s., or one-quarter of £233. The defendants have appealed against that conclusion, on the ground that in this case, on the facts proved, there was no breach of duty by them, and, alternatively, on the ground that, if there was a breach of duty, the damage was not attributable to the breach. There is a cross-appeal, whereby the plaintiff complains of the apportionment and suggests that there was no, or no such, contributory negligence on his part.

From my statement it will be apprehended that really two points are presented for our decision: (i) Was there a breach of duty on the defendants' part ? (ii) If there was, has the plaintiff established that the damage, in some degree at any rate, must be properly attributed to the breach. Of the two points I think, for my part, that the second is the more difficult. On the first, the learned judge was of opinion, uninstructed by authority, that the plaintiff was himself so experienced a moulder that he needed no warning of the hazard involved in carrying molten metal about; that he carried it about, unprotected as to his feet, entirely at his own volition; and, accordingly, so far as the first point is concerned, that there was no breach of duty on the defendants' part. The learned judge then considered a number of authorities which had been drawn to his attention, some of them unreported cases. Those authorities are summarised in the judgment*, and I do not find it necessary to consider them in detail. The conclusion which they compelled the learned judge ultimately to embrace is thus expressed in the judgment:

> " In the present case, the spats and boots were there, and the plaintiff knew they were there, but he was never told that they must be worn. He decided the matter himself. In view of this I feel that my judgment must be in favour of the plaintiff . . ."

The learned judge then went on to consider apportionment. In other words, I think that the learned judge was of opinion that the cases compelled him to hold that the nature of the occupation in which the plaintiff was engaged and of the hazard which it involved was such that the obligation of the defendants was to make the wearing of protective clothing a necessary—and a compulsory—characteristic of the job. There is no doubt whatever that the defendants did not attempt to do that. I have referred to the protective clothing, which, so far as relevant, consisted of spats (a form of legging which would protect the instep and the lower joints of the leg against splashing of heated or molten metal) and boots.

The facts in regard to those items of protective clothing were these. The defendants kept a stock of these spats at their foundry, and the evidence established to the judge's satisfaction that they were there for the asking: that is to say, any workman who said that he wished to wear a pair of spats when doing his moulding operations had only to ask for them and they would have been supplied free of any cost. In addition, the defendants were mindful enough of their obligations to those whom they employed to have in stock, and available, pairs of a particular type of boots—whether of leather or asbestos I am not quite clear—but at any rate of a kind which were sufficient to keep from the foot splashings of molten metal. The boots, however, were not there for the asking in the way that the spats were: the defendants had had these boots supplied to them and were prepared to let workmen take for themselves a pair on paying only the cost price to the defendants. The defendants put up a notice telling their workmen that the boots could be had on those terms; but, perhaps a little surprisingly, they did not also put up a notice saying that spats could be had free of any charge. Indeed, so far as the evidence goes and as I understand the finding, the defendants took no steps at all to bring to the attention of their men the availability of the spats or to advise them that, if they wished to protect their ankles and insteps from possible injury, they would be well advised to take advantage of the offer.

The evidence is, of course, shortly recorded, as is common in a county court case. As regards the plaintiff, I do not take any particular notice of what he said, because he was not a person whom the judge, on other aspects of the matter, believed. The defendants' witnesses certainly did not support the view that they had taken any steps to bring the availability of the spats to the attention of the men. True, one witness said that Mr. Bloor, the foundry foreman, used " to go on to the men about not wearing spats "; but Mr. Bloor himself, when called, by no means supported that statement. Mr. Bloor did, indeed, say that in the case of an inexperienced man, a learner coming to the job, he would advise him to wear spats; from which at least it may be inferred that Mr. Bloor appreciated that there was a risk against which an inexperienced man ought properly to be warned. However that may be, the finding, I think, is to the effect which I have already indicated.

---

* The authorities referred to by the county court judge were *Crookall* v. *Vickers-Armstrong, Ltd.* ([1955] 2 All E.R. 12); *Finch* v. *Telegraph Construction & Maintenance Co., Ltd.* ([1949] 1 All E.R. 452); *Richards* v. *Highway Ironfounders* (*West Bromwich*), *Ltd.* ([1957] 2 All E.R. 162); *Cooper* v. *K. L. Steelfounders & Engineers, Ltd.* ((Apr. 12, 1951), unreported); *Bilsbury* v. *Harrison, McGregory & Guest, Ltd.* ((Jan. 18, 1955), unreported); *Brooker* v. *Jenkins Bros. Proprietors Ocean S.S. Co., Ltd.* ((Feb. 20, 1956), unreported); *Webb* v. *Smith, Bingley & Evans, Ltd.* ((Dec. 18, 1956), unreported). In each of the last three cases, a workman was carrying a ladle of molten metal when there was a splash of metal and the workman's foot or leg was burnt. In *Bilsbury* v. *Harrison, McGregory & Guest, Ltd.*, a decision of GERRARD, J., and *Brooker* v. *Jenkins Bros. Proprietors Ocean S.S. Co., Ltd.*, a decision of GORMAN, J., protective clothing had not been provided, and it was held that there was liability on the part of the employers. In *Webb* v. *Smith, Bingley & Evans, Ltd.*, STABLE, J., found that the plaintiff had not been made to understand that spats and leggings were available and were to be worn. In *Cooper* v. *K. L. Steelfounders & Engineers, Ltd.*, a workman sustained an eye injury while pouring molten metal from a ladle. LYNSKEY, J., held that a safe system of work had not been provided because, although there were protective glasses in the stores at the works and the men might have been advised to wear them, they had not been required to do so.

In his judgment, the learned judge said:

> " The plaintiff was not ordered or advised by the defendants to wear protective clothing, and I think that was because he was an experienced moulder."

Later in the judgment, in the passage which I have already read, the learned judge said: " . . . he [the plaintiff] was never told that they must be worn." But a little later the judge said:

> " He [the plaintiff] knew that there were spats and boots in the stores; that spats were to be had for the asking and the strong boots at a price which the defendants consider to be reasonable; and he decided to wear ordinary boots which he bought himself for the purpose of this work."

I take that to be a finding (and it is well supported by the evidence) that the defendants did not, in fact, take any steps to inform their men as to the supply and availability of the spats, still less to advise them, and still less again to make the wearing in any sense a condition of employment. The judge found, and I am fully prepared to accept his finding, that the defendants did not do so because they thought that the plaintiff, being an experienced moulder, should be taken as knowing—as he did know—what the risks were. That, however, goes rather to the second point—the question of causation. The first question is: Was the provision of the spats, in the sense of having them available for the asking, a sufficient performance of whatever be the true measure of the obligation of the defendants in this case ?

The test I take to be the general one, that it is the duty of an employer in such a case as this to take reasonable care for the safety of his workmen. Counsel for the plaintiff pointed out that molten metal is of a temperature of something like thirteen hundred degrees centigrade. From that fact it is, of course, plain that if it gets on the skin or the body it is likely to do serious and painful injury, although the injury may not be, and was not in the present case, of any lasting effect. If, then, that is the nature of the hazard, I think that the obligation of the defendants extended to more than merely having the spats available in case any experienced moulder thought he would like to ask for them. I do not think that it is necessary to attempt to define in this case the extent of the duty to warn or advise. I am certainly not prepared to say that this is a case in the class of those, for example, where the eye is at risk and where, having regard to the nature of the hazard, there is a duty on the employer to go to very considerable lengths to try to see that his workmen take advantage of the protective equipment supplied. Lord Morton of Henryton, in *Paris* v. *Stepney Borough Council* (1) ([1951] 1 All E.R. 42 at p. 51), draws attention to the fact that the extent of the duty will depend in some degree on the gravity of the hazard which is involved and of the consequences which may ensue if damage is suffered. Since, on the judge's finding, the defendants in the present case did nothing at all other than have the gaiters ready for those that asked, I think that they fell short of their duty. I, therefore, agree with the judge that there was a breach of duty.

I now come to what I think to be the more difficult part of the task. There has been much discussion which properly invokes considerations of common sense, and also the point that, if an employer tries too much to assume the functions of a matron or grandmother, it may be far from good for the safety of the workman. Counsel for the plaintiff said that he would be the last to suggest that in the interests of safety all responsibilities, so far as possible, should be removed from the men themselves. I have, too, in mind that prima facie a plaintiff in an action must establish his case. If, therefore, there is no direct evidence which can be said to link the consequence with the cause, it must, I take it, be a matter of consideration of all the probabilities whether the damage can be fairly attributable to the failure to perform the duty. I think that that aspect of the matter was considered by the judge, because having, contrary to his first impression (and rightly, in my judgment), concluded that there was a duty which had not been performed, he then proceeded to consider to what extent the plaintiff, on his part, and the defendants, on their part, were responsible for the accident, which consisted of an injury which prima facie would have been avoided had protective clothing been worn. Having heard all the evidence, the judge came to the conclusion that to the extent of twenty-five per cent. he should attribute the damage to the defendants' breach of duty. It is quite true, and I do not forget, that at this stage he seems to have assumed the duty to be of a more extensive character than I, for my part, am prepared to concede; it was a case (if I have read his judgment aright) in which he thought that the defendants should have made the wearing of protective clothing what we called during the argument a local rule. I am not satisfied, however, that that disables the conclusion. Thus, if the plaintiff was the type of man who always knows much better than anyone else who tries to advise him, and if, knowing all that he did know as an experienced moulder, the proper inference ought to be that he would have disregarded any advice and warning, then it does not seem to me, for this purpose, to matter very much, if, indeed, at all, that the breach consisted, not in not making this a local rule, but in failing to give any advice at all.

The judge's conclusion being in the end a conclusion of fact, I am unwilling to disturb it; and I would, therefore, leave the whole of this matter, including apportionment, as the judge concluded it. It will follow from what I have said that I reject the cross-appeal. I think that the learned judge was most amply justified, in this case, in holding that this experienced man was, to the extent of seventy-five per cent., the author of his own calamity. Dealing with it in that way, I find it unnecessary to express any view on a question which may have some time to be considered in this court, or in the House of Lords, namely, to what extent certain decisions in this court are now entirely reconcilable with the judgments of the House of Lords in *Bonnington Castings, Ltd.* v. *Wardlaw* (2) ([1956] 1 All E.R. 615). The decisions of this court which I have in mind are, first, *Roberts* v. *Dorman Long & Co., Ltd.* (3) ([1953] 2 All E.R. 428), and, second and later, *Drummond* v. *British Building Cleaners, Ltd.* (4) ([1954] 3 All E.R. 507). In *Drummond* v. *British Building Cleaners, Ltd.* (4) the question related to the provision of certain safety devices for the use of a man engaged in cleaning windows. At the end of his judgment PARKER, L.J., said (ibid., at p. 513):

> "In my view . . . the defendants, having failed in their duty by not giving him instructions to use the rope, cannot be heard to say that even if they had he would not have used it . . ."

PARKER, L.J., relied on a passage in the judgment of LORD GODDARD, C.J., when sitting in this court in *Roberts* v. *Dorman Long & Co., Ltd.* (3) ([1953] 2 All E.R. at p. 432). As I have said, it may be that that way of expressing the matter, in the light of *Bonnington Castings, Ltd.* v. *Wardlaw* (2), may require consideration hereafter; but counsel for the defendants has not invited us to say that *Roberts* v. *Dorman Long & Co., Ltd.* (3) and *Drummond* v. *British Building Cleaners, Ltd.* (4) must be treated as overruled by the decision in

A *Bonnington Castings, Ltd.* v. *Wardlaw* (2). I, therefore, leave the matter thus: in the present case, whatever be the effect of *Bonnington Castings, Ltd.* v. *Wardlaw* (2) on the earlier cases, it seems to me undoubtedly still law that the question of causation is one of fact, to be considered in the light of all the circumstances and the probabilities. In this case, therefore, since the learned judge, properly considering those matters, concluded, I think, as a fact that to B the extent of twenty-five per cent. the plaintiff's damage was attributable to the breach of the defendants' duty, I do not see any ground in law why that conclusion is not to be sustained. There is, no doubt, a suggestion in the evidence, and, indeed, in the judgment, that the plaintiff was one of those persons whom I have already described as being of the type who know better than everybody else; and if it was true to say that, according to the fair balance C of probabilities, nothing really would have persuaded him to take proper steps for his own protection, then, of course, the answer would be to relieve the defendants; but the learned judge, as I think, has not so held; and I do not think that in this court we should be justified in so holding now. On the whole, therefore, it seems to me that the right answer here is that the careful judgment of the judge, whereby he awarded one-quarter of the damages to the plaintiff, ought not to be disturbed; and I would dismiss the appeal and the cross-appeal. D

PARKER, L.J.: I have come to the same conclusion, and in approaching the matter I have done so without very great sympathy with the plaintiff. By his particulars of claim he raised a great number of issues, all based on an allegation that he had stumbled over an obstacle in the gangway. On that, E he was completely disbelieved. One also cannot ignore the fact that this is what I may call a stale claim. The accident occurred on Sept. 16, 1954; and the particulars of claim were not delivered until Mar. 22, 1957. The fact, however, remains that there was an allegation that the defendants " failed to provide any or any proper spats or other sufficient protective clothing ", and that they " failed to provide a safe system of work and safe and proper plant and equipment ". F

The common law duty of an employer is, I think, in the words of LORD HERSCHELL in *Smith* v. *Baker & Sons* (5) ([1891] A.C. 325 at p. 362), to take " reasonable care . . . so to carry on his operations as not to subject those employed by him to unnecessary risk ". It is quite clear that in an operation G of this sort there is a risk, and a risk of serious injury—true, not injuries which are likely to be fatal or to affect the eyes, but clearly such as are likely to produce injury by burning. It seems to me perfectly clear, in those circumstances, that there is a duty on employers, not only to have protective clothing available, but to inform anybody coming into their employment that they have got that equipment, and to take some steps to educate the man to wear the equipment for his own safety. Exactly what those steps should be, I find it unneces- H sary to determine. In some cases the hazard may be so great and the injury, if it occurs, so serious, that it might be necessary to make the wearing of the protective clothing a rule of the factory. Again, where the matter is not so serious, mere advice might be sufficient. At any rate, in this case, some steps should have been taken to educate men for their own protection to wear the protective clothing. I

In the present case the employers did nothing. True, they had protective equipment in their store; but when the plaintiff came into their employment he was not told by them that that equipment was available, nor was he in any way advised to wear it. The answer given is: That is true, but that was because the plaintiff was an experienced moulder: he was thirty-eight years old, and he had been all his life in the trade. Even so, from the defendants' point of view, when the plaintiff came into their employment they would not know that he knew or would have any chance of knowing that they had equipment available. Undoubtedly, by the time of the accident, he did know that that equipment was available in store, and with his experience he must have known that the equipment was there for use for his own safety. I say that he knew that the equipment was there: that is the finding of the learned judge, which I accept, despite the suggestion of counsel for the plaintiff that there was no evidence on which the trial judge could make such a finding. It is true that the evidence on that is not altogether clear, but, read as a whole, I should have thought there was ample evidence on which the learned judge could make that inference.

That being so, the employers having been originally in breach, did that breach play any causative part in the accident which occurred ? I confess that it is that point and that alone which has given me some difficulty in this case. Counsel for the plaintiff relied strongly on the decision of this court in *Roberts* v. *Dorman Long & Co., Ltd.* (3) ([1953] 2 All E.R. 428), to which LORD EVERSHED, M.R., has referred. In that case, LORD GODDARD, C.J., presiding in this court, said (ibid., at p. 432):

> " The fact that [the safety belts] were not available gave him no opportunity of exercising his election, and, had one been available and had he elected to use it, while it might not have prevented his meeting with some injury, it would certainly have prevented his falling to his death. Some actions for negligence are based on the failure of the person to make inquiries when the circumstances are such as to show that he was put on inquiry."

LORD GODDARD, C.J., then referred to the judgment of BANKES, L.J., in *A. L. Underwood, Ltd.* v. *Bank of Liverpool* (6) ([1924] 1 K.B. 775 at p. 789), and said ([1953] 2 All E.R. at p. 432):

> " If a person who had to make an inquiry fails to do so he cannot be heard to say: ' But even if I had it would have led to no useful result '. So I think that, if a person is under a duty to provide safety belts or other appliances and fails to do so, he cannot be heard to say: ' Well, if I had done so, they would not have been worn '."

That case and that passage were followed again in this court in *Drummond* v. *British Building Cleaners, Ltd.* (4) ([1954] 3 All E.R. 507). It is true that since then there has been the decision in *Bonnington Castings, Ltd.* v. *Wardlaw* (2) ([1956] 1 All E.R. 615), in the House of Lords; but that case, as I understand it, has not overruled *Roberts* v. *Dorman Long & Co., Ltd.* (3). Nevertheless, I think for my part that there may be special circumstances in *Roberts* v. *Dorman Long & Co., Ltd.* (3) justifying the conclusion. It is to be observed that it was a decision on reg. 97 of the Building (Safety, Health and Welfare) Regulations, 1948, which provides that in certain circumstances safety belts should be available to enable such persons as elect to use them to carry out the work without risk of serious injury; so that there was a specific regulation providing that there had to be provision of apparatus which the man could elect to use. The second point was that in that case the injured man died and there was no opportunity for him to say: " If I had had an election, I should have chosen to wear a safety belt ".

For my part, I would accept the finding (and it must have been a finding) of the county court judge in this case that the original breach did play some part. The judge must have found that, because, having found the plaintiff himself guilty of contributory negligence, he apportioned the blame and held that the defendants, by reason of their original breach, were to blame, but only to the extent of twenty-five per cent. On the whole of the evidence in this case, I do not see any ground for interfering with that finding of the judge. It follows that I would, accordingly, dismiss the appeal and the cross-appeal.

SELLERS, L.J.: I have felt some doubt in this case, and, unaided by the views of my Lords, I might well not have come to the conclusion which I now express—that I also agree that the appeal should be dismissed. The case, I think, is a difficult one, and the learned county court judge so regarded it. The plaintiff was an experienced moulder, who (as was found) well knew of the dangers which beset the operation which he had to carry out: indeed, he himself made provision to meet them by wearing strong working boots which he bought himself. Mindful as he must have been, and as he has been found to have been, that molten metal might splash on his legs, he did not avail himself of the protection provided, in the sense that suitable spats were kept in the stores by the defendants. He well might have done. If the judge is right (and I think he must be held to be right) that the plaintiff knew that the spats were there, the plaintiff could, if he had so chosen, have worn them. But his attitude, as revealed in his evidence, was that he did not think it necessary to wear spats for his protection and that is why he did not wear them. One interpretation of the evidence—and one that was made by the learned judge—is that the plaintiff did not even wear the spats after he had met with the injury which is the subject-matter of this claim. It cannot, however, be overlooked that the defendants might have done a little more. As LORD EVERSHED, M.R., said, they might have put an accompanying notice about the availability of spats alongside the notice about the boots which were for sale; or they might, through the usual channels, have sought to impress on their workmen that they should wear them.

In those circumstances, although I regard it as a narrow and border-line matter, I am not prepared to dissent from the view which my Lords have taken, that there is material here to establish a duty to the plaintiff and a breach of that duty. I think, however, that it is a very slight breach, and that becomes perhaps more material in considering whether, having regard to that, the second finding ought to have been made, that the plaintiff's injury had been shown to have been caused by the defendants' breach of duty. There is, I think, material on which the county court judge could have found affirmatively that the plaintiff, having regard to the way in which he acted, his views on this matter and what he said, would not have worn the protective spats even if he had had considerable pressure put on him, and that, therefore, at the time of this accident he would not have been protected by them, and the defendants' breach of duty would not thereby have caused his accident. There is, however, no such affirmative finding, and, from the apportionment which the learned county court judge made when he felt himself driven by authority to find a breach of duty, I must accept that there is material for inferring that he must have thought that some part of the defendants' breach brought about this injury. Somewhat reluctantly, because I feel that this is an extreme case and one where the plaintiff might have been held, from any general point of view, responsible for his own injuries —he could so easily have prevented them by taking those precautions of which he knew and which he knew some of his colleagues were taking—I feel that I am bound to support the learned judge and dismiss this appeal.

Appeal and cross-appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Berrymans*, agents for *T. Haynes Duffell & Son*, Birmingham (for the defendants); *W. H. Thompson* (for the plaintiff).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

CRADDOCK *v.* HAMPSHIRE COUNTY COUNCIL AND ANOTHER.

[COURT OF APPEAL (Lord Evershed, M.R., Parker and Sellers, L.JJ.), January 22, 23, 1958.]

Landlord and Tenant—New tenancy—Opposition by landlord—Intention to demolish buildings and let land as smallholding—Intention to demolish subsidiary to purpose of letting—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2 *c.* 56), *s.* 30 (1) (*f*).

By a tenancy agreement dated Apr. 30, 1953, a county council let to the tenant land comprising 0.229 acre for one year certain and thereafter from year to year. Some buildings, including a Nissen hut and a former cowshed, occupied a substantial portion of the land. By the tenancy agreement the tenant agreed to keep these in good repair and to remove them if required to do so. The tenant carried on the business of a repairer of motor cars and agricultural vehicles on the land. After having received a notice to quit the tenant applied for a new tenancy under Part 2 of the Landlord and Tenant Act, 1954. The county council opposed the grant on the ground set out in s. 30 (1) (f) of the Landlord and Tenant Act, 1954, viz., that on the termination of the tenancy they intended to demolish the premises comprised in the holding. It was proved that the council intended to let the land to an agricultural tenant as part of a smallholding. The county court judge held that the intention of the council to demolish the buildings was only subsidiary to the main purpose of letting the land to an agricultural tenant, and was not, therefore, comprehended by s. 30 (1) (f). On appeal,

Held: the tenant was not entitled to a new tenancy because a bona fide intention of the council to demolish the building had been established, and that intention was not made ineffective for the purposes of s. 30 (1) (f) by the fact that it was ancillary to the council's main object, viz., to incorporate the land in a smallholding.

Fisher v. *Taylors Furnishing Stores, Ltd.* ([1956] 2 All E.R. 78) applied; *Atkinson* v. *Bettison* ([1955] 3 All E.R. 340) distinguished.

Appeal allowed.

[For the Landlord and Tenant Act, 1954, s. 30, see 34 HALSBURY'S STATUTES (2nd Edn.) 414, 415.]

Cases referred to:

(1) *Atkinson* v. *Bettison*, [1955] 3 All E.R. 340; 3rd Digest Supp.

(2) *Fisher* v. *Taylors Furnishing Stores, Ltd.*, [1956] 2 All E.R. 78; [1956] 2 Q.B. 78; 3rd Digest Supp.

Appeal.

This was an appeal by the respondents, the Hampshire County Council and Eva Sardinia Borthwick-Norton, from a decision of His Honour JUDGE TYLER, at Portsmouth County Court, dated Aug. 15, 1957, declaring that the applicant, Reginald William Craddock, was entitled to a new tenancy of premises known as "Highbank Engineers", London Road, Purbrook, Hampshire. By his application, dated May 27, 1957, the applicant applied for the grant of a new tenancy under Part 2 of the Landlord and Tenant Act, 1954, for a term of fourteen years. The Hampshire County Council held the land under a lease, for a term of which less than fourteen years was unexpired, from the freeholder, Mrs. Borthwick-Norton, who was joined in the proceedings. The county council opposed the grant of the new tenancy on the grounds stated in their notice under s. 25 of the Act of 1954, viz. (a) that they intended to demolish and reconstruct the premises comprised in the holding or a substantial part thereof; (b) that they intended to occupy the holding for the purposes of a business to be carried on by them.

D. J. Stinson for the respondents, Hampshire County Council and Eva Sardinia Borthwick-Norton.

A. J. Balcombe for the applicant, the tenant, Reginald William Craddock.

LORD EVERSHED, M.R.: In this case the respondent to the appeal, a Mr. Craddock, had for some years carried on, on the premises which are the subject of the proceedings and described as " Highbank Engineers ", London Road, Purbrook, Hampshire, an engineering business doing repair work to motor cars, and, more particularly, to agricultural vehicles. The freehold of the premises of the holding is vested, and at all material times was vested, in the second of the two appellants, Mrs. Borthwick-Norton. It is for that reason, and because of that interest that she is joined in the proceedings, since the claim of the tenant, Mr. Craddock, for a new tenancy under the Landlord and Tenant Act, 1954, was a claim for a tenancy of a duration extending beyond the interest of the Hampshire County Council, the first of the appellants, themselves tenants of Mrs. Borthwick-Norton. There is, however, no issue between the county council and Mrs. Borthwick-Norton; and for the purposes of the rest of this judgment I will assume that the only party other than the tenant with whom the case is concerned is the Hampshire County Council.

On Apr. 30, 1953, the county council made a written agreement of tenancy of these premises with the tenant. The term granted to him was a single year from Oct. 1, 1952, to Sept. 29, 1953; and thereafter from year to year at an annual rent set out. The subject-matter was stated to measure 0.229 acre, and it was delineated on an attached plan. The covenants on the part of the tenant were (in addition to the normal covenants for paying rent, rates and taxes, etc.):

> " 2 (vi) To keep the garage and workshop and other works and buildings erected on the land . . . in good repair and condition . . . (ix) If required by the county council and [the estate now represented by Mrs. Borthwick-Norton] to remove the buildings "

and certain other things.

The tenant continued in occupation on the terms of that document until in due course a notice of determination was given, and thereupon he applied under the Act of 1954 for a grant of a new tenancy. The notice of objection on behalf of the county council is signed by the solicitor to and clerk of the county council, and two grounds are put forward, viz., (a) that on the termination of the current tenancy they intend to demolish and reconstruct the premises comprised in the holding or a substantial part thereof; and (b) that on the termination of the current tenancy they intend to occupy the holding for the purposes of a business to be carried on by them. Those two objections reflect the provisions of para. (f) and para. (g) of s. 30 (1) of the Act of 1954. I need not make any further reference to para. (g). Whatever else may be said about the county council and their powers and intentions in this case, it is reasonably manifest that they did not and do not intend to occupy the holding themselves for the purpose of any business of their own; that objection, therefore, goes out of further consideration. As regards the first objection, it will be noticed that in terms the objection —the draftsman having perhaps allowed his eye to be too much attracted by the language of the paragraph and too little by the actual subject-matter with which he was dealing—is said to be the intention to " demolish and reconstruct ". Nobody has the smallest doubt that it never was the intention of the county council to " reconstruct " anything. The alleged intention from the start had been—and nobody, including the tenant, had been in any doubt about it—to demolish all buildings, the so-called garage and workshop, so that the land might revert to agricultural uses unencumbered by any building. During the course of the case it was eventually conceded that the use of the words " and reconstruct " was a mistake, and that, therefore, this objection should be read as though those words had never found a place in it. Thus, the matter is reduced to this: Have the county council established, as a ground of objection, an intention to demolish the premises? I have said enough already to indicate that the premises themselves (by which I mean the whole subject-matter of the holding) are small in extent and they are (as shown on the plan) carved out of an area which is in general used for agricultural purposes by the council. More precisely, the area as a whole has been used by them in exercise of their powers and duties to provide smallholdings, which will be found in Part 4 of the Agriculture Act, 1947.

It is tolerably clear (subject to the point taken by counsel for the tenant, to which I will come in due course) that the notice served indicated that the county council were proposing to take down all these buildings (which are not either particularly elegant or firmly built, being a Nissen hut, cowsheds, and so forth) and then to use the land as part of a larger unit in exercising the powers of providing smallholdings. That fact, as I have just stated it, has raised the point which appealed to the learned county court judge, viz., that the avowed intention to demolish—assuming it was established—was merely subsidiary to the intention to let the premises to an agricultural tenant; and the learned judge thought (following *Atkinson* v. *Bettison* (1) ([1955] 3 All E.R. 340) to which he referred) that he must therefore hold that intention not to be one comprehended by para. (f) of s. 30 (1) of the Act. Counsel for the tenant, supporting that view, also said that one of these buildings certainly was originally erected as a cowshed, and there was no reason why it should not remain as a cowshed and be quite convenient as such for an agricultural tenant. In truth, said counsel for the tenant, this alleged intention to demolish is merely something asserted by the council for the purpose of getting the benefit of the Act: they are not really concerned to demolish: all they want to do is to get it back so as to be able to let it to a Mr. Mears as an agricultural tenant; and *Atkinson* v. *Bettison* (1), says counsel, and so said the judge, disqualifies the landlords from seeking to rely on such an intention.

Atkinson v. *Bettison* (1) was a case, like all these cases, in which it is first necessary to observe carefully what the facts were. It was a case in which the tenant, carrying on a provision business, applied for a new lease from his landlord. The landlord wanted himself to occupy the premises for his business as a jeweller, and he, therefore, said, first, that he was going to reconstruct; then he said that he was going to occupy them himself. The second point was as such no good to him because he had not acquired the premises in due time having regard to the provisions of s. 30 (2). What this court undoubtedly held was that in that case the reconstruction was in very truth something put forward to make good the defects with which the landlord was faced in relying on para. (g). As the court observed, the reconstruction was nothing more than making what was a provision shop more suitable for a jeweller's business; and in any case, therefore, the reconstruction was not of the premises or of " a substantial part thereof ". It is true to say, however, that in the course of their judgments the members of this court, Denning, Hodson and Morris, L.JJ., used language which seemed to indicate that, if it appeared that the reconstruction was purely ancillary to the main purpose—which was, to re-possess—that main purpose not being open to the landlord because of s. 30 (2), then the court ought not to allow the landlord to evade the difficulties he would be in under para. (g) by putting forward a specious case under para. (f). That reasoning came again before this court in a later case of *Fisher* v. *Taylors Furnishing Stores, Ltd.* (2) ([1956] 2 All E.R. 78); and it is to be noted that in that case two members of the court, Denning and Morris, L.JJ., had been members of this court when deciding *Atkinson* v. *Bettison* (1). In that case it was proved to the satisfaction of the judge that the landlords intended to demolish the whole of the premises; that they could not reasonably do so without obtaining possession, and that their object was not to occupy the old building, but to rebuild on the site and to occupy the new building for the purposes of their business of furniture retailers. It then appeared that the county court judge had felt, none the less, that *Atkinson* v. *Bettison* (1) (and in particular the expressions to which I have alluded) bound him to hold that the reconstruction was ancillary to the landlord's wish to re-possess and that, since the landlord had not acquired the premises in due time, therefore he must fail. It was held that the grant of a new lease should be refused. As the landlords had established to the satisfaction of the court that they genuinely intended to demolish and rebuild the premises on the expiration of the tenancy, and reasonably required possession for that purpose, the fact that they intended to occupy the rebuilt premises themselves did not deprive them of their right to possession. The leading judgment was delivered by Denning, L.J., who adverted to what he had said in *Atkinson* v. *Bettison* (1). At the beginning of his judgment I find this passage ([1956] 2 All E.R. at p. 79):

> " The correct ground of the decision [in *Atkinson* v. *Bettison* (1)] was that the proposed work was not ' substantial ' within s. 30 (1) (f); but the court considered also s. 30 (1) (g) and (2), which says that, if the landlord wants to get possession for his own purposes, he must have been owner for the last five years. In this connexion, the court gave an emphatic warning against allowing a landlord too easily to escape from the five-year rule. That is the full extent of *Atkinson* v. *Bettison* (1) and it should not be taken to decide anything more."

The learned lord justice makes certain citations from his previous judgment, and says (ibid., at p. 80):

> " Whilst I adhere to the view that the landlord should not be allowed to circumvent the five-year rule by putting forward a colourable case of reconstruction, nevertheless I think that it is going too far to say that the work of reconstruction must be the primary purpose."

After saying whence the word " primary " had come and that the Act of 1954 contained provisions different from those of the Leasehold Property (Temporary Provisions) Act, 1951, which had given rise to the use of the word, he concludes (ibid.):

> " In many cases the landlord will have two purposes, both of which are genuine and important: the one is to get possession for his own business, and the other is to reconstruct the premises. He does not lose the benefit of s. 30 (1) (f) simply because he bought the premises less than five years before . . . Applying these principles, I think *Atkinson* v. *Bettison* (1), properly understood, did not prevent the judge giving effect to the view which he had formed."

Morris, L.J., gave judgment to the same effect. I will finally cite one short passage from the judgment of Parker, L.J. He cites the language of the paragraphs and goes on (ibid., at p. 84):

> " From the scheme of the Act as there laid down I should have thought that it was clear, apart from authority, that, if any of those grounds of objection is established, the tenant's application for a new lease must fail. Each ground is entirely separate and independent, and each, if proved, entitles the landlord to succeed. Thus, if the ground specified in para. (f) is proved to the satisfaction of the court, it matters not to what use the landlord ultimately intends to put the holding. He may intend to let it when the work is done to a third party; he may intend ultimately to occupy it himself for his own business; or he may not have made up his mind at all. To suggest that, if his intention is ultimately to occupy it himself and he cannot by reason of s. 30 (2) rely on para. (g), he is thereby debarred from relying on para. (f), is to apply a proviso to the operation of para. (f) which is not there and for which there is no warrant."

I need not refer further to my Lord's judgment because he proceeds to deal with *Atkinson* v. *Bettison* (1) in exactly the same way as had Denning, L.J.

Counsel for the tenant invited us to say that that interpretation of *Atkinson* v. *Bettison* (1) is not really justified by the language, or some of the language, of the judgments in *Atkinson* v. *Bettison* (1) themselves: and that we now on this occasion should improve on the performance of Denning, Morris and Parker, L.JJ., by giving another interpretation to the earlier case. He warned us that by the rules applicable to it this court is bound by its previous decisions, right or wrong, unless, of course, they are per incuriam; that we ought to say that this court's attempt to whittle down *Atkinson* v. *Bettison* (1) in *Fisher's* case (2) really went too far; and that in this case *Atkinson* v. *Bettison* (1) should govern.

I am unable to take that view. It seems to me quite plain that we must now regard *Atkinson* v. *Bettison* (1) as deciding what this court said in *Fisher's* case (2) it decided, and no more. In saying that, I am not to be taken to be indicating any doubt as to the correctness of the views in *Fisher's* case (2) that I have quoted. It follows, therefore, that if the landlords here (and I am confining myself, as I said I would, to the county council) establish a genuine bona fide intention to demolish, it is not made ineffective because it is what might be called ancillary to or subsidiary to some other purpose, viz., to incorporate it in someone's agricultural holding. The learned judge thought himself bound by *Atkinson* v. *Bettison* (1); but unfortunately he did not appear to have in his mind (I am not sure whether his attention had been drawn to it or not when he wrote his judgment) *Fisher's* case (2), which is not referred to. I think that had he had *Fisher's* case (2) in mind he would not, and could not, have regarded *Atkinson* v. *Bettison* (1) as laying down a principle which compelled him to decide in the tenant's favour. I therefore think, with all respect to him, that the learned judge wrongly regarded *Atkinson* v. *Bettison* (1) as governing the matter or indeed as having anything to do with it.

It would still be open to the tenant to say that the intention to demolish was not really a genuine intention at all—that the council were not concerned to demolish: they were only pretending to say so, because they wanted to throw this property into an agricultural holding, and knew that unless they said that they were going to demolish they would not succeed in establishing the objection under the section. The short answer to any suggestion of that kind (and counsel for the tenant did not contend to the contrary) is that the learned judge held that there was here proved a genuine intention, a firm and settled intention, on the county council's part to demolish.

That last statement of mine remains subject to the final point which counsel for the tenant took, and it is that the county council failed to prove any such intention on their part because all that they established was an intention on the part of one of their committees, which was called the smallholdings committee. [His Lordship considered the facts and rejected this argument. His Lordship continued:] I add by way of conclusion that s. 30 (1) (f) (it will be recalled) refers to an intention to demolish " the premises comprised in the holding ". The holding was a piece of land 0.229 acre in extent, and the buildings, the Nissen hut and the ex-cowshed, do not cover the whole of that space. There might (as was pointed out in argument) be a case in which the holding was substantially open, but on which there was one relatively small building like a pavilion on a cricket ground, and it might be said that it would be strange if it was only necessary to show an intention to destroy one relatively small building in order to justify recovering possession of a very large area. That is not the case here, and I need not pursue it. The ex-cowshed and the so-called garage cover an appreciable part of the holding, to say no more; and those premises—all of them—it is shown to be the intention of the council to demolish. No point, therefore, of the kind intimated arises here. Following what the learned judge held, viz., that the intention has been established within para. (f), I think the learned judge should have refused the tenant's application. I would therefore allow the appeal and order accordingly.

PARKER, L.J.: I entirely agree, and have nothing to add.

SELLERS, L.J.: I also agree.

Appeal allowed.

Solicitors: *Walker, Martineau & Co.* (for the respondents); *Arthur S. Joseph & Cates,* agents for *MacDonald, Jacobs & Oates,* Southsea (for the applicant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

PIPER *v.* HARVEY.

[COURT OF APPEAL (Lord Denning, Hodson and Pearce, L JJ.), February 6, 1958.]

Rent Restriction—Possession—Hardship—Availability of defence after Rent Act, 1957*—Comparative hardship—Finality of decision of county court judge—Jurisdiction to reverse county court decision—Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 *&* 24 *Geo.* 5 *c.* 32), *s.* 3 (1) (*a*), *Sch.* 1, *para.* (*h*), *proviso—Rent Act,* 1957 (5 *&* 6 *Eliz.* 2 *c.* 25), *s.* 26, *Sch.* 6, *para.* 21.

Statute—Repeal—Proviso applying only to one paragraph of schedule but expressed as proviso to schedule—Substitution of new paragraph without reference to proviso—Whether proviso applicable to substituted paragraph—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5 *c.* 32), *s.* 3 (1) (*a*), *Sch.* 1, *para.* (*h*), *proviso—Rent Act,* 1957 (5 *&* 6 *Eliz.* 2 *c.* 25), *s.* 26, *Sch.* 6, *para.* 21.

The defence that " greater hardship would be caused by granting judgment for possession than by refusing it " is still open to a tenant of a dwelling-house within the Rent Acts whose landlord is claiming possession under para. (h) of Sch. 1 to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, as substituted by the Rent Act, 1957, s. 26 and Sch. 6, para. 21*.

The defendant had been tenant of a bungalow in the country, which comprised three living rooms, kitchen and bathroom, for some seventeen years. The dwelling was within the Rent Restrictions Acts, 1920 to 1939, and was not decontrolled by the Rent Act, 1957. The plaintiff landlord had bought the property in 1951, hoping that he would be able to obtain possession for himself and his invalid wife, who were living together in one upstairs room in the suburban house of his brother, whose kitchen they shared. The wife's health was likely to benefit if they moved to the bungalow. With the tenant lived his wife and grown-up son and daughter and the financial position of the tenant was better than that of the landlord. The tenant had applied to the local authority for accommodation, and had been told by them that he could afford to buy a house. In 1957 the landlord brought an action for possession; the tenant gave evidence of his application to the council, but gave no evidence of any other efforts to obtain accommodation. On appeal against the finding of the county court judge " that greater hardship would be caused by granting an order for possession than by refusing it ", and his consequent refusal to make an order,

Held: (i) the proviso following para. (h) of Sch. 1 to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, was a proviso to the whole of that schedule (as was shown by the following words in the proviso, " on any ground specified in para. (h) of . . . this schedule . . .") and was not repealed by the substitution of a new para. (h) by the Rent Act, 1957, s. 26 and Sch. 6, para. 21.

---

* For the relevant provisions of these paragraphs, see p. 455, letters E to H, post.

A (ii) possession would nevertheless be granted because the only reasonable conclusion on the evidence was that the tenant had not proved that greater hardship would be caused by granting the judgment for possession than by refusing it.

Coplans v. *King* ([1947] 2 All E.R. 393) and *Chandler* v. *Strevett* ([1947] 1 All E.R. 164) considered (see p. 458, per HODSON, L.J.).

B Appeal allowed.

[As to restrictions on the landlord's right to possession, see 20 HALSBURY'S LAWS (2nd Edn.) 329-334, paras. 392-399; and for cases on the subject, see 31 DIGEST (Repl.) 708-710, *7959-7969.*

For the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3, Sch. 1 (h), proviso, and the Rent Act, 1957, s. 26, Sch. 6, para. 21, respec- C tively, see 13 HALSBURY'S STATUTES (2nd Edn.) 1048, 1060, and Vol. 37.]

Cases referred to:

(1) *Coplans* v. *King*, [1947] 2 All E.R. 393; 31 Digest (Repl.) 710, *7968.*

(2) *Chandler* v. *Strevett*, [1947] 1 All E.R. 164; 176 L.T. 300; 31 Digest (Repl.) 709, *7967.*

D **Appeal.**

This was an appeal by a landlord from the refusal of His Honour JUDGE HERBERT, sitting at Southend County Court on Oct. 28, 1957, to make an order in his favour against his tenant for possession of a bungalow to which the Rent Acts applied.

Prior to the commencement of the Rent Act, 1957, the Rent and Mortgage E Interest Restrictions (Amendment) Act, 1933, Sch. 1 (as amended) provided that:

> " A court shall . . . have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply . . . if . . . (h) the dwelling-house is reasonably required by the landlord (not being a landlord who has become landlord by purchasing F the dwelling-house or any interest therein after Dec. 6, 1937) for occupation as a residence for—(i) himself . . . or (iii) his father or mother:
>
> " Provided that an order or judgment shall not be made or given on any ground specified in para. (h) of the foregoing provisions of this schedule if the court is satisfied that having regard to all the circumstances of the case, including the question whether other accommodation is available for G the landlord or the tenant, greater hardship would be caused by granting the order or judgment than by refusing to grant it."

The Rent Act, 1957, s. 26 (1), provides as follows:

> " The provisions of Sch. 6 to this Act shall have effect for . . . making certain minor and consequential amendments of enactments."

H Schedule 6, para. 21, provides:

> " For para. (h) of Sch. 1 to the Act of 1933 . . . the following paragraph shall be substituted
>
> " (h) the dwelling-house is reasonably required by the landlord (not being a landlord who has become landlord by purchasing the dwelling-house or any I interest therein after Nov. 7, 1956) for occupation as a residence for— (i) himself; or . . . (iii) his father or mother."

A. E. Holdsworth for the landlord.

M. B. Smith for the tenant.

LORD DENNING: This is a claim for possession under the Rent Acts. Mr. Piper, the landlord, is the owner of a bungalow at No. 32, Helena Road, Rayleigh. Mr. Harvey is the tenant. The bungalow has only three living rooms, a kitchen and a bathroom. The tenant has been there for seventeen years and pays 10s. a week rent. It is a small bungalow at a small rent. The rateable value is only £18 a year, so that, although many houses have been decontrolled under the Rent Act, 1957, this bungalow still remains subject to the Rent Restrictions Acts, 1920 to 1939.

The landlord bought the property in 1951, hoping to be able to get possession of it then. However, he did not understand the law at that time. As the law was then*, when he bought the bungalow in 1951 he could not get possession on the ground that he wanted it for himself. He had to prove that suitable alternative accommodation was available, and that he could not do. So he could not get possession. When the Rent Act, 1957, came into force it altered the former position. It provided that so long as the landlord bought the house before Nov. 7, 1956, a landlord could ask for possession on the ground that he wanted the dwelling-house for occupation as a residence for himself. That is what the landlord has done in this action.

We have had some argument as to what the landlord has to prove. It was suggested by counsel for the landlord that as a result of the amending Act of 1957 it was quite enough if the landlord proved that he wanted it for occupation as a residence for himself, and that no question of greater hardship came into the matter. Counsel based his argument on the wording of the amendment in para. 21 of Sch. 6 to the Rent Act, 1957. He said that the effect of that paragraph was to replace para. (h) in Sch. 1 to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, and to omit the proviso about greater hardship. He has referred us to the past history of this legislation, to the way in which amendments have been made, and to the punctuation, and has urged us to say that since 1957 the proviso about greater hardship has gone. He said that it was a difficult point, and there have been decisions of county court judges each way on the matter. Having heard the whole of the careful and able argument presented to us, I am quite satisfied that the proviso about greater hardship still applies. Paragraph 21 simply inserts, instead of the old para. (h), the new words there set out. It does nothing more than alter the date about the landlord's purchase of the property. The proviso about greater hardship is not a proviso included in para. (h). It is a proviso to the whole schedule. That is clear from the words

> " on any ground specified in para. (h) of the foregoing provisions of this schedule."

Being a proviso to the whole schedule, it is still intact.

Having failed on this point of law, counsel for the landlord asks us to review the judge's findings on the facts. It is quite plain that the landlord now requires the bungalow for himself. The question is where the greater hardship lies. The landlord proved that he bought the house in 1951, but he could not get into it as he hoped. He lives at Ilford in one unfurnished room upstairs in his brother's house. They have to share the kitchen. The landlord's wife is an invalid. Her doctor was called. He said that the wife had been his patient for ten years, and that she suffered from mental ill-health. The doctor said:

> " I think she would be better out of these conditions. One of the treatments is occupational therapy. She is keen on gardening, and this would help. She can look after herself and her husband. She would be better at Rayleigh ",

which is much more out in the country than Ilford. So the landlord made out a strong case of hardship.

In answer to that case, the tenant himself went into the witness-box and said what his position was. In this small bungalow there is himself, his wife and his son and his daughter—one aged twenty and the other eighteen—and the mother-in-law lives next door. He did not give full details of all the money coming into the house, but he himself is a lorry driver earning £11 a week. The son works on the arterial road, and the daughter is training. The question immediately arises, what steps had they taken to try to get some other accommodation? According to the judge's note all he said about that was " I have tried with the council. I have been on their list for a number of years ". When he was cross-examined, he said: " I applied to the council years ago. They told us we could afford to buy."

---

* The relevant enactments previously existing and the amending provisions of the Rent Act, 1957, are set out at p. 455, letters E to H, ante.

What does that show? He did not give in evidence that he had been round hunting for houses. He did not show that he had made any effort to buy another house, or get another house at all apart from his action in going to the council years ago. The burden is on the tenant to show there is greater hardship on him by having to move. The learned judge thought that he had shown it. He said:

> " For them to obtain other accommodation is and was on the evidence apparently almost impossible unless the local authority by some miracle came to their assistance. It may be possible for them to obtain other accommodation here, but they say they cannot."

The question for this court, which is not an easy one, is whether that is a reasonable and possible conclusion for the county court judge to come to having regard to all the evidence. It is undoubtedly the law that if it is just a matter of weighing the balance of hardship, that is a matter for the judge himself who hears the case, and is not a matter in which this court can interfere. This court can only interfere if on all the evidence there is only one reasonable conclusion to be reached, or, alternatively, if the judge has misdirected himself on the facts or on the evidence. Here it is a very close thing. However, when I look at all the evidence in this case and see the strong case of hardship which the landlord put forward, and when I see that the tenant did not give any evidence of any attempts made by him to find other accommodation, to look for another house, either to buy or to rent, it seems to me that there is only one reasonable conclusion to be arrived at, and that is that the tenant did not prove (and the burden is on him to prove) the case of greater hardship. Although it is very rarely that this court interferes in a hardship case, this does seem to me to be a case in which only one conclusion is possible.

I would therefore allow the appeal and give judgment for the landlord for possession.

HODSON, L.J.: I agree. On the question of construction I have no doubt that Sch. 6, para. 21, to the Rent Act, 1957, has the effect of substituting for para. (h) of Sch. 1 to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, a new paragraph which is set out in extenso in the section (although it merely alters the date) and does not have the effect of repealing the proviso which was contained in the Act of 1933.* The reason for that is clear from the language of the proviso itself, which begins with the words:

> " Provided that an order or judgment shall not be made or given on any ground specified in para. (h) of the foregoing provisions . . ."

Paragraph (h) is the only one on which the proviso has any operation; but the proviso itself is expressed to be a proviso to the whole " of the foregoing provisions ", which indeed are numbered (a) to (h), so that the repeal of (h) does not have the effect of repealing the proviso. Counsel for the landlord has gone through the history of this legislation and shown us how the situation of this provision or a similar provision has altered from time to time. Notwithstanding his argument, and particularly his pointing out to us that the date could easily have been altered without substituting an entirely new proviso, I am of opinion that the words are so clear that it is impossible to say that the proviso has gone.

---

* The relevant parts of the Act of 1957, and of Sch. 1 to the Act of 1933, are printed at p. 455, letters E to H, ante.

On the main question for consideration on this appeal, namely, whether the learned judge was wrong in coming to the conclusion that he did on greater hardship, I have in mind what this court has said in *Coplans* v. *King* (1) ([1947] 2 All E.R. 393) to the effect that the decision of the county court judge, when considering the balance of hardship, is to all intents and purposes final. It is not for the Court of Appeal to interfere when there is evidence on which the judge can reasonably come to the conclusion which he did.

Certain observations of SCOTT, L.J., in another case, *Chandler* v. *Strevett* (2) ([1947] 1 All E.R. 164) were criticised in *Coplans* v. *King* (1) ([1947] 2 All E.R. at p. 394). The two other members of the court in *Chandler* v. *Strevett* (2), BUCKNILL, L.J., and SOMERVELL, L.J., had to deal with a similar problem; and at the outset of his judgment, BUCKNILL, L.J., said ([1947] 1 All E.R. at p. 166) what I think LORD DENNING has just pointed out, and what I feel myself:

> " This appeal raises the difficult question whether there was any evidence on which the judge could come to the conclusion from which the appeal has been made."

SOMERVELL, L.J., at the end of his judgment (ibid., at p. 168) came to the conclusion which I have reached in this case, namely, that there is really " only one possible answer on the issue of greater hardship ", and in this case that is in favour of the landlord. The tenant has not been able to say anything more than the minimum which every tenant can say, namely, that he has in fact been in occupation of the bungalow, and that he has not at the moment any other place to go to. He has not, however, sought to prove anything additional to that by way of hardship, such as unsuccessful attempts to find other accommodation, or, indeed, to raise the question of his relative financial incompetence as compared with the landlord. On the face of it the tenant's financial position, or that of his family, is very much superior to that of the landlord. The domestic position of the landlord is indeed a hard one. It is not even a case where he is occupying a house on his own; he is living in an unfurnished room upstairs in a house which does not belong to him with his invalid wife, and there is very strong evidence of hardship on his side; whereas I am bound to say that I can see no evidence on the other side which can be put into the scale to balance that. I would therefore allow the appeal.

PEARCE, L.J.: I agree.

Appeal allowed: judgment below set aside and judgment entered for landlord.

Solicitors: *Daybell, Court-Cooper & Co.* (for the landlord); *H. Maxwell Lewis*, Southend-on-Sea (for the tenant).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

LES FILS DREYFUS ET CIE SOCIÉTÉ ANONYME *v.* CLARKE.

[COURT OF APPEAL (Parker and Sellers, L.JJ.), January 30, 31, 1958.]

Practice—Summary judgment—Leave to sign judgment—Defective affidavit in support of summons—Whether further affidavits admissible—R.S.C., Ord. 14, *r.* 1 (*a*), *r.* 2.

The plaintiffs, who were assignees of a debt owing by the defendant, brought an action against him for the debt by specially indorsed writ which alleged original indebtedness, the assignment and the sum owing. The defendant appeared to the writ and the plaintiffs took out a summons under R.S.C., Ord. 14, r. 1 (a)*, asking for leave to enter final judgment. The affidavit in support of the summons did not expressly verify the original debt or that it was still due or the assignment, but it alleged indebtedness to the plaintiffs and stated that particulars appeared by the indorsement on the writ. When the summons came before the master, the original assignment was put in and handed to him without objection on the part of the defendant. Subsequently further affidavits verifying the original debt and that it was still due at the date of the assignment were filed on behalf of the plaintiffs.

Held: (i) the court had jurisdiction to allow a defective affidavit filed in support of a summons under R.S.C., Ord. 14, r. 1, to be supplemented by further affidavits, and the defect could thus be cured.

(ii) the original affidavit filed in the present case was defective in two respects, viz., that it neither verified the original debt nor verified the assignment of it, but the former defect had been cured by the subsequent affidavits and the latter defect had been cured by the production of the assignment before the master (*Begg* v. *Cooper* (1878), 40 L.T. 29, applied); on the merits there was no triable issue and the plaintiffs would have leave to enter judgment.

Appeal allowed.

[**Editorial Note.** The Court of Appeal did not overrule the decision of the judge in chambers on what the affidavit should have contained. It follows from his decision (cf., 108 L.Jo. 121) and the present decision, that an affidavit in support of a summons for judgment by an assignee of a debt under R.S.C., Ord. 14, should verify the original debt, that it was owing at the time of the assignment, the assignment, that the assignment was absolute and the amount still due (cf. p. 461, letters B to E, p. 461, letter H, post).

In *Imperial Tobacco Co.* (*of Great Britain and Ireland*), *Ltd.* v. *McAllister* ((1916), 50 I.L.T. 156) a second affidavit to remedy defects in the first was not admitted. This, however, was to remedy a failure to show means of knowledge and authority to depose when the deponent was not the plaintiff. The Court of Appeal in

---

* R.S.C., Ord. 14, r. 1 (a), reads:

"Where the defendant appears to a writ of summons specially indorsed with or accompanied by a statement of claim under Ord. 3, r. 6, the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any liquidated sum is claimed), and stating that in his belief there is no defence to the action except as to the amount of damages claimed if any, apply to a judge for liberty to enter judgment for such remedy or relief as upon the statement of claim the plaintiff may be entitled to. The judge thereupon, unless the defendant shall satisfy him that he has a good defence to the action on the merits or shall disclose such facts as may be deemed sufficient to entitle him to defend the action generally, may make an order empowering the plaintiff to enter such judgment as may be just, having regard to the nature of the remedy or relief claimed."

R.S.C., Ord. 14, r. 2, reads:

"The application by the plaintiff for leave to enter final judgment under r. 1 shall be made by summons returnable not less than four clear days after service accompanied by a copy of the affidavit and exhibits referred to therein."

England has also held (*Chirgwin* v. *Russell* (1910), 27 T.L.R. 21) that absence of a statement of means of knowledge and authority vitiates the affidavit for the purposes of R.S.C., Ord. 14, r. 1.

As to summary judgments on specially indorsed writs, see 26 Halsbury's Laws (2nd Edn.) 49, 50, paras. 77-79; and for cases on the subject, see Digest (Practice) 278-284, *119-175*.

For R.S.C., Ord. 14, r. 1, see the Annual Practice, 1958, Vol. 1, p. 241.]

Cases referred to:

(1) *Symon & Co.* v. *Palmer's Stores (1903), Ltd.*, [1912] 1 K.B. 259; 81 L.J.K.B. 439; 106 L.T. 176; Digest (Practice) 278, *122*.

(2) *Begg* v. *Cooper*, (1878), 40 L.T. 29; Digest (Practice) 280, *138*.

(3) *Lagos* v. *Grunwaldt*, [1910] 1 K.B. 41; 79 L.J.K.B. 85; 101 L.T. 620; Digest (Practice) 279, *125*.

(4) *Jacobs* v. *Booth's Distillery Co.*, (1901), 85 L.T. 262; Digest (Practice) 278, *121*.

Interlocutory Appeal.

The plaintiffs appealed from a decision of Havers, J.*, given on Dec. 18, 1957, allowing the defendant's appeal from an order made by Master Jacob on Nov. 18, 1957. By a specially indorsed writ issued on Oct. 24, 1957, the plaintiffs alleged that, by a deed of assignment dated Oct. 10, 1957, they were the assignees of a debt of £10,000 due from the defendant on June 30, 1957, and they claimed payment of the debt and interest thereon. The defendant appeared to the writ. On a summons by the plaintiffs under R.S.C., Ord. 14, r. 1 (a), Master Jacob, by order dated Nov. 18, 1957, gave leave to sign final judgment for the amount claimed. Havers, J., allowed the defendant's appeal from the order of the master on the ground that the deed of assignment of the debt to the plaintiffs was not verified by the affidavit which accompanied the summons under R.S.C., Ord. 14, or by subsequent affidavits filed on behalf of the plaintiffs.

L. G. Scarman, Q.C., and *C. F. Dehn* for the plaintiffs.

F. W. Beney, Q.C., *M. G. Polson* and *I. A. Kennedy* for the defendant.

PARKER, L.J.: By a specially indorsed writ, dated Oct. 24, 1957, the plaintiffs, who are a corporation in Switzerland, alleged (to put it shortly): (i) that in December, 1956, Messrs. Guinness Mahon & Co., a firm of merchant bankers in London, lent the defendant a sum of £10,000 repayable on Apr. 30, 1957; (ii) that after that sum had become due, namely, on Oct. 10, 1957, Guinness Mahon & Co. assigned the debt to the plaintiffs; and (iii) that notice of that assignment had been given and the defendant had neglected to pay. The plaintiffs claimed the sum of £10,000 and interest amounting to £194 19s. 5d. A summons under R.S.C., Ord. 14, r. 1, for leave to enter final judgment, was issued on Nov. 1, 1957, and on the day before, Oct. 31, Mr. Lang, a director of the plaintiffs, swore an affidavit. It is a formal affidavit supporting the claim indorsed on the writ, and, as some of the issues here concern this affidavit, I must read it. It says:

> " 1. The defendant Thomas Oliver Neville Clarke is justly and truly indebted to the above named plaintiffs in the sum of £10,194 19s. 5d. representing a capital sum of £10,000 owing by the defendant to the plaintiffs together with the sum of £194 19s. 5d. interest thereon and was so indebted at the commencement of this action. The particulars of the said claim appear by the indorsement on the writ of summons in this action. 2. I verily believe that there is no defence to this action. 3. It is within my knowledge that the said debt was incurred and is still due and owing. I am duly authorised by the plaintiffs to make this affidavit."

On Nov. 7 the matter came before the master on that affidavit. The defendant had filed no affidavit in reply. Those representing him said that he desired to file an affidavit, and finally the master gave leave to the plaintiffs to enter judgment, but stayed the drawing up of the order for four days, to enable the defendant to file an affidavit. On Nov. 11 the defendant filed an affidavit in answer, and the summons was restored. I think that it was before the master on that day, Nov. 11, and possibly on a second occasion. The matter was dealt with finally by the master on Nov. 18, when he gave the plaintiffs leave to enter final judgment for the sum claimed*.

---

* See 108 L.Jo. 121 (Feb. 21, 1958) where the decision is shortly reported.

The defendant appealed to the judge in chambers, and before him counsel for the defendant raised a number of points. He submitted, first, that Mr. Lang's affidavit which I have read was defective in two respects: (i) that it did not verify the original debt to Guinness Mahon & Co., or verify that it was still due and owing at the time of the alleged assignment to the plaintiff; and (ii) that it did not verify the assignment itself, either by saying that the deponent had knowledge of it or by exhibiting it. Counsel for the defendant then went on to submit that in those circumstances the court had no jurisdiction to inquire into the merits. To put it briefly, counsel submitted that it was a condition precedent to the issue of the summons under R.S.C., Ord. 14, that there should be a proper affidavit, and that the defect could not be cured. In the alternative, he submitted that, if he was wrong on that point, the further affidavits which were filed did not cure the defects. Finally, he appealed on the merits. The learned judge, in a long and careful judgment, upheld the first contention of counsel for the defendant, namely, that the affidavit was defective in those two respects; but he was against counsel on the second objection and held that any defect could be cured by further affidavit. He then went on to hold that the first defect complained of, namely, that the original debt to Guinness Mahon & Co. was not verified and that the money was still due and owing at the date of the assignment was also not verified, had been cured by subsequent affidavits; but he upheld counsel for the defendant in his second criticism in regard to the assignment and held that, looking at all the facts, the assignment had not been verified. Accordingly, following the decision of this court in *Symon & Co.* v. *Palmer's Stores* (*1903*), *Ltd.* (1) ([1912] 1 K.B. 259), he held that he had no jurisdiction to entertain the matter. He accordingly dismissed the summons, and under R.S.C., Ord. 14, r. 9 (b), ordered the plaintiffs to pay the defendant's costs forthwith. It would seem, therefore, that the only point on which the learned judge was against the plaintiffs was in regard to the failure to verify the assignment.

Before this court counsel for the plaintiffs made two submissions in regard to that. He submitted, first, that, on a fair and reasonable reading of Mr. Lang's affidavit of Oct. 31, Mr. Lang had sufficiently verified the assignment. Secondly, counsel submitted that, although the assignment was not formally exhibited to any affidavit, it was in fact put in before the master. Finally, in case he was wrong on both points, counsel asked and obtained the leave of this court to file and put in a further affidavit exhibiting the original assignment. As regards the first of these submissions, in my view, Mr. Lang's affidavit of Oct. 31 is a thoroughly bad affidavit in support of a summons under R.S.C., Ord. 14. It is the ordinary form used, and properly used, in the case of a simple debt, but it is wholly inadequate and defective for the purposes of dealing with a case such as this. In the ANNUAL PRACTICE, 1958, Vol. 1, p. 246, there is a note stating the proper way to deal with a case like this. The note reads:

> "Plaintiff Assignee of Debt.—Where the plaintiff sues as assignee of a debt, the affidavit should be made by the assignee and assignor, jointly, proving the assignment; and severally by the assignor proving that the debt was owing at the time of the assignment."

---

* Further affidavits were filed on behalf of the plaintiffs and a further affidavit on behalf of the defendant before the matter came before the master on Nov. 18, 1957.

As the learned judge held, Mr. Lang's affidavit of Oct 31, clearly did not verify the original debt to Guinness Mahon & Co. That defect, however, if cure is permissible, has been cured, as counsel for the defendant conceded, by the further affidavits. Counsel for the plaintiffs nevertheless maintained that, at any rate in regard to the assignment, the original affidavit was a sufficient affidavit. Put shortly, his argument was this. By para. 3 of the affidavit the deponent says that "the said debt was incurred and is still due and owing." Going back to para. 1 of the affidavit, one finds that "the said debt" is the debt owing to the plaintiffs, particulars of which have been given in the statement of claim. Counsel then goes one step forward and says that that is the debt arising on the assignment referred to in the statement of claim, and, accordingly, that that is a sufficient verification of the assignment. For my part, I agree that there is, as it were, an oblique reference to the assignment in the affidavit of Oct. 31; but I am perfectly satisfied that it is not a proper affidavit, in the circumstances, to verify the assignment. I am not saying that the assignment itself should have been exhibited; but either the assignor or the assignee should specifically have sworn that in his knowledge there was this assignment. Incidentally, perhaps it is worth mentioning that, if and in so far as this affidavit does verify the assignment, it does not verify an absolute assignment.

In those circumstances I cannot accept the contention of counsel for the plaintiffs on the first point. The matter, however, does not rest there. It is always difficult in this court to go into questions in regard to what exactly happened before the master, but it seems reasonably plain that the original assignment was, in fact, put in and handed to the master; and, indeed, a copy, albeit without signatures, was handed to the defendant's representative. It is also true that there was no express consent given to that course being taken by those representing the defendant. At the same time, no objection was taken and no condition was imposed that the assignment should be exhibited to an affidavit. In those circumstances, I am satisfied that the assignment was put in and remained in, and that the production of the original in those circumstances cured the defect in the affidavit. I should add that, unfortunately, this contention apparently either was not raised or was not pressed before the learned judge. It seems to have been rather lost sight of; but, as I have said, I am satisfied that the assignment was put in, and the omission to refer to that before the learned judge can be properly dealt with, I think, when it comes to a question of an order for costs.

Counsel for the defendant sought to uphold the learned judge's judgment by raising again the second contention which he raised before the learned judge, namely, that it is a condition precedent to the issue of a summons under R.S.C., Ord. 14, that there should be a proper affidavit, and that, if there is a defect in the affidavit filed, it cannot thereafter be cured. This is the more difficult part of the case. In regard to it, as long ago as 1878, in *Begg* v. *Cooper* (2) ((1878), 40 L.T. 29), it was held, to quote the headnote:

> "The making of the affidavit required by r. 1a of Ord. 14, is not a condition precedent to the issue of the summons for leave to sign final judgment. So that, where the plaintiff made a defective affidavit, then obtained his summons, and afterwards swore a fresh and good affidavit, it was Held (affirming the decision of the Queen's Bench Division, COCKBURN, C.J., and MELLOR and FIELD, JJ.), that the issue of the summons was good, and leave to sign final judgment might be given."

It is true that the wording of Ord. 14, r. 1, in 1878, at the time of *Begg* v. *Cooper* (2), was in a slightly different form from that in which it is now; but I agree with the learned judge, who felt that there was no difference between the rules now and then which would lead to a different interpretation; and, as far as I know, *Begg* v. *Cooper* (2) has never been disapproved in any later case.

Counsel for the defendant then referred to a note in the Annual Practice, 1958, Vol. 1, p. 246—the note headed "Plaintiff's Affidavit"—in which this appears:

> "The affidavit must be produced before summons is issued. *Begg* v. *Cooper* (2), which held otherwise, has not been acted upon in practice, and was so disregarded on this point by authority."

Thanks to the industry of junior counsel in the case, it appears—I do not propose to go into this matter in detail—that, until 1888 at any rate, in Wilson's Judicature Acts, Rules, Forms, Etc. (4th Edn. (1883), at p. 214, and 7th Edn., (1888), at p. 167) *Begg* v. *Cooper* (2) is referred to and the statement is made, following that case, that the affidavit need not be filed before the issue of the summons. The Annual Practice, 1886-87, p. 199, in a note to Ord. 14, r. 1, took the same line; but in the Annual Practice, 1889-90, at p. 267, there is a note to Ord. 14, r. 1, to the effect that after the decision in *Begg* v. *Cooper* (2) instructions were given that it was not to be acted on in so far as it said that the affidavit was not a condition precedent to the issue of the summons, and reference was then made in that note to Archibald's Practice at Judges' Chambers (2nd Edn.) (1886), p. 62. Reference to Archibald's Practice confirms that, very shortly after *Begg* v. *Cooper* (2), and allegedly on the ground of mistake, instructions were given—exactly by whom is not clear—that *Begg* v. *Cooper* (2) was not to be acted on in that respect; and it is from that passage that the note in the Annual Practice, 1958, Vol. 1, p. 246, is derived.

Similarly, in the Yearly Practice of the Supreme Court for 1918, in a note to Ord. 14, r. 2, at p. 128 (and also in the 1940 Edition at p. 161) it is said that *Begg* v. *Cooper* (2) is not acted on in practice.

Counsel for the defendant submitted, with some force, that if, notwithstanding *Begg* v. *Cooper* (2), the practice since that decision had been that an affidavit must be produced before the issue of the summons in order to found jurisdiction, the affidavit must be a proper one, because it was idle to say that any affidavit could be put in and that the defects could then be cured by further affidavits in the course of the proceedings. It is an attractive argument and may be logically sound, but it produces a revolutionary idea in regard to practice in chambers. To say now that an affidavit filed by the plaintiff in proceedings under R.S.C., Ord. 14, cannot be, as it were, supplemented by a further affidavit by the plaintiff, with the leave of the court, is something which startles one, and, as far as I know, no case has ever heretofore suggested that with the leave of the court the plaintiff's affidavit cannot be supplemented. Indeed, it is to be observed that in *Symon & Co.* v. *Palmer's Stores* (*1903*), *Ltd.* (1), when the matter came before the court finally, there was one affidavit, at least, supplementing the original affidavit and seeking to cure, but failing in that case to cure, defects in the original affidavit, and no comment was made before the court that that was wholly improper. In *Begg* v. *Cooper* (2) itself, quite apart from what was said in regard to the first point as to a condition precedent, it was said, in effect, that defects could be cured after the issue of the summons. It is also to be observed that in the Yearly Practice of the Supreme Court for 1918*, to which I have already referred, the note at p. 128 dealing with *Begg* v. *Cooper* (2) says this:

> "That case, however, shows that any defects or omissions in the affidavit originally filed may be allowed to be set right or supplied by an affidavit made subsequently."

The note goes on to say (ibid.):

> "See, however, *Lagos* v. *Grunwaldt* (3) ([1910] 1 K.B. 41), where the Court of Appeal appears to have held that the defect in the plaintiff's affidavit was fatal."

It is true that in *Lagos* v. *Grunwaldt* (3) it was found that the affidavit, looked at as a whole, was still defective, and that, as in *Symon & Co.* v. *Palmer's Stores (1903), Ltd.* (1), led to the result that the court had no jurisdiction; but there—and, I think, there alone—is a reference in the practice notes to the fact that the affidavit can be cured. I have no reason to doubt—neither did the learned judge—that there always has been and is jurisdiction in the court to allow the affidavit to be supplemented, and that in deciding jurisdiction one looks at the matter at the end of the day on the affidavits which have been filed.

---

* There is a similar note in the Yearly Practice of the Supreme Court for 1940, at p. 161.

Accordingly, in my judgment, HAVERS, J., was wrong in dismissing the application for want of jurisdiction. The learned judge in those circumstances did not, of course, deal with the merits. Both parties before us have invited this court to deal with them, and I will do so very shortly. The original loan, made in December, 1956, was a loan of £10,000. There was a written agreement providing for repayment on Apr. 30, 1957. The defendant's defence put up in his affidavit is, in effect, this: True, I signed that written agreement, but it does not express the real bargain. The real bargain was that I was to have this £10,000 for two years firm, and I only signed that agreement providing for repayment on Apr. 30, 1957, because I was told, or I understood, that it would be illegal under some regulation to provide for repayment at a later date than six months. Counsel for the defendant maintained that that raised a triable issue which would entitle him to unconditional leave to defend. He referred to *Jacobs* v. *Booth's Distillery Co.* (4) ((1901), 85 L.T. 262), which is always quoted in these cases. I hope I am mindful that, in dealing with a matter of this sort, which is a summary procedure whereby a defendant may be prevented from having his case tried before the court, the matter must be looked at very strictly; but, at the same time, I am quite satisfied in this case that there is (if I may put it in this way) no bona fide triable issue. The matter does not rest on that mere statement of the defendant in his affidavit. The court has seen quite a lot of the correspondence. Every single document, as far as I can see, is consistent only with the true bargain having been that set out in the written document; and one cannot put out of one's mind the fact that this defence was put up for the first time on Nov. 11, 1957, at a time when the matter had already been dealt with once by the master. I am satisfied that in this case there is no bona fide triable issue, and I would allow this appeal and restore the order of the master.

SELLERS, L.J.: I so entirely agree with the judgment of my Lord and his reasonings that I shall not detract from the clarity of our decision by using any words of my own.

Appeal allowed. Order of the master restored.

Solicitors: *Rowe & Maw* (for the plaintiffs); *G. F. Wallace & Co.* (for the defendant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

PRACTICE DIRECTION.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

Husband and Wife—Maintenance—Agreement—Alteration of maintenance agreement after death of one party—Application for leave—Maintenance Agreements Act, 1957 (5 *&* 6 *Eliz.* 2 *c.* 35), *s.* 2.

Where it is necessary to obtain the permission of the court to apply for an order under s. 2 of the Maintenance Agreements Act, 1957, in a case in which more than six months have elapsed since the date of the grant of representation, the application for leave should be included in the summons for directions under r. 58A (6) of the Matrimonial Causes Rules, 1957.

B. LONG,
Senior Registrar.

By direction of the President.
Feb. 14, 1958.

A

REID *v.* THOMAS BOLTON & SONS, LTD.

[COURT OF APPEAL (Lord Denning, Hodson and Pearce, L.JJ.), February 4, 5, 1958.]

County Court—Costs—Fixed costs—Claim for damages for personal injury—Whether court officials should enter fixed costs on summons—Payment in by B *defendant of sum for damages plus amount of fixed costs—Acceptance by plaintiff of sum paid in for damages—Whether plaintiff entitled to tax his costs or only to fixed costs—County Court Rules, Ord.* 11, *r.* 1, *Appendix D, Part* 1, *Direction* 1 (*a*).

An action in a county court for unliquidated damages for personal injuries is an action in which " the only relief claimed is the payment of money " C within C.C.R., Ord. 11, r. 1*; in such an action it is proper for the fixed costs (in accordance with App. D† to the C.C.R., 1936) to be entered in the summons by the officers of the county court, and, if the defendant pays into court within eight days a sum that the plaintiff accepts together with the amount of the fixed costs, no further costs are recoverable from the defendant.

D The plaintiff brought an action for negligence in the county court against the defendants claiming damages not exceeding £400 for personal injuries. Before the action the plaintiff was medically examined and the particulars of claim in the action were settled by counsel. Within eight days of service the defendants paid into court £91 5s. in satisfaction of the plaintiff's claim for damages and £7 for fixed costs, the £7 being the total amount of such E costs marked on the summons by the officers of the county court. The plaintiff accepted the payment into court and claimed to be entitled to costs in excess of the fixed costs. His costs were taxed at £24 1s. 6d.

Held: the defendants were not liable for any costs beyond the £7 fixed costs stated in the summons.

Appeal dismissed.

F [As to county court fixed costs, see 9 HALSBURY'S LAWS (3rd Edn.) 315, para. 764.]

Appeal.

The plaintiff appealed against the decision of His Honour JUDGE HAROLD BROWN, sitting in the St. Helens and Widnes County Court, on Oct. 8, 1957,

---

G * C.C.R., Ord. 11, r. 1 (as substituted by S.I. 1957 No. 174, which came into operation on Mar. 1, 1957), provides:

" (1) Where the only relief claimed in an action is the payment of money, the defendant may, within eight days of the service of the summons on him inclusive of the day of service, pay into court in satisfaction of the claim . . . (b) so much of the claim as he admits to be due from him to the plaintiff, together with the costs (including court fees) which would be entered on a summons for that amount under Part 1 of H Appendix D.

" (3) Where a lesser amount is paid into court, together with the appropriate costs under para. (1) (b) of this rule, and the plaintiff elects to accept that amount in satisfaction of his claim—(a) he shall . . . deliver . . . a notice of acceptance; (b) on receipt by the registrar of the notice . . . the action shall be stayed; and (c) the defendant shall not be liable for any further costs."

† Appendix D which is entitled " Fixed Costs ", under Part 1, Summonses and the I heading " Directions " provides:

" 1. Tables 1 to 6 of this part of this Appendix show the amount to be entered on the summons in respect of solicitor's charges—(a) in an action for the recovery of a sum of money for the purpose only of Ord. 11, r. 1 and Part 2 of this appendix.

" 2. In addition to the amounts entered in accordance with Tables 1 to 6 the appropriate court fees shall be entered on the summons."

C.C.R., Ord. 47, r. 36 (2) provides:

" (2) In a case to which Appendix D does not apply no amount shall be entered on the summons for the charges of the solicitor for the plaintiff, but the words ' to be taxed ' shall be inserted."

reversing the decision of the registrar, and holding that the plaintiff was entitled only to fixed costs, not to taxed costs.

The plaintiff's summons was issued from the county court on Mar. 14, 1957. The material part of the claim, which was for damages for negligence causing personal injuries, read as follows:

The plaintiff claims	
Debt or Damages	See particulars
Costs:	£ s. d.
Court fee	3
Solicitor's charges	4
Total ..	

The plaintiff did not insert the figures for the court fee or for the solicitor's charges; these figures (the £3 and the £4) were inserted by the county court officials in the space provided on the printed form. The particulars of claim, which were settled by counsel, claimed damages not exceeding £400, including £41 5s. special damage. The plaintiff had engaged a doctor to examine him before the action was begun. The summons was served by post, being posted on Mar. 20, 1957. On Mar. 27, 1957, the defendants paid into court £91 5s. in full satisfaction of the plaintiff's claim for damages together with £7, the amount marked on the summons, as shown above, for fixed costs. On Mar. 30, 1957, the plaintiff's solicitors gave notice of acceptance of the £91 5s. " in full satisfaction of the claim in respect of which it is paid in ". On May 30, 1957, the plaintiff applied to tax his costs and on June 4, 1957, despite opposition of the defendants, the registrar held that he was entitled to tax the costs and they were taxed and allowed at £24 1s. 6d., which the defendants were ordered to pay. The defendants appealed to the county court judge, who held that no costs beyond the fixed costs, £7, were recoverable from the defendants. The plaintiff appealed, seeking to recover the taxed costs of £24 1s. 6d.

N. J. L. Brodrick for the plaintiff.

Montague Berryman, Q.C., and *R. I. Kidwell* for the defendants.

LORD DENNING stated the facts and continued: The importance of this case is that it raises the question what is the proper practice in the county court. When the county court officers are presented with particulars of a claim for personal injuries, are they to put in the appropriate fixed costs, as they did in this case, or are they to put in " costs to be taxed " ? Reading through all these rules, it seems to me that it all depends on this: Is an action for damages for personal injuries an action for " the recovery of a sum of money " within Appendix D of the County Court Rules dealing with fixed costs, or, put in other words, is the only relief claimed " the payment of money " within C.C.R., Ord. 11, r. 1 ? The argument, which has been attractively put before us by Mr. Brodrick (counsel for the plaintiff) is that the word " money " there means a liquidated sum or demand, such as a claim for goods sold and delivered or money lent, and that it cannot be intended to apply to actions for unliquidated damages such as these which, as everyone knows, often involve considerable costs far in excess of the fixed costs given by Appendix D. Indeed, counsel for the plaintiff referred us to a rule* which, in regard to infants, shows a distinction between a claim for money and a claim for damages. On the other hand, counsel for the defendants has drawn our attention to a number of rules where, when the makers of the rules intend to refer to a liquidated sum, they do so specifically, such as C.C.R., Ord. 6, r. 2, about a default action, and, indeed, Appendix D itself, Part 2, para. (d). Further (and I think most significantly) he referred us to the rules relating to the scale of costs, such as C.C.R., Ord. 47, rr. 5 and 6†, which show that in an action of this kind, the amount of costs that may be recovered depends on the amount of the sum that you recover in the action; and, indeed, as everyone with any practice in the county court knows, that is the case. In an action of this kind it does not matter what the claim is. The claim may be up to £400, but if the plaintiff gets only £90, he gets costs on the appropriate scale unless some special order is made.

---

* C.C.R., Ord. 5, r. 19.

† The terms of C.C.R., Ord. 47, r. 6, are printed at p. 467, footnote, post.

Weighing the arguments on both sides I have come to the conclusion that counsel for the defendants' argument is right. This action is an action for the recovery of a sum of money. It is an action in which the only relief claimed is a sum of money. What the plaintiff wants is money and nothing else, and, therefore, it is an action which comes within the rule as to fixed costs. It all comes to this, that in an action for personal injuries—which is an action for the recovery of money—it is the proper course for the fixed costs to be entered in the summons by the county court officers. If the defendant pays in a proper sum within the eight days plus those fixed costs, and the plaintiff accepts the sum paid in, then those are the only costs recoverable, and the action is at an end. The convenience of the system may outweigh the apparent injustice of the result.

I think that the decision of the learned county court judge was right, and I would dismiss the appeal.

HODSON, L.J.: I entirely agree. I think that the learned judge was right, for the reasons which he gave and those which my Lord has given. The order under consideration (C.C.R., Ord. 11, r. 1) uses the phrase: "Where the only relief claimed . . . is the payment of money". Prima facie that covers payment of money not only where the claim is liquidated, but also where the claim is unliquidated. I see nothing in the other rules, in the context of which this rule appears, to displace the prima facie meaning of the word "money" except that counsel for the plaintiff was able to point out that in one rule—C.C.R., Ord. 5, r. 19—there was a reference to money or damages as if there were a distinction between a claim for a liquidated sum and a claim for general damages. Apart from that, however, I think that the rules consistently throughout, where they wish to refer to a liquidated payment, do so. As PEARCE, L.J., pointed out in the course of the argument, C.C.R., Ord. 47, r. 6*, really clinches the matter, because the recovery of money is dealt with, and a scale of charges is fixed. If the argument for the plaintiff is right no provision is made for the scale of charges in respect of unliquidated claims, such as the claim in this case, except the general discretion in the county court judge to award costs.

I agree that this appeal fails, and should be dismissed.

PEARCE, L.J.: I agree with what my Lords have said. Although this is an unliquidated claim I think that it must come within the words of C.C.R., Ord. 11, r. 1, and that the relief claimed is "the payment of money". It appears to me that there is no answer to the point founded on C.C.R., Ord. 47, r. 6*, which lays down the scale of costs which shall be allowed in an action for the recovery of a sum of money only. If that is to be construed as limited to liquidated demands and as not including unliquidated claims, then nothing is laid down with regard to the costs of a very large and very important class of actions. I cannot believe that to have been intended. I doubt whether plaintiffs as a class lose by the rule as we construe it. It gives an incentive and an impulse to defendants to dispose of an action at an early stage by a sufficiently generous payment in. They know that they can do so then without risk of finding that the case has already been overloaded with costs. Of course, in cases where costs cannot be avoided before the action, it may create hardship. In liquidated claims under the rule there are admittedly hardships for plaintiffs who have to incur rather unusual costs, and I think that the hardship here is no greater than in those cases. In general the rule works to keep down the costs and to bring about a speedy settlement. Viewed on a more general basis, and not on the facts of a particular case, I think that it is perfectly reasonable if one gives to it the construction which we have given.

---

* C.C.R., Ord. 47, r. 6, provides:

"(1) Subject to rr. 7, 8, 9 and 13 of this order the scale of costs in an action for the recovery of a sum of money only shall be determined (a) as regards the costs of the plaintiff, by the amount recovered . . ."

For these reasons and those that my Lords have given I agree that the appeal fails and should be dismissed.

Appeal dismissed.

Solicitors: *Mawby, Barrie & Letts*, agents for *Barrell & Co.*, Liverpool (for the plaintiff); *Gardiner & Co.* (for the defendants).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

R. *v.* VACCARI.

[COURT OF CRIMINAL APPEAL (Cassels, Streatfeild and Slade, JJ.), February 10, 1958.]

Criminal Law—Gambling by bankrupt engaged in trade or business—Income tax debt unpaid—Whether debt contracted in course and for the purposes of trade or business—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5 *c.* 59), *s.* 157 (1).

The appellant made substantial profits from his business as a café proprietor. In 1950 the Inland Revenue re-assessed him to income tax for the period 1944-49 in the sum of £5,000. In 1956 they obtained judgment against him for that amount and in November of that year a receiving order in bankruptcy was made against him on their petition as judgment creditors. The appellant had lost £3,000 gambling in the two years preceding the judgment and lost a further £2,000 gambling in the interval between the petition and the receiving order. At the date of the receiving order the appellant's outstanding indebtedness for income tax (including an additional assessment in 1955 for £2,000) amounted to some £7,000. He was convicted by quarter sessions on charges under s. 157 (1) (a) (b)* of the Bankruptcy Act, 1914, viz., of materially contributing to his insolvency by gambling within the two years prior to the bankruptcy petition and of losing part of his estate between the dates of the petition and the receiving order by gambling. Section 157 (1) applied only if a person, having been engaged in trade or business, had outstanding at the date of the receiving order "any debts contracted in the course and for the purposes of such trade or business". On appeal,

Held: income tax on business profits was the Crown's share of the profits and was not a debt arising in the course and for the purposes of a business, and therefore s. 157 (1) of the Bankruptcy Act, 1914, was inapplicable and the convictions must be quashed.

Appeal allowed.

[As to the commission of a misdemeanour by a bankrupt by gambling or speculation, see 2 HALSBURY'S LAWS (3rd Edn.) 631.

For the Bankruptcy Act, 1914, s. 157 (1), see 2 HALSBURY'S STATUTES (2nd Edn.) 437.]

---

* Section 157 (1) of the Bankruptcy Act, 1914, provides: "Any person who has been adjudged bankrupt, or in respect of whose estate a receiving order has been made, shall be guilty of a misdemeanour, if, having been engaged in any trade or business, and having outstanding at the date of the receiving order any debts contracted in the course and for the purposes of such trade or business—(a) he has, within two years prior to the presentation of the bankruptcy petition, materially contributed to or increased the extent of his insolvency by gambling or by rash and hazardous speculations, and such gambling or speculations are unconnected with his trade or business; or (b) he has, between the date of the presentation of the petition and the date of the receiving order, lost any part of his estate by such gambling or rash and hazardous speculations as aforesaid; or . . ."

A **Appeal.**

This was an appeal by Amedeo Vaccari, the appellant, against his conviction and sentence before the deputy chairman of the County of London Sessions, on Dec. 11, 1957, on an indictment containing three counts, the first two of which alleged against the appellant offences under s. 157 (1) of the Bankruptcy Act, 1914. The first count charged the appellant, that being adjudged a bankrupt, B he materially contributed to or increased his insolvency by gambling within two years prior to the presentation of the bankruptcy petition, contrary to s. 157 (1) (a) of the Act of 1914, and the second count charged him, being adjudged a bankrupt, with having lost part of his estate by gambling between the date of the presentation of the bankruptcy petition and the date of the receiving order, contrary to s. 157 (1) (b) of the Act of 1914.

C The appellant was engaged in business as a café proprietor from which business he made a large yearly profit. In 1950 the Inland Revenue, who had been inquiring into the appellant's income, presented him with a re-assessment of tax for the period 1944-49 amounting to £5,000. The appellant disputed the assessment. A further additional assessment for income tax was made on the appellant on Oct. 7, 1955, in the sum of £2,000. On Jan. 3, 1956, the Inland D Revenue secured a judgment against him for the sum of £5,166 in respect of the re-assessment in 1950, and, the appellant being unable to pay it, the Inland Revenue, on July 27, 1956, presented a petition in bankruptcy against him asking that the appellant be made a bankrupt. On Nov. 22, 1956, a receiving order was made against the appellant, and in January, 1957, a public examination in his bankruptcy was held. At his public examination, the appellant gave E evidence that in the two years prior to the presentation of the bankruptcy petition he had lost some £3,000 by gambling and that in the period between the presentation of the petition and the making of the receiving order he had lost a further £2,000 by gambling. At the time when the appellant was adjudicated bankrupt he owed the Inland Revenue some £7,000. The appellant was convicted on all three counts in the indictment, and was sentenced to six months' F concurrent imprisonment on counts one and two and three months' concurrent imprisonment on the third count which charged an offence under s. 158 of the Act of 1914. He was granted a certificate under s. 3 (b) of the Criminal Appeal Act, 1907. He now appealed against his conviction on counts one and two on the grounds that the deputy chairman was wrong in law in directing the jury that the Revenue debt amounting to £7,000 was a debt contracted in the G course and for the purposes of the appellant's business within the meaning of s. 157 (1) of the Bankruptcy Act, 1914.

Victor Durand for the appellant.

S. A. Morton and *C. P. C. Whelon* for the Crown.

CASSELS, J., delivering the judgment of the court, stated the facts and H continued: There was evidence for the consideration of the jury that the appellant had gambled and that, as the result of gambling during the material period, he had brought himself within the mischief of s. 157 (1) of the Bankruptcy Act, 1914, the words of which in this respect are of some importance. [His Lordship read the relevant terms of s. 157 (1), which sub-section has been printed at p. 468, footnote, ante, and continued:] Within the four corners of that section, I the appellant who, by his learned counsel has been described as possessing no merits at all, has gone ahead first because he has succeeded in losing to bookmakers who must have been very pleased to know that they would be paid no less a sum than £6,000, and secondly, because he did not pay the Inland Revenue but left them to obtain such judgments by such processes as they saw fit. The appellant was therefore prosecuted as coming within the mischief of s. 157 (1) of the Act of 1914, namely, that within two years prior to the presentation of the bankruptcy petition he had materially contributed to or increased the extent of his insolvency by gambling.

The whole case turned on the debt to the Inland Revenue, and the matter was decided as a question of law by the learned deputy chairman, that such a debt could be regarded as a debt contracted " in the course and for the purposes of such trade or business ". The learned deputy chairman said that that was a point of law and left to the jury the fact whether the appellant had increased his insolvency by gambling, and on these two counts of the indictment the jury did not have much difficulty in arriving at the conclusion that the appellant had undoubtedly increased his insolvency by gambling because he had not paid certain people and he had not paid the Inland Revenue a debt which was due to them, a debt contracted in the course and for the purposes of such trade or business. This court has listened to the argument of counsel for the appellant, who has put everything before us which could possibly be put, and has even succeeded in finding that which he did not find at the trial, namely, some authorities on the point. These authorities have been cited, and learned counsel for the Crown finds that he is quite unable to support the conviction on these two counts or to argue that a debt due to the Inland Revenue by a man in business or a trader is a debt contracted in the course and for the purposes of such trade or business. This court has been concerned to find out—indeed it did not have much difficulty in so doing—what is the nature of the debt due to the Inland Revenue by way of income tax. Income tax is a share of the profit, and it is not a debt arising in the course of the trade or business, but it is the Crown's share of the profit after that has been ascertained. The authorities which have been cited to the court go to show that which was already known and very well established, that a trader cannot deduct from his profits the cost of having to pay damages to somebody who happens to have been injured by a faulty chimney on licensed premises*. He cannot deduct the costs of bringing an action against the Board of Inland Revenue on a matter concerned with income tax†. He cannot deduct the cost of unsuccessfully defending an action brought against him by the Board of Inland Revenue‡. In other words, income tax is not a debt arising in the course of or out of the trade or business. It is a liability due directly to the Crown and it is calculated on the profits or gains in the course of the business but has nothing to do with the actual business in the way of a trade debt. It is not a trade debt. It is a statutory liability which has to be paid, and it therefore could not possibly be held to come within the four corners of the words of the Act of 1914, namely, a debt " contracted in the course and for the purposes of such trade or business ".

It may seem very strange that a taxpayer who succeeds in delaying payment of his just dues to the tax collector and enjoys himself as much as he likes by gambling, yet should not come within the mischief of s. 157 (1) (a) of the Bankruptcy Act, 1914, when he is made bankrupt and it is found that his estate is considerably diminished by his activities in gambling. The only answer that this court can make is to say that that is not a matter for the court but for Parliament. We have to interpret the law and the Act of 1914 as we find it, and s. 157 (1) is applicable only to a debt which is contracted in the course and for the purposes of the trade or business on which a man has been engaged.

The position therefore is that the convictions on counts 1 and 2 must be quashed.

Appeal allowed against convictions on counts 1 and 2.

Solicitors: *Hardcastle, Sanders & Armitage* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

---

* See *Strong & Co., Ltd. v. Woodifield* (*Surveyor of Taxes*) ([1906] A.C. 448).

† See *Smith's Potato Estates, Ltd.* v. *Bolland* (*Inspector of Taxes*) ([1948] 2 All E.R. 367).

‡ See *Allen* v. *Farquharson Bros. & Co.* ((1932), 17 Tax Cas. 59).

A

R. v. GREEN.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery, Cassels, Barry and Salmon, JJ.), January 27, 28, February 3, 1958.]

Criminal Law—Recognisance—Breach of recognisance—Appeal.

B *Criminal Law—Sentence—Probation order—Breach of probation order—Whether conviction for which invalid sentence was imposed may be used as a breach of a probation order—Criminal Justice Act,* 1948 (11 *&* 12 *Geo.* 6 *c.* 58), *s.* 6 (4) (*b*), (6), *s.* 8 (5).

Certiorari—Conviction—Quashing—Sentence illegal—No power to amend sentence.

Appeal to the Court of Criminal Appeal lies from a court of quarter sessions C sentencing an offender brought before them on breach of a probation order or recognisance (see p. 473, letters G and H, post).

R. v. *Smith* ([1925] 1 K.B. 603) followed.

In January, 1957, G. was convicted by Buckinghamshire quarter sessions of larceny and placed on probation for two years. In October, 1957, he was D again convicted of larceny and was sentenced by magistrates at Aldershot to two months' detention. After eight days of his detention he was released by order of the Home Secretary because a sentence of less than three months' detention could not lawfully have been imposed in his case. G. was then brought before quarter sessions who sentenced him to borstal training, purporting to act under s. 6 (4) (b)* of the Criminal Justice Act, 1948, on his E failure to comply with a requirement of the probation order and to sentence him for the offence for which the order was made. On appeal against sentence,

Held: the sentence must be quashed because, if the sentence of October, 1957, had been brought before the High Court on application for certiorari, the conviction and the sentence would have been quashed (that court F having no power to amend the sentence) and, therefore, the conviction of October, 1957, could not be used to show failure to comply with a requirement of the probation order; moreover, s. 6 (4) (b)* of the Criminal Justice Act, 1948, was not applicable to G.'s case by reason of sub-s. (6)*.

Quaere whether when a magistrates' court had convicted and sentenced an offender, but the sentence imposed was invalid, the offender had been G "convicted and dealt with" within s. 8 (5)† of the Criminal Justice Act, 1948.

Observations on the desirability of conferring power on the Queen's Bench Division to amend sentence where application is made for certiorari to quash in a criminal case (see p. 474, letters C to E, post).

Appeal allowed.

H [**Editorial Note.** Where an accused is properly convicted by justices but, in error, a sentence that cannot lawfully be imposed is passed on him, certiorari to quash the conviction may be obtained, the Divisional Court having no jurisdiction to amend the sentence (*R.* v. *Willesden JJ., Ex p. Utley,* [1947] 2 All E.R. 838).

As to appeal lying from breach of a recognisance, see 10 HALSBURY'S LAWS I (3rd Edn.) 496, para. 906; and for cases on the subject, see 14 DIGEST (Repl.) 227, *1899-1901.*

As to the power of the court on the commission of a further offence by a probationer, see 10 HALSBURY'S LAWS (3rd Edn.) 504, para. 918.

For the Criminal Justice Act, 1948, s. 6 and s. 8, see 28 HALSBURY'S STATUTES (2nd Edn.) 356 and 358.]

---

* The relevant terms of these enactments are printed at p. 473, letters C and E, post.

† The terms of this enactment are printed at p. 474, letter F, post.

Case referred to:

(1) *R.* v. *Smith,* [1925] 1 K.B. 603; 94 L.J.K.B. 592; 132 L.T. 799; 89 J.P. 79; 14 Digest (Repl.) 227, *1899.*

Appeal.

On Jan. 27, 1957, the appellant, Noel Green, pleaded guilty before Quarter Sessions for the County of Buckingham to shopbreaking and larceny and was placed on probation for two years. On Oct. 14, 1957, he pleaded guilty at a magistrates' court at Aldershot to stealing a bicycle and was sentenced to two months' detention in a detention centre. This sentence was below the statutory minimum of three months' detention*, applicable in the circumstances of his case, and the Home Secretary ordered the appellant's release on Oct. 23, 1957. The appellant was brought before the Buckingham Quarter Sessions again on breach of his probation order, and, on Nov. 11, 1957, he was sentenced to borstal training. He was nineteen years of age. Quarter sessions purported to act under s. 6 (4) (b) of the Criminal Justice Act, 1948. The appellant admitted before quarter sessions the theft of the bicycle, and that he understood that this was a breach of the probation order†. The appellant appealed against this sentence on the ground that the sentence of Oct. 14, 1957, being bad the conviction could not be used as a breach of the probation order. He was given leave to appeal against conviction and sentence.

At the original hearing of his appeal on Jan. 27, 1958, before Hilbery, Jones and Salmon, JJ., counsel for the appellant admitted there could be no appeal against the conviction on Jan. 27, 1957, and limited his appeal to one against sentence only on the ground that he had not been properly convicted of a breach of the probation order. The Crown raised the point that the Court of Criminal Appeal had no jurisdiction, when hearing an appeal against sentence, to consider whether the probationer had been validly convicted of a breach of the probation order, but only to consider the quantum of sentence. This point was adjourned for hearing by a court of five judges.

D. R. M. Henry for the appellant.
J. Malcolm Milne for the Crown.

LORD GODDARD, C.J., delivered the judgment of the court: This youth was originally convicted of a theft or housebreaking before quarter sessions at Aylesbury and was placed on probation. While he was on probation he committed another offence of stealing a bicycle, for which he was brought before a magistrates' court at Aldershot. The magistrates' court thinking, I suppose, that they did not want to be too hard on this boy, and thinking that a detention centre was the place to send him, sent him to a detention centre for two months. Unfortunately a court cannot send a person to a detention centre for less than three months. I suppose Parliament thought, and one can well understand it, that if a boy is to get any real advantage from detention in a detention centre three months is the least time for which he should be treated. No doubt when this matter was brought to the attention of the Home Office, the Home Secretary came to the conclusion that it was his duty to order this boy to be released because he took the view that he was being held under an illegal sentence. The Home Secretary did not purport to quash the conviction because the Home Secretary has no power to quash a conviction; he can only act under the prerogative, and the conviction never has been quashed. In this case the boy was released. Thereupon, he was brought before quarter sessions at Aylesbury, and the court had considerable difficulty in knowing how to deal with him because the sentence which had been passed for stealing the bicycle was an illegal sentence in the way which I have mentioned. The court came to the conclusion that they would deal with him under s. 6 of the Criminal Justice Act, 1948. That is a section which enables the court to deal with a breach of conditions which may be imposed on a person who is put on probation. One of the terms of the probation with regard to a boy very often is that he shall live at a certain place or that he shall live where directed by the probation officer. Sometimes a term is put on him that he shall not live at a certain place; there are various other terms which the court can place on a probationer and, of course, there is always the condition that he shall keep the peace. Sometimes a condition is inserted that he shall lead an industrious life so that if he is offered work and will not take it he may be brought before the court for breach of probation, but apparently s. 6 of the Criminal Justice Act, 1948, is meant to deal only with breaches of that description because the concluding words of sub-s. (6) of that section are:

---

* Criminal Justice Act, 1948, s. 18, as amended by the Magistrates' Courts Act, 1952, s. 131, Sch. 5.

† The procedure followed was in accordance with *R.* v. *Devine* ([1956] 1 All E.R. 548, n.).

> " . . . and without prejudice to the provisions of s. 8 of this Act, a probationer who is convicted of an offence committed during the probation period shall not on that account be liable to be dealt with under this section for failing to comply with any requirement of the probation order."

For the purposes of s. 6, therefore, a further offence is, so to speak, out.

Counsel for the appellant has quite rightly called attention to the fact that a certain procedure is laid down for the court to deal with a probationer under s. 6. He has to be brought before a court of summary jurisdiction. Then, if the probation order was made by a court of assize or quarter sessions he has to be committed to custody or released on bail until he can be brought or appear before the court of assize or quarter sessions. When he is brought before the court of quarter sessions, then, under s. 6 (4) (b) of the Act of 1948, if—

> " . . . it is proved to the satisfaction of that court that he has failed to comply with any of the requirements of the probation order, that court may deal with him, for the offence in respect of which the probation order was made, in any manner in which the court could deal with him if he had just been convicted before that court of that offence."

The first point that we have to deal with, before turning to s. 8 of the Criminal Justice Act, 1948, is this. Counsel for the Crown has addressed an interesting argument to the court whether there is any right to appeal here at all because he says there has been no conviction against which an appeal will lie, and the only possible appeal would be against the quantum of sentence when one is dealing with an appeal against sentence. It appears, however, from the cases which he has most properly brought to our attention that from a very early period of the history of this court the court have always dealt with the question whether a person brought before a court because of a breach of recognisance has a right of appeal, and he has always been granted a right of appeal. A case in which the doubt was set at rest is *R.* v. *Smith* (1) ([1925] 1 K.B. 603), a judgment given by SALTER, J. Since that case it has been quite clear that this court always have power to deal with cases where a person is brought before the court under the terms of a probation order or a common law recognisance and is subsequently sentenced. We think, therefore, that we should not be following the cases which have been decided if we held that there was no right of appeal.

Then what are we to do ? We have said that s. 6 of the Criminal Justice Act, 1948, under which quarter sessions purported to act in this case did not apply. We do not think the attention of quarter sessions could have been called to the concluding words of sub-s. (6). Quarter sessions did consider s. 8, and the difficulty which they felt with regard to s. 8 is a very real difficulty. It is the difficulty of using a conviction which is recognised to be bad so far as the sentence passed on that conviction is concerned to establish a ground for saying that a person had committed a breach of recognisance. The matter is put quite shortly, as a matter of fact, in the appellant's notice of appeal, when he says:

> "In September, 1957, I was charged with the stealing of a cycle and sent to a detention centre for two months by the Aldershot magistrate. It was later found that the minimum sentence was three months and the offence was quashed and I was discharged after serving only eight days. If this offence was quashed I fail to see how I could be charged with breach of probation for which I have received borstal training."

In other words he is saying that the conviction for which he was brought before the court cannot be used to say that he had committed a breach of probation. The conviction never was quashed in fact, but it is quite clear that if this boy could have been advised at the time, he would have been advised to apply for an order of certiorari to the Divisional Court to bring up that conviction before the Aldershot magistrates and get it quashed, and quashed it would have been. It is an unfortunate hiatus in our law, and one to which the Queen's Bench Division has on more than one occasion called attention, that unfortunately the High Court have no power to amend where a conviction by magistrates is brought before the court and where the magistrates per incuriam have passed a sentence which is not justified by law as, for instance, where they impose a fine of £10 in what they regard as a very bad case, but the statute only allows a fine of £5 to be ordered. The High Court can only look at the conviction, and the conviction is bad on its face, and therefore has to be set aside. It is quite absurd because if a man appeals against his sentence to quarter sessions, quarter sessions can put the matter right. If a man is convicted on indictment and an illegal sentence is passed, this court can put it right. It is only where a sentence is passed by magistrates and is challenged by means of certiorari that the court has no power to put it right, and I hope that at no great distance of time a provision will be made in the law, though it must be made by an Act of Parliament, to give the Queen's Bench power to alter an illegal sentence which is passed to a legal sentence; because otherwise the offender goes unpunished.

The one thing which has given us trouble in this case is that sub-s. (5) of s. 8 provides:

> "Where it is proved to the satisfaction of the court by which a probation order or an order for conditional discharge was made, or, if the order (being a probation order) was made by a court of summary jurisdiction, to the satisfaction of that court or the supervising court, that the person in whose case that order was made has been convicted and dealt with in respect of an offence committed during the probation period, or during the period of conditional discharge, as the case may be, the court may deal with him, for the offence for which the order was made, in any manner in which the court could deal with him if he had just been convicted by or before that court of that offence."

Those words "convicted and dealt with" cause some difficulty. It may be that on their true construction the words simply mean that the magistrates have made some order, so that they are functus officio; or the words may mean convicted and sentenced, and therefore dealt with. The court do not propose in this case to resolve that difficulty, which really is more or less academic. What we do feel is that in this case we ought not to allow the present sentence to stand as a breach of recognisance, since the sentence that was passed by the magistrates at Aldershot* could not be upheld because it was for two months instead of three months (for which reason the Home Secretary felt obliged to discharge the boy from custody) and since, if the case had then been brought before the Divisional Court by certiorari, the conviction would have been quashed. If the conviction had been quashed, it could not have been used to support a breach of recognisance. The case is unsatisfactory, the application is wholly technical and there are no merits in it at all, as counsel for the appellant, who has quite properly taken every point, has admitted; but the criminal law still allows technical points to be taken and, if the technical point succeeds, the prisoner goes unpunished. In this case it may be unfortunate that this boy who is obviously in need of discipline and training will have to be discharged, but this court cannot see any way in which this order can properly be upheld, and the appeal is therefore allowed and the boy will be discharged.

---

* I.e., the sentence of two months' detention; see p. 472, letter B, ante.

Appeal allowed.

Solicitors: *Registrar of Court of Criminal Appeal* (for the appellant); *N. M. Fowler*, High Wycombe (for the Crown).

[*Reported by* E. Cockburn Millar, *Barrister-at-Law.*]

R. *v.* SMITH AND OTHERS.

[Central Criminal Court (Glyn-Jones, J.), November 11, 25, 26, 27, 28, 29, December 2, 3, 4, 5, 6, 9, 10, 1957.]

Criminal Law—Indictment—Joinder of counts—Separate indictments for manslaughter and other offences—Evidence on each indictment substantially similar—Bill of indictment granted including count of manslaughter and other offences.

The first two prisoners were indicted for manslaughter, and in a second indictment they were charged with the other three prisoners on counts of stealing or receiving a lorry laden with lead. Almost the whole of the evidence in support of each indictment would, if each indictment had been heard separately, have had to be called again on the other.

Held: in the circumstances it was desirable in the interests of justice and in the public interest that all the charges laid against the five prisoners should be disposed of in one trial, and, it not being proper to amend either indictment by including in it the charges contained in the other, a bill of indictment would be granted against all the prisoners in which a charge of manslaughter against the first two prisoners would be included.

[**Editorial Note.** A bill of indictment may still be preferred by the direction or with the consent of a judge of the High Court under s. 2 (1), (2) (b) of the Administration of Justice (Miscellaneous Provisions) Act, 1933. Such a bill is often called a voluntary bill, though the old common law procedure of presenting a voluntary bill before a grand jury without previous leave or inquiry no longer exists.

It was intimated in *R.* v. *Large* ([1939] 1 All E.R. 753) that counts charging other offences should not be joined in an indictment for manslaughter; and in the present case it was not appropriate to amend the indictment for larceny so as to include the charge of manslaughter (see p. 476, letter F, post).

As to voluntary bills, see 10 Halsbury's Laws (3rd Edn.) 381, para. 690; as to the joinder of several offences, see ibid., p. 391, para. 708; and as to the amendment of indictments, see ibid., p. 393, para. 712.

For the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2, see 5 Halsbury's Statutes (2nd Edn.) 1067.]

Trial on indictment.

The first two prisoners, Henry Thomas Smith and Robert Semaine, were charged in the first indictment with the manslaughter of George Benjamin Day who was alleged to have received fatal injuries while assisting them and the other three prisoners in unloading a lorry laden with lead which had been stolen. In a second indictment, containing four counts, Smith and Semaine were charged with stealing the lorry and receiving stolen property, Candler was charged with being an accessory after the fact to stealing and receiving stolen property and E. G. Richardson and C. W. Richardson were charged with receiving stolen property. Apart from the medical witnesses on the charge of manslaughter the witnesses on each indictment were the same. After the trial had proceeded five days the charge of manslaughter was withdrawn from the jury, and in the result Smith and Semaine were convicted of stealing the lorry and its contents and were sentenced; Candler was convicted of being an accessory after the fact A to the stealing and receiving and was sentenced; E. G. Richardson and C. W. Richardson were found not guilty and were discharged. The case is only reported on the issue of the joining of the separate indictments for manslaughter and other offences.

R. E. Seaton, E. J. P. Cussen and *Miss P. G. Coles* for the Crown.

R. A. Kaye for Smith and Semaine. B

P. A. G. Rawlinson for Candler.

J. C. G. Burge and *D. W. T. Price* for E. G. Richardson.

Victor Durand and *R. M. G. Simpson* for C. W. Richardson.

Nov. 11. **GLYN-JONES, J.:** In this case depositions were taken before the examining magistrates and at the close of the hearing the accused, Smith and Semaine, were committed to stand their trial on a charge of the manslaughter of George Benjamin Day, and all the defendants, including Smith C and Semaine, were committed to stand their trial on charges of stealing or receiving a lorry or the lead which was loaded on it.

Separate indictments were preferred against them in this court; an indictment against Smith and Semaine for manslaughter, and a separate indictment against them and the others containing various counts charging stealing or receiving. D Having inquired from counsel for the prosecution I learned that if those two indictments were tried in separate trials, as they would have to be since they were separate indictments, it would be necessary for the prosecution to call in each trial almost the whole evidence which would have to be called in the other trial. In particular, on the trial of Smith and Semaine and others for stealing the lorry and lead or for receiving the lead knowing it to have been stolen, the E whole of the evidence on which the prosecution would ask the jury to convict on the manslaughter charge would have to be called.

It seemed to me that it would be a great waste of time and money that all that evidence should be called twice over, and I formed the opinion that it would be desirable in the interests of justice and in the public interest that all the matters alleged against these defendants should be heard and disposed of in one F trial, but a technical difficulty arises. It was not, as I saw it, possible to amend the indictment for manslaughter by including the other defendants in the indictment which charges the stealing and receiving; nor had I thought it right to amend the indictment for stealing and receiving by adding the charge of manslaughter, and it therefore seemed to me that the proper course was, having read the depositions, to grant a bill of indictment against all these defendants, G in which there shall be included a charge of manslaughter against Smith and Semaine. That has been done, and this trial will proceed on the voluntary bill.

A further question arises whether or not the provisions of the Criminal Justice Act, 1925, s. 13 (3)*, apply so as to enable the depositions of those witnesses who were conditionally bound over to be read on this trial. I have come to the conclusion that this is a trial of persons who have been committed for trial for H the offences, in the case of Smith and Semaine of manslaughter and of stealing or receiving, as the case may be, and in the case of the others of receiving. The trial will take place, therefore, on the charges on which these defendants have all been committed. Each has heard the evidence given by the witnesses conditionally bound over, each has had his opportunity to cross-examine, and I rule that in this case, all the defendants having been committed for trial for I the offences with which they are now charged, the deposition of the witness Detective Sergeant Merry may now be read. Any other decision in my opinion would cause a wholly unjustified waste of public time and money.

Solicitors: *Director of Public Prosecutions* (for the Crown); *R. G. Freeman & Co.* (for Smith and Semaine); *Prothero & Prothero* (for Candler); *Brian Rees & Co.* (for E. G. Richardson and C. W. Richardson).

[*Reported by* T. J. KELLY, ESQ., *Barrister-at-Law.*]

---

* 14 HALSBURY'S STATUTES (2nd Edn.) 940.

Re SAGE.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Salmon, JJ.), January 27, 1958.]

Person of Unsound Mind—Mental defective—Detention order in case of indictable offence—Jurisdiction to make order if satisfied on medical evidence that the offender was a defective—Evidence by prison doctor that offender was a feeble-minded person within the Act—Whether justices had jurisdiction to make order for detention in institution for defectives—Mental Deficiency Act, 1913 (3 *&* 4 *Geo.* 5 *c.* 28), *s.* 8 (1).

A boy aged twenty was convicted of larceny before a magistrates' court and was remanded for medical examination. He was examined by a doctor well acquainted with the Mental Deficiency Act, 1913, who gave evidence that the boy was a feeble-minded person within the Act. The magistrates made an order, as they were empowered to do by s. 8 (1) (b)* of the Act if "satisfied on medical evidence" that the boy was a defective within the meaning of the Act, committing him to an institution for mental defectives. The consent of the parents or guardian of the boy was not obtained. On application for habeas corpus,

Held: the statement by the doctor in evidence, coupled with the magistrates' observation of the boy in court, was sufficient evidence to justify them in making the order; the consent of the parent or guardian was not necessary and habeas corpus would be refused.

[**Editorial Note.** A feeble-minded person is defined by s. 1 (1) (c) of the Mental Deficiency Act, 1913, as a person in whose case there exists mental defectiveness which, though not amounting to imbecility, is yet so pronounced that he requires care, supervision and control for his own protection or for the protection of others. The decision in the present case shows that the magistrates' court was entitled to accept the evidence of the doctor, assumed to consist of a single sentence, as showing that the requirements of that definition were satisfied.

As to defectives found guilty of a criminal offence, see 21 HALSBURY'S LAWS (2nd Edn.) 470, 471, para. 841.

For the Mental Deficiency Act, 1913, s. 8 (1), see 17 HALSBURY'S STATUTES (2nd Edn.) 1194.]

Application.

This was an application for an order for the issue of a writ of habeas corpus directed to the Board of Control and the medical superintendent of Moss Side Hospital, Maghull, near Liverpool, the respondents, in respect of the detention there, under the Mental Deficiency Act, 1913, of Cyril Montague Sage, the applicant, as a feeble-minded person.

On Oct. 15, 1952, the applicant was charged at Bearsted magistrates' court with stealing two and a half pints of milk; he pleaded guilty to the offence and was convicted and placed on probation for one year. The applicant did not fulfil the terms of his probation in that he failed to notify the probation officer of his change of address, and on Jan. 13, 1953, he was brought before Cranbrook magistrates' court and charged with a breach of the probation order, to which he pleaded guilty. At that time, the applicant, who was just twenty, was living in a hut on a farm, and the magistrates, having had an opportunity of observing him in court, remanded him in custody for a medical report to Canterbury Prison where he was examined by the medical officer. The report of the medical officer, dated Jan. 22, 1953, which was sent to the magistrates' clerk, stated that the applicant

---

* Section 8 (1) of the Mental Deficiency Act, 1913, so far as material, provides:

"(1) On the conviction by a court of competent jurisdiction of any person of any criminal offence punishable in the case of an adult with . . . imprisonment . . . the court, if satisfied on medical evidence that he is a defective within the meaning of this Act, may either . . . (b) in lieu of passing sentence . . . itself make any order which if a petition had been duly presented under this Act the judicial authority might have made, which order shall have the like effect as if it had been made by a judicial authority on a petition under this Act . . ."

> "was unable to interpret pictures which showed, without explanation, their meaning to an ordinary observer. He could not arrange in order a simple sentence of disarranged words. He appeared unconcerned at his present situation. His backwardness is not the result of insanity, but is clearly the result of mental defectiveness and his reasoning and judgment are grossly impaired. I am of opinion that he is a feeble-minded person within the meaning of the Mental Deficiency Acts and that he requires institutional care and treatment."

On Feb. 2, 1953, the applicant appeared on remand at Cranbrook magistrates' court where the medical officer who had examined the applicant at Canterbury Prison gave evidence, merely stating that the applicant was a feeble-minded person within the Act, viz., the Mental Deficiency Act, 1913. The magistrates, being satisfied that the applicant was a defective within the meaning of the Mental Deficiency Act, 1913, made an order under s. 8 (1) (b) of that Act that he be sent to an institution for defectives, Leybourne Grange, West Malling, Kent; the consent of the applicants' parents or guardian was not obtained to the making of the order. By a further order dated Nov. 11, 1953, made by the Board of Control, the applicant was transferred to Moss Side Hospital, Maghull, near Liverpool.

The applicant contended that the magistrates had no jurisdiction to make the order as there was insufficient evidence before them on which they could conclude that the applicant was a defective, and further, that the consent in writing of the applicant's parent or guardian had not been obtained before the order was made.

P. R. Pain for the applicant.
Rodger Winn for the respondents.

LORD GODDARD, C.J.: The court is asked to issue a writ of habeas corpus to bring up and discharge Cyril Montague Sage who, on Feb. 2, 1953, was committed by the Cranbrook magistrates under s. 8 of the Mental Deficiency Act, 1913, to an institution for mental defectives. The boy had been before the court previously on a charge of larceny and had been put on probation. He had not fulfilled the terms of his probation and was therefore brought by the probation officer before the court. The magistrates remanded him for a medical report because they wanted to know whether he was or was not a mental defective. It is to be observed that the court had an opportunity of seeing the boy in court and hearing about him. He was remanded to H.M. Prison, Canterbury, to see the prison doctor, who was a man well acquainted with the Mental Deficiency Acts and had the medical experience necessary to enable him to give evidence on these matters. The doctor came before the court and said that this boy was a feeble-minded person within the Mental Deficiency Act, 1913. Assuming that that is exactly what the doctor said, it is only a compendious way of saying that he had examined the boy and had come to the conclusion that the provisions of the Act applied to him, and that the boy was a person who could properly be dealt with by the court under the Mental Deficiency Act, 1913.

We are asked to say that there was no evidence which would justify the magistrates in making the order. We take a contrary view. We think that on the evidence of the doctor and their own observation it was open to the magistrates to make that order. On an application for habeas corpus we have to see whether the detention is lawful. The detention is lawful here because an order which Parliament has authorised to be made under s. 8 of the Mental Deficiency Act, 1913, was made. If it could have been shown that the magistrates had made the

A order without evidence, we could have gone behind the order and interfered, but it is clear in this case that the magistrates had evidence on which they could make the order.

The last point put by counsel for the applicant was really, if I may say so, raised as a matter of despair. It is said that if a petition is presented for the detention of a person under s. 5 of the Mental Deficiency Act, 1913, that is to B say, a person who is not alleged to be guilty of any offence, but where the magistrates are simply being asked to make an order that a person should be taken to an institution for mental defectives, the consent of the parent or guardian must be obtained or it must be shown that the parent could not be found or that the parent was unreasonably withholding his consent*. Of course that does not apply when magistrates have to decide what is the proper order to make in C respect of a boy for a breach of the criminal law. The magistrates' court is not bound to consult the parent whether he likes or wishes the court to pass a particular sentence. What s. 8 (1) (b) of the Act of 1913† says is that the court itself may make any order, which if a petition was presented, the judicial authority might have made. If the judicial authority are to make an order under s. 6 a petition has to be presented. The magistrates have to make the same order which D could be made if the judicial authority had a petition duly presented to them. It is not for the magistrates' court in making up their minds whether the prisoner ought to be dealt with as a mental defective to consider whether or not a petition has been duly presented or what would have happened; they are entitled to make the same order as if a petition had been duly presented. It is not necessary for them to ask anything of the parent or guardian.

E In the opinion of this court, there is no ground for granting habeas corpus in this case. In our opinion the applicant is lawfully detained under the Act of 1913, and this application fails and is dismissed.

HILBERY, J.: I agree.

SALMON, J.: I agree.

Application dismissed.

Solicitors: *Walter Stein & Grover* (for the applicant); *Solicitor, Ministry of Health* (for the respondents).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

---

* See s. 6 (3) (a) of the Act of 1913.

† For the relevant terms of s. 8 (1) (b), see footnote p. 477, ante.

Re CASTIGLIONE'S WILL TRUSTS. HUNTER *v.* MACKENZIE AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), February 11, 1958.]

Company—Shares—Bequest to a company of shares in the company—Validity.
Will—Legacy—Shares—Bequest to a company of shares in the company—Validity.

The testator by his will made in Scottish form and dated Oct. 25, 1940, directed his trustees to hold one thousand shares of C.E. & Co., Ltd., a private company, in trust for his son for life and after his death without leaving issue to " transfer " them to C.E. & Co., Ltd. The testator, who was domiciled in England, died on Dec. 18, 1940, and his son died in 1956 without leaving issue. The articles of the company restricted the right of membership. On the question whether the bequest of shares to the company was valid,

Held: although the shares could not be transferred to the company itself, the company was entitled to direct that the shares should be transferred to proper nominees on trust for itself, viz., nominees qualified to hold shares under the company's articles of association.

Kirby v. *Wilkins* ([1929] 2 Ch. 444) and dictum of LORD HATHERLEY in *Cree* v. *Somervail* ((1879), 4 App. Cas. at p. 661) applied. *Re Buckingham* ((1943), 170 L.T. 53) considered.

[As to a company's right to purchase or hold its own shares, see 6 HALSBURY'S LAWS (3rd Edn.) 456, para. 882; and for cases on the subject, see 9 DIGEST (Repl.) 649-652, *4313-4333*.]

Cases referred to:

(1) *Cree* v. *Somervail*, (1879), 4 App. Cas. 648 ; 41 L.T. 353; 9 Digest (Repl.) 528, *3482*.

(2) *Kirby* v. *Wilkins*, [1929] 2 Ch. 444; 142 L.T. 16; 9 Digest (Repl.) 402, *2575*.

(3) *Re Buckingham, Oswell* v. *John Dobell, Ltd.*, (1943), 113 L.J.Ch. 23; 170 L.T. 53; 2nd Digest Supp.

(4) *Trevor* v. *Whitworth*, (1887), 12 App. Cas. 409; 57 L.J.Ch. 28; 57 L.T. 457; 9 Digest (Repl.) 435, *2844*.

(5) *Bellerby* v. *Rowland & Marwood's S.S. Co., Ltd.*, [1902] 2 Ch. 14; 71 L.J.Ch. 541; 86 L.T. 671; 9 Digest (Repl.) 435, *2845*.

(6) *Re Patent Paper Manufacturing Co., Addison's Case*, (1870), 5 Ch. App. 294; 9 Digest (Repl.) 250, *1593*.

Adjourned Summons.

By his originating summons dated June 17, 1957, the plaintiff, the sole surviving trustee of the will of the testator, Edwin James Castiglione, deceased, asked for the determination of the question whether, on the death of Austin Castiglione, the one thousand ordinary shares in Castiglione Erskine & Co., Ltd., bequeathed by the testator to the said Austin Castiglione during his life (a) ought to be transferred to David Thomson Nicol Turner and John Kenneth Macrae as the nominees appointed by the defendant company; or (b) ought to be held as part of the residuary estate of the testator; or (c) ought to be dealt with in some other and, if so, what way.

Raymond Walton for the plaintiff, the trustee.
J. FitzHugh for the second, third and fourth defendants, interested in residue.
E. J. A. Freeman for the fifth defendant, Castiglione Erskine & Co., Ltd.
The first defendant did not appear and was not represented.

DANCKWERTS, J.: The testator, who died on Dec. 18, 1940, and who was apparently domiciled in England, drafted his will in Scotland, and adopted a form not usual for an English will. The will is dated Oct. 25, 1940, and after appointing two executors and trustees, one his son and the other his son-in-law, the testator made a number of specific gifts of shares in a company called Castiglione Erskine & Co., Ltd. That company was incorporated as a private company on Jan. 17, 1922, to take over the business of estate agents carried on by the testator in partnership. I am now concerned with the shares which the testator disposed of by the seventh direction in his will:

> " To hold one thousand shares in Castiglione Erskine & Co., Ltd., in trust for the life-rent use of my son Austin Castiglione. I direct my trustees after his death to divide these shares between his children who survive him, or, should he die without lawful issue, to transfer them to Castiglione Erskine & Co., Ltd., at the date of his death."

Austin Castiglione died on Mar. 12, 1956, without leaving any issue. Accordingly, the direction was effective, operating to direct the trustees to transfer the shares to the company itself. Gifts of shares to the other children of the testator were in rather similar terms with directions in one case that the shares should " revert " to the company, and in another case that the shares should be " made over " to the company. I do not think that the use of those different terms makes very much difference.

There is no doubt about the construction of the gift. It is quite plainly a direction requiring the trustees of the will to transfer the shares to the company itself. It is contended that that is contrary to law, and, therefore, cannot be carried out, and as a consequence that the shares in question fall into the ultimate residuary gift contained in the will.

In Jarman on Wills (8th Edn.), Vol. 2, at p. 1055, there is a statement of the law in respect of this matter in the following terms:

> " The question whether a bequest of its own shares to a company is valid appears never to have been decided, but there would appear to be no reason why such a bequest should not be effective. The company cannot, of course, be a member of itself, but it could direct the shares to be held by nominees, and such a transaction would not, it is suggested, offend against any of the principles of company law."

There are three cases referred to in the note*. The principle which has been well established by the cases is well known, viz., that a company may not traffic in its shares, which I take it means that a company may not buy its own shares. The question is whether there is anything in that principle which would be offended against by the direction in the present will. I need not go through *Cree* v. *Somervail* (1) ((1879), 4 App. Cas. 648), the first of the cases mentioned in Jarman because the material parts are set out in *Kirby* v. *Wilkins* (2) ([1929] 2 Ch. 444), which came before Romer, J., in 1929. In that case there was a sale by promoters of a company of a business for £16,000 to be satisfied by the allotment to the promoters of sixteen thousand fully paid shares in the company. Then it was discovered that the vendors had over-valued some of the assets of the company and voluntarily they agreed, the company having paid £3,000 more for the business than the sum which ought to have been paid, that the vendors would place at the disposal of the company three thousand of the fully paid shares which were allotted to them. Those three thousand shares were in due course transferred to Mr. Wilkins, the defendant in the action, who was chairman of the board of directors, on trust for the company. Then it was claimed in an action against the chairman that he held the shares as trustee for the individual shareholders, and they sought an injunction restraining him from voting at any meeting of the company as the holder of the shares. Romer, J., held:

> " that the transfer did not offend against any principle laid down by any of the decided cases, and that the transaction was not made invalid by reason of the transfer having been made to a nominee on trusts which

---

* Viz., *Cree* v. *Somervail* (1), *Kirby* v. *Wilkins* (2), *Re Buckingham* (3).

> involved an obligation on the trustee to vote in respect of the shares as the company might from time to time direct."

After referring to *Trevor* v. *Whitworth* (4) ((1887), 12 App. Cas. 409) Romer, J., summarised the principles which arose from that case, quoting from Buckley on the Companies Acts (10th Edn.), at p. 140 ([1929] 2 Ch. at p. 447):

> " 'The grounds of the decision in *Trevor* v. *Whitworth* (4), and the principles which it affirms may be summarized thus: (1) Purchase by a company of its own shares is not forfeiture or surrender or anything like it. Forfeiture is valid, the Act recognises it: the company parts with no money, but resumes dominion of a share upon which something has been paid, and this because a further payment cannot be obtained. Surrender may be valid, e.g. where the company could forfeit and the member dispenses with the formalities. Each case of surrender must be determined upon its merits. Where money is paid or consideration given by the company it is a purchase, and purchase is neither forfeiture nor surrender'. The reference there to consideration given by the company as opposed to money paid by the company has reference, no doubt, to the decision of the Court of Appeal in *Bellerby* v. *Rowland & Marwood's S.S. Co., Ltd.* (5) ([1902] 2 Ch. 14) in which the Court of Appeal pointed out that where shares are surrendered to a company which are not fully paid up, and in consideration of the company purporting to release the transferors or surrenderers from their further liability in respect of the shares, it is in effect the equivalent of a purchase by the company of its shares, and is invalid. To go on with the statement in Buckley on the Companies Acts the second principle is stated to be this: '(2) The company cannot be a member of itself. (3) The purchase of its own shares is a reduction of capital. The Act, in sanctioning reduction of capital under certain conditions and with certain restrictions, impliedly prohibits it unless the prescribed conditions and restrictions are observed. (4) The Act impliedly prohibits the return of capital to members. The payment of capital to one shareholder is just as much a reduction of capital and just as detrimental to the interests of creditors as the payment of the same amount to all the shareholders rateably. (5) The transaction cannot be justified as "incidental" to the company's objects, e.g. in a private company where it is desired to keep the shares in the hands of a few. To the creditor whose interests the Act intends to protect it makes no difference what the object of the purchase is'. Now, if that be a true statement of the principles enunciated in the case of *Trevor* v. *Whitworth* (4), and in my view it is, adding perhaps thereto *Bellerby's* case (5), it is difficult to see which of those principles is infringed by the transfer that has been made in the present case. The company has not parted with one penny of its money, either in cash or money's worth. The company does not become a member of itself. The member of the company in respect of these three thousand shares is Mr. Wilkins, the defendant."

Romer, J., then deals with *Re Patent Paper Manufacturing Co., Addison's Case* (6) ((1870), 5 Ch. App. 294), to which I need not refer, and he comes to *Cree* v. *Somervail* (1), and he refers ([1929] 2 Ch. at p. 450) to a passage in the speech of Lord Hatherley (4 App. Cas. at p. 661):

> "There Lord Hatherley was dealing with the possibility of shares in a company becoming vested in a trustee for them without the company necessarily becoming a purchaser of them, and he said this (ibid.): 'As to their being trustees for the company, that might be perfectly legitimate and lawful, whatever view be taken of this case. I am not, as I have said, pronouncing any opinion as to what would have happened if the nature of the transaction had been different, if it had been for the purpose of merging the shares. But those shares might have become vested in a variety of ways in trustees for the company, without their being necessarily the purchasers

A of them. For instance, Mr. Thomson by his own will might, if he had thought fit, or if he had thought that such a course was desirable for his own purposes, have made a bequest of these very shares to certain persons as trustees for the company, or he might have made a bequest of them to the company itself, and the company might have found trustees to hold the shares as trustees for them, and to be answerable to third parties in B respect of them '."

LORD HATHERLEY seems to have dealt with a case which would cover the circumstances of the case with which I have to deal. ROMER, J., continues ([1929] 2 Ch. at p. 451):

> "It may be, however, and I think that in BUCKLEY ON THE COMPANIES ACTS the cases I have referred to are treated as authority for this, that C although a transfer of partly paid shares to a nominee of the company leaves the transferor liable, because the company cannot purchase its own shares, yet in the case last put the transferee may himself be made liable. On the other hand I cannot find in *Addison's Case* (6) any clear authority for the proposition that in the case of a transfer of fully paid shares to a company without any consideration moving from the company, the transfer D is invalid."

ROMER, J., eventually decided that the transfer of the shares in the case which he had to deal with did not offend against any principle. Therefore, in the quotation from LORD HATHERLEY in *Cree* v. *Somervail* (1), and in the statement of ROMER, J., himself, there are indications that a gift to a company of shares in the company itself does not offend against any rule of law.

E On the other hand, in a case before SIMONDS, J., of *Re Buckingham, Oswell* v. *John Dobell, Ltd.* (3) ((1943), 170 L.T. 53), there are some statements which do not seem quite to conform with the principles laid down by ROMER, J., and LORD HATHERLEY. In that case, according to the headnote:

> "The testatrix made a bequest in the following terms: 'I bequeath my F shares in the company of D., Ltd., to the said O. to receive the income derived therefrom during her lifetime—the shares to remain the property of D., Ltd.'. At her death she owned sixty preference shares of £10 each in D., Ltd. Two questions were raised: First, whether, as a matter of construction, there was a gift of the reversionary interest in the shares to the company; secondly, if there was such a gift, whether it was a valid G gift having regard to the rule of law that a company cannot be a member of itself. Held, that subject to the life interest of O. the shares were undisposed of. If there had been a valid bequest of the reversionary interest in the company, the second question would have arisen. Notwithstanding the dictum of LORD HATHERLEY in *Cree* v. *Somervail* (1) (4 App. Cas. at p. 661), that a testator might make a bequest of its own share to a company, H which was not disapproved by ROMER, J., in *Kirby* v. *Wilkins* (2) ([1929] 2 Ch. at p. 450) this question required further consideration."

SIMONDS, J., said (170 L.T. at p. 53):

> "The question that I have to determine is whether there is a valid bequest in reversion, after the life interest of Gladys Mary Oswell, of the shares of the company of John Dobell, Ltd., to the company. Now there are two I questions, first of all a question of construction, namely: is there upon the true construction of this will a gift of the reversionary interest in the shares to the company? Secondly, if there is such a gift, is it a valid gift, having regard to the rule of law that a company cannot be a member of itself? I find it unnecessary to consider the second, and as I think very difficult, question; having given to this provision the best consideration that I can, I find it impossible to say that by the words, 'the shares to remain the property of John Dobell, Ltd.', there is any sufficient indication of an intention on the part of the testatrix to make a gift of the shares."

That was the end of the matter, but SIMONDS, J., said (ibid., at p. 54): A

> "There is a life interest in the shares to Gladys Mary Oswell and, subject to her life interest, the shares are not disposed of. If the words were adequate to create a gift of reversionary interest, I should have to consider the second question. Notwithstanding the dictum of LORD HATHERLEY in *Cree* v. *Somervail* (1) that a testator may bequeath its own shares to a company, which dictum was approved, or at any rate not disapproved by B ROMER, J., in *Kirby* v. *Wilkins* (2), I think that is a question which still deserves the consideration of the court but it is unnecessary for me to do more than say that about it."

SIMONDS, J., seems to have had some doubt about it, and he does not really advance the matter any further, but merely leaves it open. C

I have to consider the question in the present case on this state of the authorities. A company cannot hold its own shares because it cannot be a member, but it does not necessarily follow that it may not have a beneficial interest arising from the shares in some way or other. It appears plain from ROMER, J.'s decision in *Kirby* v. *Wilkins* (2) that there can be a trust under which certain persons on the share register of the company may hold the shares D on trust for the company beneficially. I think that that must be taken to be established by that case. In the present case the situation is that the shares are vested in the surviving trustee of the will. Therefore, at the moment, there is no rule of law which seems to be offended in the actual disposition of the shares. They are held on trust for the company, and, as *Kirby* v. *Wilkins* (2) shows, that is entirely good in law. E

On the other hand, what cannot be carried out is a transfer on trust to the company itself of the shares in question. But is that an end of the matter? It does not seem to me that it is. The person who is entitled to the benefit of the shares is entitled to direct that the shares should be transferred to any person other than himself whom he shall name, and, if there is no other objection to the person to whom he directs the transfer, then the transfer may F be good. Consequently, in accordance with the principles laid down by LORD HATHERLEY and by ROMER, J., I must say that the company could direct a proper nominee to hold these shares for the company or as it should direct, and, therefore, the beneficial interest will be enjoyed by the company as in *Kirby* v. *Wilkins* (2), so that the vote can be cast by the nominee at the meetings of the company as the company shall direct. G

I have been careful, however, to say "proper nominee" because in this case the suggestion made by the company seems to me to be wrong. The company requested or suggested a transfer to be made to Mr. Turner and Mr. Macrae. Mr. Turner is a member of the company, and Mr. Macrae is not. This being a private company, one finds, as one would expect, that there are restrictions on the transfer of shares. Article 4 (B) of the company's articles of association H restricts transfers so that generally they may be made only to members of the family of the holder. After mentioning various persons on the death of the deceased holder who stand in personal relationship to the deceased, the article says:

> "and shares standing in the name of any deceased original holder thereof may be transferred to or placed in the names of the trustees of his will. I Shares standing in the names of trustees of any instrument may, upon any change of trustees, be transferred to the trustees for the time being of such instrument or to a cestui que trust but not otherwise under the foregoing provisions. A share may at any time be transferred to a member of the company."

Accordingly, it appears that shares standing in the name of the trustee of the testator's will might on any change of trustees be transferred to the trustees for the time being of the will, and they might eventually be transferred to a cestui que trust taking under the terms of the will. But in this case the company has been created the cestui que trust and such a transfer cannot be made because of the rule of law which does not permit of a company holding its own shares. Whether or not new trustees could be appointed limited to these particular shares of which Austin Castiglione was receiving the income need not be considered. It seems to me that the last sentence of this article shows the way in which nominees may properly be constituted, and it indicates that the shares may at any time be transferred to any member of the company. Accordingly, there would not appear to be any objection to a transfer in the name of Mr. Turner being directed by the company, though there might be an objection to a transfer into the name of Mr. Macrae. It seems to me that the article limits the selection which the company may make of the nominees into whose names the shares may be transferred, but otherwise it appears to me that a transfer of shares may be made to nominees.

I would, therefore, answer the question by declaring that the company is entitled to demand a transfer of shares into the names of nominees properly qualified in accordance with the articles of association of the company.

Declaration accordingly.

Solicitors: *W. E. Wise & Son* (for the plaintiff); *Rising & Ravenscroft*, agents for *Bernard Kuit, Steinart & Ashby*, Manchester (for the second defendant); *Vivash Robinson & Co.*, agents for *Harold G. Walker*, Bournemouth (for the third and fourth defendants); *Linklaters & Paines*, agents for *Harold G. Walker*, Bournemouth (for the fifth defendant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

KUCHENMEISTER *v.* HOME OFFICE AND ANOTHER.

[QUEEN'S BENCH DIVISION (Barry, J.), January 27, 28, 29, 1958.]

Alien—Detention—Alien landing at approved airport in United Kingdom in transit to another country—Landing for sole purpose of embarking in an aircraft at same airport—Alien detained by immigration authorities for period preventing his embarking in outward aircraft—No refusal of leave to land—Whether detention by immigration authorities illegal—Aliens Order, 1953 (*S.I.* 1953 *No.* 1671), *art.* 2 (1) (*b*).

The plaintiff was a German citizen living in Dublin. He was a person to whom leave to reside in or visit the United Kingdom would be refused by the immigration authorities. On Apr. 27, 1955, he was travelling back from Amsterdam to Dublin on a route booked with a Dutch airline and had been informed that he did not need a British visa. On that particular flight the Dutch aircraft landed at London Airport (northern section) and passengers to Dublin were to complete their journey by Aer Lingus aircraft flying from the central section of the airport. Between the two sections of the airport was a road about a mile long within the perimeter of the airport, but there were no physical controls preventing egress outside the airport by a passenger going from one section to the other. By the Aliens Order, 1953, art. 2 (1) (b) leave to land is not required in the case of an alien " who lands from an aircraft at an approved port for the purpose only of embarking in an aircraft at the same port " and remains between his landing and embarkation within " limits . . . approved . . . by an immigration officer ". The plaintiff, having disembarked at London Airport (an approved port) for the sole purpose of flying on to Dublin, was detained by the immigration authorities in the buildings of the northern section for nearly two and a half hours. He was then conducted by an immigration officer to the central section to join the Aer Lingus aircraft which was about to leave from that section. He arrived too late to be allowed to board the aircraft and had to remain at the airport until the next aircraft left for Dublin on the following morning. At no time did the immigration authorities either grant him or refuse him leave to land. The plaintiff claimed damages for false imprisonment against the Home Secretary and the senior immigration officer at the northern section of London Airport.

Held: the detention of the plaintiff for so long as to cause him to miss his onward flight to Dublin was illegal because, although art. 2 (1) (b) of the Aliens Order, 1953, conferred a discretion as to the premises on which an alien might remain, it could not be exercised so as to frustrate the purpose of para. (b), viz., allowing aliens to land without leave for the purpose of embarking on another aircraft, and, if the authorities apprehended danger in allowing an alien to land under art. 2 (1) (b), their remedy was to refuse leave to land under art. 2 (2), which had not been done; therefore, the plaintiff was entitled to damages for false imprisonment.

[As to restrictions on aliens' landing and as to detention of aliens, see 1 Halsbury's Laws (3rd Edn.) 510, 511, para. 988, and p. 513, para. 992, and Supplement.

As to damages for false imprisonment, see 33 Halsbury's Laws (3rd Edn.) 43, para. 79.

For the Aliens Order, 1953, art. 2, see 2 Halsbury's Statutory Instruments (1st Re-issue) 28.]

Action.

In this action Carl Walter Kuchenmeister, the plaintiff, claimed damages against the Home Office and John Malcolm, the senior immigration officer in the northern section of London Airport, the defendants, in respect of his alleged false imprisonment at London Airport, Hounslow, Middlesex, on Apr. 27, 1955. The following facts were found by Barry, J. The plaintiff was a German citizen who, being in England in 1939, was interned until March, 1947. After his release from internment the plaintiff was required to leave England, and although the authorities in England were anxious that he should return to Germany, the plaintiff managed to obtain a visa to enter Eire and he now lived in Dublin where he carried on an engineering business; the plaintiff was a person who was fully acceptable to the authorities in Eire although the immigration authorities in this country had instructions to refuse him leave to land in England because of his previous history. In April, 1955, the plaintiff decided to visit the Hanover trade fair and accordingly he booked a return through air ticket from Dublin to Amsterdam, travelling from Amsterdam to Hanover by train. Having travelled on the outward journey, on Apr. 24, in a K.L.M. plane from Dublin to Amsterdam, stopping on the way at Manchester airport, without incident, the plaintiff decided to return to Dublin on Wednesday, Apr. 27; on arriving at Amsterdam on the homeward journey, the plaintiff was told that the flight to Dublin would be made via London and not via Manchester but he was not informed that this would entail changing from the K.L.M. plane from Amsterdam to an Aer Lingus plane at London Airport, as was the fact. Before embarking at Amsterdam for London on the K.L.M. plane, the plaintiff was told that he would not require a British visa, and while landing cards were issued to passengers on the K.L.M. plane who were travelling to the United Kingdom, the plaintiff, on showing the air hostess his through ticket to Dublin, was not given a landing card; nor were the other passengers on the plane who were bound for Eire. The K.L.M. plane landed at London Airport at about 6 p.m. on Apr. 27, the plaintiff having a passage booked on an Aer Lingus plane which was due to leave London Airport at 8.45 p.m. that day; passengers who were travelling on the Aer Lingus plane were asked to check in forty minutes before its departure.

At Manchester airport, where the plaintiff had previously landed in transit, there were no difficulties regarding transit passengers in respect of whom there were instructions to refuse leave to land in England because, there, passengers were disembarked and re-embarked without leaving the tarmac and were kept segregated while at the airport; but the position at London Airport on Apr. 27 was different. London Airport, which was an " approved airport " within the meaning of the Aliens Order, 1953, was divided into two sections, the northern and the central section which were some distance apart, and access between the two sections was obtained by a road within the perimeter of the airport which travelled through a tunnel and across the airport for about one mile; the northern section of the airport was near to the public highway and there were no physical controls to prevent someone who was travelling on the road between the two sections from walking out of the airport. On Apr. 27 the K.L.M. company were operating their planes from the northern section of the airport while Aer Lingus were operating their planes from the central section; it was therefore necessary for the plaintiff, in order to continue his journey from London Airport to Dublin, to proceed from the northern to the central section of the airport. Having disembarked from the K.L.M. plane at the northern section, the plaintiff, with other passengers from the plane, was taken to the arrival lounge in that section and from there he was taken to be interviewed by the immigration officers; the plaintiff showed his German passport and certificate of registration under the Aliens Order, 1920, to one of the officers and was then asked for his landing card but, having told the officer that he did not have a card, he was asked to complete one and in answer to one of the questions on the card relating to his proposed address in the United Kingdom, the plaintiff wrote " None; in direct transit to Dublin only ". The plaintiff was then seen by another immigration officer, Mr. McHugh, who consulted a reference book in which, it was the plaintiff's impression, he found the plaintiff's name; immigration authorities had available to them particulars of those aliens to whom they were to refuse leave to land. Thereafter the plaintiff was kept waiting on a chair in the corner of the room; he protested several times that he had no intention or wish to enter this country, that he was in transit and that he failed to understand why further inquiries about him were necessary. In due course all the other passengers were cleared and the plaintiff was left sitting alone in the room; when it was 8 p.m., he told the officers that he had to check in with Aer Lingus before boarding the plane on which his passage was booked and which left at 8.45 p.m., but he was still told that he must wait, and finally, at 8.25 p.m. a Mr. Wysman, an immigration officer, said that he would take the plaintiff to the Aer Lingus checking-in desk in the central section of the airport and would try to get him aboard his plane, but, although Mr. Wysman did everything he could to enable the plaintiff to board the plane which was then about to depart, owing to the fact that the central section had only recently begun to operate and to the fact that Aer Lingus were operating a new type of aircraft, he was unsuccessful in his efforts and the plane departed without the plaintiff. The plaintiff was driven back to the northern section where he waited for about forty minutes and was then driven back again to the central section and taken to the transit lounge where he remained for the night. He was made as comfortable as possible; there was a bar in the lounge and refreshments were available, as was lavatory accommodation. The next morning, viz., Apr. 28, the plaintiff was put on an Aer Lingus plane which left London Airport at 7.45 a.m., and his passport, certificate and papers were returned to him. As a result, the plaintiff missed some appointments which he had in Dublin in the early part of the morning of Apr. 28, although he did not claim that he thereby suffered any direct pecuniary loss. The plaintiff was never either refused or granted leave to land at London Airport.

The evidence for the defendants showed that when the plaintiff filled up his landing card, one of the immigration officers in the northern section of the airport, Mr. McHugh, realised that there were instructions issued to the immigration authorities regarding the plaintiff, and having looked these up in his office, Mr. McHugh reported the matter to Mr. Malcolm, the senior immigration officer in the northern section of the airport and one of the defendants to the action. Mr. Malcolm instructed Mr. McHugh to ask the plaintiff about his antecedents, whereon the plaintiff embarked on a long history of himself, which dated back to before the war. Mr. Malcolm then instructed Mr. McHugh to telephone the department of justice in Eire who stated that they had no objection to the plaintiff being allowed to continue his journey to Dublin and landing there. Mr. Malcolm gave evidence to the effect that the plaintiff's position was an exceptional one as, while he was a person regarding whom there were instructions to refuse leave to land in England, yet he had a genuine desire not to remain in this country but to proceed with his flight to Dublin; unless the plaintiff was given leave to land, there were grave difficulties in allowing him to proceed along the road from the northern to the central section of the airport. Mr. Malcolm thought that, in law, his duty was to return the plaintiff to Amsterdam but he told the plaintiff that, if he wished, he would seek higher authority to allow the plaintiff to proceed to Dublin; this, in fact, Mr. Malcolm did, and it was intimated to him by the Home Office, at about 8.20 p.m. on Apr. 27, that the plaintiff could proceed to the central section of London Airport and there embark on the Aer Lingus plane on which he had his passage booked.

In the above circumstances the plaintiff claimed damages in respect of the period that he was detained at London Airport contending that that detention amounted to false imprisonment; the defendants contended that the plaintiff was properly detained at the airport under powers contained in the Aliens Order, 1953.

L. G. Scarman, Q.C., and *W. A. B. Forbes* for the plaintiff.

The Solicitor-General (*Sir Harry Hylton-Foster, Q.C.*) and *Rodger Winn* for the defendants.

BARRY, J., having stated the facts, and having considered the evidence which was given by the defendants' witnesses, continued: It is right for me to say this: I am quite satisfied that throughout, Mr. Malcolm* and the other officials concerned regarded themselves as being in a somewhat difficult position. On their view of their duties under the Aliens Order, 1953, they were under the impression that, in strict law, the plaintiff was not entitled to travel from the northern buildings to the central buildings and so to embark on the Aer Lingus flight. Being faced with that difficulty (which in their minds at least was a genuine difficulty) I am satisfied that they did their best to secure that the plaintiff was put to as little inconvenience as possible and tried, to the best of their ability, to ensure that he did in fact catch the aircraft which took off at 8.45 p.m. However, owing to the various activities to which I have referred†, their hope that the plaintiff would be in time to catch that aircraft was not fulfilled.

The question which I have to consider is whether Mr. Malcolm and his officials correctly interpreted their powers and duties under the Aliens Order, 1953. If in fact they incorrectly interpreted their powers and duties, that would not be a very surprising feature of the case. The exact effect of the Order of 1953 on circumstances of the kind now under consideration is by no means free from doubt. I have had the benefit of an argument as to the correct interpretation of the order which has lasted some two and a half days. I am now about to express my views with regard to it, having had the advantage of that argument. Even with that advantage I do not pretend that I have complete confidence in the interpretation which I propose to adopt. It may well be that elsewhere my interpretation will be found to be wrong. In these circumstances, I am bound to say that I think no possible blame can attach to Mr. Malcolm for any misapprehension which he may have had as to the real meaning of this order.

---

* The senior immigration officer at the northern section of London Airport, and one of the defendants to the action.

† See p. 487, letter G, ante.

A The Aliens Order, 1953*, was made under the powers conferred on the Crown to make regulations by Order in Council imposing restrictions on aliens. That power is to be found in s. 1 of the Aliens Restriction Act, 1914, as at present amended by the Aliens Restriction (Amendment) Act, 1919. The order that I am about to construe was, as I have said, made in 1953, and it provides, under art. 1 (1):

B
> " Subject to the provisions of this order, an alien shall not land or embark in the United Kingdom except with the leave of an immigration officer, and shall not so land or embark elsewhere than at an approved port or at such other place as an immigration officer may in any particular case allow."

I need not read the rest of art. 1, which defines the words " land " and " embark ", and which empowers the Secretary of State to designate the ports C and airports which can be regarded as approved. In fact, by a subsequent statutory instrument, the Aliens (Approved Ports) Order, 1954†, the Secretary of State approved London Airport as being one of the approved airports within the meaning of art. 1 of the Order of 1953.

Article 2 of the Order of 1953 reads:

> "Exception for certain aliens landing temporarily. (1) Subject to para. (2) D of this article, leave to land shall not be required under art. 1 of this order . . . (b) in the case of an alien who lands from an aircraft at an approved port for the purpose only of embarking in an aircraft at the same port, and remains, throughout the period between his landing and embarkation, within such premises or limits as may be approved for the purpose by an immigration officer."

E That is the article, art. 2 (1) (b), on which the plaintiff founds his case.

Paragraph (2) of art. 2 of the Order of 1953 reads:

> " Notwithstanding anything in para. (1) of this article, an immigration officer may at any time—(a) give notice to an alien who is for the time being on board a ship or aircraft prohibiting him from landing without leave thereunder; or (b) grant or refuse leave to land to an alien who is within the United F Kingdom after landing without leave thereunder; and thereupon the said para. (1) [of art. 2] shall cease to apply to the alien."

Then there is art. 3, which deals with the common travel area, and I think it is conceded that by virtue of the provisions of that article the plaintiff did not require leave to embark from the United Kingdom. The only requirement, if G any, was the requirement of a leave to land.

The next material article of the Aliens Order, 1953, is art. 7. Paragraph (1) of that article requires every person over sixteen to produce certain documents, including a passport, to an immigration officer if so required. Paragraph (2) of art. 7 requires those same persons to give information asked for by the immigration authorities. Paragraph (3) of art. 7 reads:

H
> " Notwithstanding anything in art. 1 of this order, an alien may land, without the previous grant of leave to land, for the purpose of examination under this article in accordance with arrangements in that behalf approved by an immigration officer, and if he submits himself forthwith to such examination shall be deemed for the purposes of this order not to have landed unless and until such leave is granted to him; and an alien who I lands as aforesaid may be detained, pending and during the examination, under the authority of an immigration officer."

Therefore, para. (3) of art. 7 gives an express power of detention to immigration officers in the case of aliens who land without previous grant of leave for the purpose of examination under art. 7. At one time the provisions of para. (3) of art. 7 were relied on by the defendants as a justification for the plaintiff's detention, but in my judgment it is clear that the provisions of para. (3) of art. 7 relate solely to aliens who land for the purpose of being examined under the provisions of that article, and I am quite satisfied that the plaintiff did not land for that purpose but for the purpose—and the sole purpose—of embarking in an aircraft at the same port as that in which he had arrived.

---

* S.I. 1953 No. 1671.

† S.I. 1954 No. 391.

Certain other express powers of detention are given to immigration authorities under the Aliens Order, 1953. Article 8 refers to the removal of aliens from the country who have been refused leave to land. I need not refer to the first three paragraphs of art. 8 but para. (4) thereof reads:

> "An alien to whom leave to land is refused may be detained, under the authority of an immigration officer, pending the giving of directions in his case under para. (1) of this article and pending his removal in pursuance of directions so given; and where any such alien is on board a ship or aircraft he may, under the like authority, be removed therefrom for detention under this paragraph ".

Now, it is quite clear that at no time during the course of this ill-fated visit to London Airport was the plaintiff refused leave to land, and in those circumstances it is clear, in my judgment, that para. (4) of art. 8 has no application to the facts of the present case.

Article 9 relates to aliens who have landed unlawfully in this country, and again confers certain powers on immigration authorities and others. In the present case it cannot be suggested that in the first instance at least the plaintiff landed unlawfully in this country. He landed, it is true, without having obtained leave to do so, but he landed, as I find—and as, indeed, very soon became apparent to the immigration authorities—from an aircraft at an approved port for the purpose only of embarking in an aircraft at the same port. In those circumstances, under the provisions of art. 2 (1) (b), his landing was lawful, as no leave to land in those circumstances, under art. 1 of the Order of 1953, is required. Further than that, there is no evidence that during any part of his enforced sojourn at London Airport he failed to remain within such premises or limits as were approved for the purpose by an immigration officer. Therefore, it cannot be suggested that at any period the plaintiff was in the position of an alien who had landed unlawfully or, as I have said, of an alien to whom leave to land had been refused. Similarly, it is right to say that the plaintiff was never in the position of an alien to whom leave to land had been granted. It is quite clear from Mr. Malcolm's evidence* and from a report made by Mr. McHugh* on this whole incident on Apr. 29, 1955, that leave to land was at no time either given or refused.

Now, the gist of the problem is this: The defendants' contention is that it is within the sole discretion of the immigration authorities to lay down the prescribed limits or premises in which an alien landing under the provisions of art. 2 (1) (b) of the Order of 1953 may remain. For various reasons, some of which are obvious, Mr. Malcolm considered that aliens landing at the northern section of the airport should be confined to the transit hall and certain other buildings in that section of the airport. His view was, and the defendants' view is today, that if aliens were allowed to stray beyond those very narrow limits and wander off unescorted towards the central buildings, all effective control over their movements would be lost, because unless a policeman was sent to accompany them it was perfectly open to them never to proceed to the central buildings at all but to walk out of the airport and so travel to any part of England. " In those circumstances ", say the defendants, " we were entitled to say that, having landed—and lawfully landed—under art. 2 (1) (b), the plaintiff was bound to remain in the transit lounge, or certainly in some part of the buildings of the northern section of the airport. All we did was to confine him within that perimeter, and in the circumstances it cannot possibly be alleged that we were guilty of any unlawful or enforced imprisonment. The plaintiff's rights were limited. He could only pray in aid art. 2 (1) (b) of the Order of 1953 so long as he remained for the whole period between his landing and embarkation within such premises or limits as may be approved for the purpose by an immigration officer, and the fact that remaining within those limits caused him to lose his flight to Dublin is a very unfortunate fact but one which was quite unavoidable and about which the plaintiff has no legal ground for complaint ". According to the defendants' view, if the plaintiff was to proceed outside the narrow confines of the northern buildings, or such parts of the northern buildings as were approved by the immigration authorities, he required leave to land. He never obtained leave to land, and in those circumstances no wrong has been done to him by insisting that he remain until some time about 8.30 that evening in those northern buildings.

---

* Mr. Malcolm and Mr. McHugh were immigration officers at London Airport.

Counsel for the plaintiff puts the case in this way: The plaintiff was undoubtedly detained in the northern buildings at the airport, and detained for so long a period that he was unable to catch the aeroplane on which his passage from London to Dublin had been booked. The defendants, says counsel, must justify that detention. Certain grounds on which they sought to justify it have been shown to be unsound. As I have already indicated, art. 8 (4) of the Order of 1953, one of the articles which provides an express power of detention, only applies to aliens refused leave to land; and para. (3) of art. 7 which again provides an express power of detention, relates only, as I have found, to aliens who have landed for the purpose of examination under art. 7.

Counsel for the plaintiff concedes that the defendants could have provided themselves with a justification for the plaintiff's detention, because it is I think conceded on all hands that the powers conferred on the immigration authorities by art. 2 (2) could have been utilised at any period during the evening with which we are concerned. It would have been open to Mr. Malcolm and the officials under him at any time during that evening to refuse the plaintiff leave to land, even though he had in fact landed lawfully under the provisions of para. (1) of art. 2. Further than that, of course, they could have prevented him from leaving the aircraft at all by acting under sub-para. (a) of art. 2 (2). Counsel for the plaintiff's case is, however, that unless the immigration authorities elected to proceed under para. (2) of art. 2, they cannot by indirect means secure the detention of an alien by a quite arbitrary exercise of their discretion under art. 2 (1) (b). This brings me to the one vital question in this case—assume that the immigration authorities do not put into operation their powers to grant or refuse leave to land, can they, by an exercise of their discretion as to the premises or limits within which an alien who has landed under art. 2 (1) (b) may remain, effectually defeat the purpose for which the alien in fact landed under that paragraph, namely, for the purpose of embarking in an aircraft at the same port? If they can do so, then the plaintiff has no possible ground for complaint in law, however much he may feel that this was an unreasonable exercise of the powers conferred on the immigration officials. If they cannot do so, then what are the justifications for the plaintiff's detention during this very considerable period—upwards of two-and-a-half hours—in the buildings in the northern section of the airport?

I have come to the conclusion that, subject of course to all the other powers which are vested in them, the immigration authorities cannot so exercise the discretion conferred on them by the latter limb of art. 2 (1) (b) as to frustrate the purpose for which sub-para. (b) was (I do not say " enacted ", because it is not an Act of Parliament) included in the Order of 1953. As I see it, the policy of the Aliens Order, 1953, is that an alien should be allowed to land without leave under certain limited conditions, all but one of which the plaintiff has admittedly fulfilled. He landed from an aircraft, he landed at an approved port, and, as was very soon apparent to the immigration officials, he landed for the purpose only of embarking in an aircraft at the same port. Having fulfilled those conditions, were the defendants or the immigration officials entitled to prevent him from carrying out his purpose by limiting the premises or limits within which he might remain between his landing and embarkation in such a way as to render his embarkation impossible? In my judgment they were not. As I see it, this provision—that is to say, the provision contained in art. 2 (1) (b)—was inserted in the Order of 1953 to confer the privilege of landing without leave on a certain limited class of aliens who were entering the approved airport not for the purposes of visiting the United Kingdom but merely in transit to some other area outside the United Kingdom. It is true that sub-para. (b) of art. 2 (1) does confer a discretion on the immigration authorities as to the premises or limits in which the alien may remain while he is on British soil, but I accept counsel for the plaintiff's argument that that discretion in effect relates to the geographical situation of the premises or limits in which that alien may be. I do not think that the word " may " confers so wide a discretion on the immigration officials that they may purely capriciously say: " We are going to limit the area in which the alien may remain in such a drastic way that he is faced with the alternative of either returning from where he came or remaining permanently detained in a small area of the airport from which access to the aircraft in which he wishes to continue his journey cannot be obtained ".

The conditions imposed on the alien, if he is to take advantage of this enabling order, are conditions which he must fulfil. The alien must land from an aircraft, he must land at an approved port, and he must land for this very limited purpose referred to in sub-para. (b) of art. 2 (1). He must also remain within the approved premises or limits. All those are obligations imposed on the alien, and unless he complies with those obligations he cannot rely on sub-para. (b) and he becomes a person who has unlawfully landed in this country. It seems to me a corollary that if a requirement is placed on an alien to remain within certain prescribed areas, certain areas must in fact be prescribed, and if the immigration authorities prescribe no area at all in which he may remain, or if they prescribe an area which renders his onward flight impossible, then to my mind they are frustrating the whole purpose of this provision and are acting outside the jurisdiction and discretion which is conferred on them by sub-para. (b) of art. 2 (1). I do not feel impressed as to the dangers to which this interpretation may give rise. The immigration authorites are armed with ample powers. If they feel it dangerous to allow either the plaintiff or any other alien to move from the northern section of the airport to the central section, they can refuse him leave to land. Further than that, I am inclined to the view that, as they are entitled to approve the premises or limits, it would be quite open to them to say that the alien must travel from the northern buildings to the central buildings in a motor car provided by them or provided by the aircraft company in which either an immigration official or a policeman is also travelling. Be that as it may, if any danger is apprehended the remedy is the refusal of leave to land. Here the immigration authorities did not refuse leave to land, and in those circumstances I think that their purported detention of the plaintiff under the terms of art. 2 (1) (b) of the Order of 1953—namely, by confining the approved area to the northern building—was outside their powers and was illegal.

The question therefore arises whether or not the plaintiff can maintain an action for wrongful imprisonment. As I have already indicated, if the immigration authorities were entitled to confine the approved area to the narrow limits to which they did in fact confine it, then of course the plaintiff could not say that he had been wrongfully imprisoned. If, however, they were not entitled to so confine the permitted area as to prevent him from obtaining access to the aeroplane for the purpose of catching which he had landed at the airfield, then I think that he is entitled to regard that as an unlawful imprisonment. His

A liberty was restricted to a greater degree than the immigration authorities were entitled to restrict it under art. 2 (1) (b). The fact that they might have restricted his liberty by employing the powers conferred on them by other articles of the Order of 1953 seems to me to be immaterial. It is no answer, when a man says: "I have been unlawfully arrested without a warrant", to reply: "Well, had I, the person making the arrest, taken the trouble to go and get a warrant, I would
B undoubtedly have got it". That would be no answer to a claim for unlawful arrest. Similarly here, although Mr. Malcolm and his colleagues could have detained the plaintiff by refusing him leave to land, that does not entitle them to detain him on the grounds on which they did.

I have indicated that no express powers of detention are conferred under art. 2 (1) (b). Counsel for the plaintiff has rightly conceded that immigration
C officials would be entitled to a reasonable time in which to satisfy themselves that the alien who arrived at the approved port really did intend to embark in an aircraft at the same port. If the immigration authorities' inquiries had been confined to that question and they had been completed within a reasonable time, the plaintiff would have raised no complaint: certainly counsel disclaims any suggestion that he would raise any complaint on the plaintiff's behalf. Similarly,
D I think, without deciding the point, that they would be entitled to a reasonable time to consider whether or not to refuse the alien leave to land. Here that point does not appear ever to have been considered at all, and if it were considered it would not give rise to the type of inquiry which formed the subject-matter of the various telephone messages and conversations which took place between shortly after 6 and approximately 8.30 on the night of Apr. 27. Whatever view
E one takes of this case, on the interpretation of the law which I now adopt, I cannot see that this delay of nearly two-and-a-half hours could possibly be regarded as reasonable. If I am wrong as to my view of the law, then of course no question as to reasonable time arises, because the plaintiff has never been unlawfully detained. On the law as I understand it, therefore, the plaintiff is entitled to recover damages.

F The plaintiff does not ask for an extravagant figure, but, on the other hand, it would be quite wrong for the court to award a contemptuous figure. No pecuniary damage has been suffered, but the very precious right of liberty, which is a right available to everyone who can for the time being be regarded as a subject by local allegiance of Her Majesty, is one which must be protected. Doing the best I can, I think that a fair figure which will vindicate the plaintiff's
G rights without amounting to a vindictive award would be a sum of £150. I need hardly say that I should have felt fully entitled to increase that amount to a very great extent if there had been any suggestion here that the plaintiff was being ill-treated by any of the officials concerned. I am quite satisfied that all the officials genuinely considered that they were doing the best possible thing in difficult circumstances, and in my judgment no blame of any kind rests on them.
H As I have found, they were called on to decide a very difficult point which I have dealt with, whether rightly or wrongly, with the assistance that has been given to me by the learned Solicitor-General and Mr. Rodger Winn, Mr. Scarman and Mr. Forbes, over a period, as I say, of some two-and-a-half days. In these circumstances, there must be judgment for the plaintiff for £150.

Order against the Crown and judgment against the second defendant accordingly.

Solicitors: *Chalton Hubbard & Co.*, agents for *Marsh & Ferriman*, Worthing (for the plaintiff); *Treasury Solicitor* (for the defendants).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

LONDON EXPORT CORPORATION, LTD. *v.* JUBILEE COFFEE ROASTING CO., LTD.

[QUEEN'S BENCH DIVISION (Diplock, J.), February 7, 10, 1958.]

Arbitration—Setting aside award—Misconduct—Procedure of board of appeal—Custom of trade contrary to implied term of agreement—Approach to question of setting aside award on grounds of irregularity in procedure or infringement of the rules of natural justice.

A dispute arising out of a contract for the sale of ground nuts was referred to arbitration under an arbitration clause in the contract and, the arbitrators being unable to agree, to an umpire. An appeal from the umpire's award was taken to the board of appeal constituted in accordance with the regulations of the Incorporated Oil Seed Association. Rule 6 of the rules incorporated in the contract provided that an appeal should be determined by a board consisting of four members of the association's committee of appeal and that " no member of the committee of appeal who has an interest in the matter in dispute or who has acted as arbitrator or umpire in the case and no member of the same firm or company to which either of the arbitrators or the umpire shall belong, shall vote on the question of the appointment of members of the board of appeal or shall be appointed a member of the board of appeal ". After the conclusion of the hearing of the appeal the board requested, as was customary in the trade, the umpire to remain with them when they deliberated on their decision in the absence of the parties to the dispute. On motion to set aside the decision of the board on the ground that the presence of the umpire at the deliberations of the board was an irregularity amounting to " misconduct ",

Held: it was a necessary implication from r. 6 that the umpire was to have no influence on the board of appeal in reaching their decision and that the board had no right to allow him to attend their deliberations after the conclusion of the hearing; accordingly the award must be set aside.

Per CURIAM: in approaching a question whether an award should be set aside on the ground that proper arbitration procedure has not been followed the court's first task should be to ascertain, by construing the arbitration agreement, what procedure was agreed between the parties; if there has been no breach of the agreed procedure, there may arise the second task, viz., to decide whether the award made without breach of the agreed procedure ought to be set aside on grounds of public policy, often called the rules of natural justice (compare p. 497, letters G to I, post). Trade custom may be taken to be incorporated in contracts if it is not unreasonable and does not conflict with the terms of a written agreement, and in determining whether a custom is unreasonable a relevant test must be whether it tends to an unjust result; thus something like the rules of natural justice is brought into the first task by a side-wind (compare p. 498, letters E and F, and p. 500, letter I, post).

[As to setting aside an award on the ground of misconduct, see 2 HALSBURY'S LAWS (3rd Edn.) 57-59, para. 126; and for cases on the subject, see 2 DIGEST 548-551, *1810-1827*.]

Cases referred to:

(1) *Mediterranean & Eastern Export Co., Ltd.* v. *Fortress Fabrics (Manchester), Ltd.*, [1948] 2 All E.R. 186; [1948] L.J.R. 1536; 2nd Digest Supp.

(2) *Spence* v. *Eastern Counties Ry. Co.*, (1839), 7 Dowl. 697; 3 Jur. 846; 2 Digest 469, *1143*.

(3) *Czarnikow* v. *Roth, Schmidt & Co.*, [1922] 2 K.B. 478; 92 L.J.K.B. 81; 127 L.T. 824; Digest Supp.

(4) *Taylor (David) & Son, Ltd.* v. *Barnett*, [1953] 1 All E. R. 843; 3rd Digest Supp.

A (5) *Catalina S.S. Owners* v. *Norma Owners*, (1938), 61 Lloyd's Rep. 360.

(6) *Re Fuerst Bros. & Co., Ltd.* v. *R. S. Stephenson*, [1951] 1 Lloyd's Rep. 429.

(7) *Walker* v. *Frobisher*, (1801), 6 Ves. 70; 31 E.R. 943; 2 Digest 446, *941*.

(8) *Royal Commission on Sugar Supply* v. *Kwik-Hoo-Tong Trading Society*, (1922), 38 T.L.R. 684; Digest Supp.

(9) *Naumann* v. *Nathan*, (1930), 37 Lloyd's Rep. 249.

B (10) *Hutton* v. *Warren*, (1836), 1 M. & W. 466; 5 L.J.Ex. 234; 150 E.R. 517; 17 Digest (Repl.) 38, *449*.

(11) *Re Sutro (L.) & Co. & Heilbut, Symons & Co.*, [1917] 2 K.B. 348; 86 L.J.K.B. 1226; 116 L.T. 545; 17 Digest (Repl.) 45, *543*.

(12) *Produce Brokers Co., Ltd.* v. *Olympia Oil & Cake Co., Ltd.*, [1916] 1 A.C. 314; 85 L.J.K.B. 160; 114 L.T. 94; 2 Digest 475, *1187*.

C

Motion.

This was a motion to set aside an award of a board of appeal of the Incorporated Oil Seed Association on the ground of misconduct.

The Jubilee Coffee Roasting Co., Ltd. (the buyers) had entered into a contract with the London Export Corporation, Ltd. (the sellers) for the purchase of ground D nuts. Both buyers and sellers were members of the Incorporated Oil Seed Association. The contract contained an arbitration clause and incorporated the rules relating to arbitration provided for appeal from an umpire's award to a board of appeal. A dispute between the buyers and sellers was referred to an umpire, who made his award in favour of the sellers. The buyers appealed to the board of appeal, who, following a custom of the trade in arbitration proceedings, E requested the umpire to remain with them after the conclusion of the hearing. The board upheld his award.

H. A. P. Fisher for the applicants, the buyers.

J. F. Donaldson for the respondents, the sellers.

A. J. Bateson held a watching brief on behalf of the Incorporated Oil Seed Association.

F *Cur. adv. vult.*

Feb. 10. **DIPLOCK, J.,** read the following judgment: The applicants (who were the buyers) and the respondents (who were the sellers) entered into a c.i.f. contract for the sale of ground nuts. The contract expressly incorporated all the terms, conditions and rules of contract form no. 75 of the Incorporated G Oil Seed Association (which I shall call " I.O.S.A."). This contract form appears to have been drafted in its present terms in 1956; it is probably the latest modification of several predecessors. The only clause in the contract to which I need refer is the arbitration clause, cl. 16, the relevant portions of which read as follows:

> " All disputes from time to time arising out of this contract, including any H question of law appearing in the proceedings, whether arising between the parties hereto, or between one of the parties hereto and the Trustee in Bankruptcy of the other party, shall be referred to arbitration according to the rules appended to this contract."

There follow provisions making this a *Scott* v. *Avery* clause*. The rules appended I to the contract are fifteen in number, only a portion of which need I read. Rule 1 is as follows:

> " Any dispute arising out of a contract embodying these rules shall be referred to arbitration in London, each party appointing one arbitrator, who shall be a member of the association, or a partner in a member's firm, or a director of a company represented by a member, and such arbitrators shall have the power if and when they disagree to appoint an umpire, who shall

---

* For the effect of such a clause, see 2 HALSBURY'S LAWS (3rd Edn.) 19, para. 47.

> be a member of the association, or a partner in a member's firm, or a director of a company represented by a member, whose decision is to be final."

Rule 2 deals with fees; r. 3 deals with a refusal by one party to appoint an arbitrator; r. 4 deals with the form of the award and costs; and r. 5 provides for a right of appeal. Rule 6 is an important rule:

> "The appeal shall be determined by a board of appeal consisting of four members of the committee of appeal of the association in accordance with the regulations of association for the time being of the Incorporated Oil Seed Association, and the rules of the executive committee for the time being in force. No member of the committee of appeal who has an interest in the matter in dispute or who has acted as arbitrator or umpire in the case and no member of the same firm or company to which either of the arbitrators or the umpire shall belong, shall vote on the question of the appointment of members of the board of appeal or shall be appointed a member of the board of appeal."

I do not think I need read the second part of that rule. Rule 7 provides as follows:

> "The parties to an arbitration or an appeal to the committee of appeal shall not be represented or appear by counsel or solicitor on the hearing of such arbitration or appeal unless in the sole discretion of the arbitrator, or umpire, as the case may be, or board of appeal, the case is of special importance or questions of law are likely to arise upon which the opinion of the High Court of Justice may be required."

Rule 8 provides:

> "The board of appeal shall confirm the award appealed from unless not less than three members of the board of appeal decide to vary such award . . . "

Then there are provisions as to costs and expenses. Rule 9 deals with withdrawals of appeals; r. 10 with fees on appeal; r. 11 with the stating of a Special Case and similar matters; and r. 12 with the return of fees where an appeal is lodged by both parties. Rule 13 provides that an award shall not be invalidated because of a disqualification of the parties unless objection is made. Rule 14 deals with notices; and r. 15 with the posting of names of defaulters. I would observe that these rules do not deal in detail with the procedure at the hearing, but it is implicit from r. 7, which I have read, that unless the parties waive the right there is to be a hearing by the board of appeal.

A dispute having arisen between the parties whether there was good tender of documents by the sellers under this contract, it went to arbitration. The arbitrators failed to agree; and the umpire appointed awarded against the buyers. The issue involved was what was primarily, I think, a question of law—namely, whether the contract as amended called for shipment by a named vessel or for shipment by a named vessel on or before a fixed date. The buyers duly appealed to the appeal board. At the hearing, their representative, Mr. Barry (a director of the buyers), and the sellers' representative, the original arbitrator appointed by them, argued the respective contentions of the parties. The umpire was present at the hearing. It does not appear whether during the actual hearing he said anything. At the close of the hearing the chairman of the appeal board asked the umpire to remain behind. Mr. Barry, on behalf of the buyers, protested and asked to be allowed to be present to hear what was said by the umpire. Permission was refused, and Mr. Barry left under protest. He was later informed by the umpire that the umpire had given the appeal board his reasons for making his award. That has now been amplified by the evidence. The chairman of the board apparently asked him whether the evidence and contentions put forward at the hearing before the board differed from those put before the umpire. The umpire replied "No", and volunteered the information that he had taken the view that the contract as amended was for shipment by a named vessel. This was, of course, the issue that had been fully argued by the parties at the preceding hearing.

There is undisputed evidence that for very many years it has been a common practice in the I.O.S.A. appeal board arbitrations for the umpire to stay behind with the appeal board after the conclusion of the hearing. A similar practice is adopted with the London Oil and Tallow Trades Association. It is not quite an invariable practice, since although Mr. Barry has in the past protested against it in vain on a number of occasions there was one occasion when he was allowed to remain while the board asked the umpire questions. There is no suggestion that any moral opprobrium attaches to the members of the board or to the umpire: what is said is that what occurred on this occasion (and, it would follow, on hundreds of other occasions) amounts to what in arbitration law is called " misconduct ", or, to use a more appropriate term, an irregularity in procedure which entitles the buyers to have the award set aside.

The buyers put their case this way: It is misconduct, they say, for an arbitral tribunal to receive evidence or argument in the absence of the parties irrespective of whether the tribunal's award is in fact influenced by such evidence or argument; and, they add, the sellers cannot rely on any custom for the umpire to remain with the appeal board to answer questions after the parties have retired from the hearing, because, first, such a custom is contrary to the rules of natural justice and, secondly, it is inconsistent with the terms to be implied from the written agreement submitting the dispute between the parties to arbitration. To this the sellers reply that, whatever may be the position as regards the receipt of evidence or argument in private from the parties themselves or from a stranger to the arbitration, similar considerations do not apply to its receipt from the umpire from whose award the appeal is brought: the court should therefore uphold the custom unless it is excluded by an express term of the arbitration agreement, and there is no such express term here.

I must deal with each of these contentions; but since, as has frequently been said, the use of the expression " misconduct ", with its suggestion of moral values, to include the kind of alleged irregularity in procedure with which this case is concerned, tends to misunderstanding, I think it helpful—at any rate to myself—to start by analysing what are the tasks of the court when asked to set aside an award on the ground that the proper procedure has not been followed in the arbitration.

The first task of the court is to construe the arbitration agreement—that is, to ascertain to what procedure the parties have agreed. At this stage of its task the court is not directly concerned with whether the agreement " violated any rules of what is so often called natural justice ", to use the phrase of LORD GODDARD, C.J., in *Mediterranean & Eastern Export Co., Ltd.* v. *Fortress Fabrics* (*Manchester*), *Ltd.* (1) ([1948] 2 All E.R. 186 at p. 189); although, as I shall point out later, the court's views as to what procedure tends to achieve a just result will be one of the considerations which will influence it in deciding what terms as to procedure are to be implied where the written agreement is silent. Where the award has been made by the arbitrator in breach of the agreed procedure, the applicant is entitled to have it set aside, not because there has been necessarily any breach of the rules of natural justice, but simply because the parties have not agreed to be bound by an award made by the procedure in fact adopted: contrast *Spence* v. *Eastern Counties Ry. Co.* (2) ((1839), 7 Dowl. 697). When the arbitration agreement has been construed and no breach of the agreed procedure found there may nevertheless arise a second and quite separate question: that is, whether, as a matter of public policy, a particular award, made pursuant to that agreed procedure, ought not to be enforced and ought, therefore, to be set aside; for an arbitrator's award, unless set aside, entitles the beneficiary to call on the executive power of the state to enforce it, and it is the function of the court to see that that executive power is not abused.

It is in relation to this second and separate question that the rules of what is so often called natural justice may arise directly. There may be a variety of grounds of public policy on which an award may be set aside. That it has sought to oust the statutory jurisdiction of the court to direct a Special Case to be stated is one example: see *Czarnikow* v. *Roth, Schmidt & Co.* (3) ([1922] 2 K.B. 478). That its effect is to enforce an illegal contract is perhaps another: see *David Taylor & Son, Ltd.* v. *Barnett* (4) ([1953] 1 All E.R. 843); and I apprehend that an award obtained in violation of the rules of natural justice even where there was no breach of the agreed procedure would be set aside on grounds of public policy: as, for instance, where an arbitrator manifested obvious bias too late for an application for his removal to be effective before he made his award. Contrast *Catalina S.S. Owners* v. *Norma Owners* (5) ((1938), 61 Lloyd's Rep. 360).

Much of the confusion is caused by the fact that the expression "misconduct of the arbitrator" is used to describe both these quite separate grounds for setting aside an award; and it is not wholly clear in some of the decided cases on which of these two grounds a particular award has been set aside. If my analysis is correct, it follows that where the court in a case such as this is engaged in its first task of construing the arbitration agreement it must first look to see if there is an express term authorising the particular procedure impugned. If there is such an express term, it will not set aside the award except on grounds of public policy, which may include violation of the rules of natural justice in the strict sense in which I have sought to use it above. Arbitration agreements seldom contain, however, a complete code of procedure, and where there is no express written term relating to the point of procedure impugned the court has to ascertain the term to be implied, which it does from the language the parties have used in their written agreement, the provisions of the Arbitration Act, 1950, the surrounding circumstances, and—particularly in the kind of arbitration which comes before this court—any custom or trade practice which must be taken to be incorporated in their agreement. A custom or trade practice is not, however, to be incorporated in an agreement if it is unreasonable—not because the parties to a contract cannot expressly agree to something unreasonable, but because the court will not draw the inference that they have done so by silence. It is in this connexion that something like "the rules of natural justice" are blown in by a side-wind.

In considering whether a particular customary procedure in the determination of a dispute is unreasonable, a relevant test must be whether it tends or may tend to an unjust result. It may well be that the test of what is unreasonable in this sense so as to exclude a proved custom from being incorporated in an arbitration agreement is broader than the test of what is a "violation of the rules of natural justice" which entitles the court to set aside, on grounds of public policy, an award made in accordance with the procedure expressly provided for in the arbitration agreement. It was, I think, because he regarded it as unreasonable and therefore not to be treated as incorporated in the arbitration agreement that CROOM-JOHNSON, J., in *Re Fuerst Bros. & Co., Ltd.* v. *R. S. Stephenson* (6) ([1951] 1 Lloyd's Rep. 429), doubted the validity, as a matter of procedure, of a practice whereby, in a commercial arbitration, the umpire saw one of the parties' advocate-arbitrator in the absence of the other party's arbitrator, leaving it to the one arbitrator to keep the other informed. I doubt very much, had such a procedure been expressly provided for in a written arbitration agreement, whether the court would have set aside the award on grounds of public policy.

With those principles in mind, I turn now to see whether the arbitration agreement with which I am concerned impliedly authorises (for it is not suggested that it does so expressly) the procedure of the appellate board which was adopted in this case. I start, naturally, with the express terms of the agreement, the most relevant of which I have already recited, on which I make the following comments. First: Every arbitrator, umpire and member of the appeal board

A must be a member of the association—that is to say, commercial men of experience and special knowledge of the subject-matter of any disputes likely to arise under the contract. Secondly, it is implicit in r. 7 that on an appeal there is to be a "hearing" before the board of appeal, but save that the parties prima facie are not entitled to legal representation at the "hearing" there are no express provisions as to the procedure to be adopted at the hearing. Thirdly, it is B expressly provided by r. 6 that neither the umpire nor any member of his firm or company may be a member of the board of appeal, or even vote as to its constitution.

Where an arbitration agreement is silent as to the procedure, what attitude should the court adopt in seeking to imply terms ? Obviously it does not imply terms which tend or appear to tend to an unjust award; but the court, parti-C cularly in commercial arbitrations, does not now, as perhaps once courts did, start on the assumption that the parties, except as otherwise expressly agreed, intended to adopt in its full rigour the procedure which, on long experience, helped by natural conservatism, has commended itself as most appropriate to the courts of law themselves. Rather should the courts start with the presumption that, in confiding their disputes, not to the courts of law, but to an D arbitral tribunal of their own choice, the parties intended to confer on that tribunal a discretion as to the procedure it should adopt to arrive at a just decision; and the court will not lightly assume a limitation on that discretion, unless the mode of exercising it tends, or appears to tend, to an unjust result. Thus, where it was agreed that the arbitrators should be "commercial men of experience and special knowledge of the subject-matter", it was held a proper exercise of their E discretion to use their own expertise without restricting themselves to evidence given by the parties—see the *Mediterranean & Eastern Export Co.* case (1) cited above—although, as appears from the judgment of LORD GODDARD, C.J., in that case ([1948] 2 All E.R. at p. 187), it would have been otherwise if the arbitrator had not been an expert but, say, a lawyer.

Counsel for the applicants does not dispute the general proposition that F commercial arbitrators have a wide discretion as to their procedure; but he says that it does tend or appear to tend to an unjust award if the arbitral tribunal receives evidence or argument in the absence of the parties. There is ample authority, extending over 150 years, from LORD ELDON, L.C., in *Walker* v. *Frobisher* (7) ((1801), 6 Ves. 70) decided in 1801, to CROOM-JOHNSON, J., in *Re Fuerst* G *Bros.* (6), decided in 1951, that it is misconduct for an arbitrator to hear evidence or receive argument on behalf of one party in the absence of the other; or, as I prefer to put it, the court will not imply a term permitting him to do so; and there is also ample authority that where evidence or argument is so received it is immaterial whether it in fact affected the arbitrator's decision. The rule that an arbitrator must not receive evidence or argument in the absence of one of the H parties, whether it be regarded as "misconduct" or as a term to be implied in the arbitration agreement, applies even to evidence or argument given, not on behalf of either of the parties, but by a disinterested stranger; see *Royal Commission on Sugar Supply* v. *Kwik-Hoo-Tong Trading Society* (8) ((1922), 38 T.L.R. 684). The umpire, says counsel for the applicants, is at least in no better position than a disinterested stranger, for having made his award he is functus I officio, and although not interested in any financial sense he is not free of the natural human interest in being shown to be right. In the absence of a proved custom or trade practice to the contrary, I should have no hesitation in acceding to this argument; but the real strength of the respondents' case lies in the "custom", for by agreeing to arbitration by arbitrators and umpires who must be members of the I.O.S.A., with an appeal to a board of appeal also members of the committee of appeal of that body, there must be taken to be incorporated in the arbitration agreement an agreement to accept the association's customary procedure except in so far as such procedure is unreasonable or conflicts with the written terms of the agreement.

Counsel for the respondents says that there is nothing unreasonable in the umpire communicating his views in private to the appeal board: he is not in the position of a stranger, he has exercised a quasi-judicial function in relation to the dispute, and there is nothing unreasonable in a judge of first instance communicating his views privately to the Court of Appeal. Indeed, counsel for the respondents points out that s. 8 of the Criminal Appeal Act, 1907, and r. 15 (b)* made thereunder provide that the opinion of a judge on a case tried before him shall be given to the Court of Criminal Appeal and that, except by leave of the court, neither party shall be furnished with a copy. I doubt if this presents any very helpful analogy to commercial arbitrations. Leaving aside appeals against sentence, to which very special considerations obviously apply, the judge in a criminal case, where there is a right of appeal to the Court of Criminal Appeal, was not the judge of fact in the court of first instance: the jury was: whereas in a commercial arbitration the umpire is; and in quality arbitrations (which are the commonest type of arbitration under this kind of agreement), the umpire, in coming to his decision of fact, is not restricted to evidence given before him but entitled to make use of his own expertise. Furthermore, the Court of Criminal Appeal, unlike a board of appeal of the I.O.S.A., does not hear the evidence de novo.

Though I do not accept counsel for the respondents' analogy, I would not be prepared to reject the practice of the I.O.S.A. as unreasonable if the arbitration agreement merely provided (as it did in *Naumann* v. *Nathan* (9) ((1930), 37 Lloyd's Rep. 249) that disputes should be settled " by arbitration by the I.O.S.A. in the usual way ". I should be very hesitant to condemn as " unreasonable " a practice which has commended itself to commercial men versed in the trade for fifty years and, with some exceptions (Mr. Barry is one), apparently worked to their satisfaction. If parties or their arbitrators have selected an umpire, presumably because they have confidence in his expert knowledge and independence, I see nothing unreasonable, as opposed to unusual, in their agreeing that the tribunal to whom they appeal from his decision may consult him without the parties being present, thus in effect making him an advisory but non-voting member of the tribunal of appeal. If there is nothing unreasonable—and I think that clearly there is not—in making the umpire a full member of an arbitral tribunal to which an appeal from his award may be made, there is nothing unreasonable in making him a non-voting member. And if, as I think, such practice is not so unreasonable as to exclude in principle its incorporation in the arbitration agreement as a custom, it follows a fortiori that its adoption affords no ground for setting aside the award on grounds of public policy as contrary to the rules of natural justice.

Though I am not prepared to say that the practice is unreasonable, there yet remains the question whether it is inconsistent with the terms of the written agreement; and although I have evidence that the practice has gone on for very many years and has been adopted by another well-known trade association, I have no information how long the arbitration rules appended to the I.O.S.A. contract forms have been in their present form or whether the arbitration rules of the other association are in identical form. There is no express term in the arbitration agreement forbidding the practice; and counsel for the respondents has argued in the first instance that a proved custom can be excluded only if it is inconsistent with an express term. I think, however, that this is not the correct view, and that a custom or trade practice may be excluded by the express terms of the contract or by necessary implication from those express terms. This seems to me to be well established. See *Hutton* v. *Warren* (10) ((1836), 1 M. & W. 466 at p. 475); *Re L. Sutro & Co. & Heilbut, Symons & Co.* (11)

---

* I.e., r. 15 (b) of the Criminal Appeal Rules, 1908 (S.R. & O. 1908 No. 227).

A ([1917] 2 K.B. 348); and *Produce Brokers Co., Ltd.* v. *Olympia Oil & Cake Co., Ltd.* (12) ([1916] 1 A.C. 314 at p. 324), to which counsel for the applicants referred.

It is here that r. 6 of the arbitration rules appended to the contract is important. The parties have made it clear, not only that the umpire is not to be a member of the board of appeal which hears the appeal from his decision, but also that he is
B to have no voice even in the selection of that board; and these prohibitions apply not only to the umpire himself but to any member of the firm or company to which he belongs. This at least suggests that it was the intention of the parties that the umpire, having made his award, had to have nothing to do with any appeal from it. There are other considerations which support this conclusion. One of the commonest types of arbitration contemplated by the arbitration
C agreement is a quality arbitration. In such an arbitration the umpire is not merely weighing expert evidence given before him which may be repeated before the appeal board and on which they can form their own judgment, but is entitled to exercise his own expertise; and if he communicates to the appeal board the views that he has formed as a result of such exercise this is in no different category from any other expert evidence given at the hearing before the appeal board,
D for the appeal board re-hears evidence de novo and does not hear the evidence given before the umpire save in so far as the parties choose to re-present it before them. By r. 6 the parties have expressly confided the decision of any appeal to an appeal board appointed in the manner there set out and to no one else. They have expressly provided that the umpire and any person closely connected with him in business shall not be a member of that board or have any voice in its
E selection. He, together with the arbitrators, is, of all members of the committee of appeal of the association, to be a stranger to the board of appeal's decision. I think that it is a necessary implication from this that the umpire is to have no influence, direct or indirect, on the board of appeal in reaching its decision, and that the board of appeal have no right to seek any information, whether of fact or of opinion, from him in the absence of the parties, or to allow him to attend their
F deliberations after the conclusion of the hearing. If they do so, that is contrary to the implied terms of the arbitration agreement, and it matters not whether the information he gives them in fact has influenced their decision, or indeed, if they allow him to attend their deliberations after the hearing, whether they in fact ask him for any information at all.

For these reasons, I think that the award must be set aside. The effect of so
G doing, since the award was an appellate award, is to reinstate the award of the umpire from which the buyers appealed. This can only be set aside by a decision of a board of appeal of I.O.S.A.; and it is agreed by the parties that the proper order in these circumstances is that I should remit the matter to a fresh appeal board to be differently constituted.

Award of board of appeal set aside. Matter remitted for fresh hearing before
H *differently constituted board of appeal.*

Solicitors: *Coward, Chance & Co.* (for the applicants); *Gaster & Turner* (for the respondents); *Thomas Cooper & Co.* (for the Incorporated Oil Seed Association).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

SAMROSE PROPERTIES, LTD. *v.* GIBBARD.

[COURT OF APPEAL (Lord Evershed, M.R., Morris and Pearce, L.JJ.), May 2, 3, 1957.]

Rent Restriction—Premium—Payment expressed as consideration for agreement to grant a lease for one year if tenant suitable—Recital that landlords unwilling to grant a lease within Rent Restrictions Acts—Rent stated in lease less than two-thirds of rateable value—Premium commuted rent—Total rent thus exceeding two-thirds of rateable value.

The landlords of a block of dwellings let two rooms and a right to share a kitchen and lavatory to a tenant for one year. The rateable value of the premises was £7 yearly. The rent was expressed to be £1 quarterly, i.e., less than two-thirds of the rateable value, with the consequence, if that were the true rent, that the Rent Restrictions Acts would not apply (Act of 1920, s. 12 (7)). The transaction was effected by means of three documents as follows. On Aug. 16, 1955, the tenant made written application for a tenancy giving, among other information, two references. On Aug. 23, 1955, the landlords and the tenant entered into a written agreement by which, after reciting that the landlords were not willing to grant a lease to which the Rent Restrictions Acts would apply, it was agreed that in consideration of £35 paid by the tenant the landlords agreed to grant the one year's lease. The agreement was conditional on the landlords being satisfied in their discretion of the tenant's suitability. On Aug. 30, 1955, the lease at the quarterly rent of £1 was executed. At the trial of an action by the landlords for possession after the expiration of the lease there was evidence that the landlords had let some dwellings in the block at a weekly rent of 13s. On appeal by the landlords from the refusal of an order for possession on the ground that the tenant was entitled to the protection of the Rent Restrictions Acts,

Held: the true consideration for the one year's letting was £39 (viz., the £35 and the four quarterly payments of £1); the £39, therefore, was rent for the purposes of the Rent Restrictions Acts and, that sum not being less than two-thirds of the rateable value, the letting was within the Rent Restrictions Acts.

Woods v. *Wise* ([1955] 1 All E.R. 767) applied.

Appeal dismissed.

[**Editorial Note.** The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (7), is amended by the Rent Act, 1957, s. 26 and Sch. 8, Part 1, but not materially in relation to such facts as those of the present case. The Landlord and Tenant Act, 1954, s. 1, has rendered the Rent Acts applicable at the end of long tenancies at low rents, but this would not affect a short tenancy.

For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (7), see 13 HALSBURY'S STATUTES (2nd Edn.) 1014.]

Cases referred to:

(1) *Regor Estates, Ltd.* v. *Wright,* [1951] 1 All E.R. 219; [1951] 1 K.B. 689; 115 J.P. 61; 2nd Digest Supp.

(2) *Woods* v. *Wise,* [1955] 1 All E.R. 767; [1955] 2 Q.B. 29; 119 J.P. 254; 3rd Digest Supp.

(3) *Foster* v. *Robinson,* [1950] 2 All E.R. 342; [1951] 1 K.B. 149; 31 Digest (Repl.) 697, *7888.*

(4) *Maclay* v. *Dixon,* [1944] 1 All E.R. 22; 170 L.T. 49; 31 Digest (Repl.) 653, *7567.*

(5) *O'Connor* v. *Hume,* [1954] 2 All E.R. 301; 3rd Digest Supp.

Appeal.

The landlords, Samrose Properties, Ltd., appealed from an order of His Honour JUDGE CLOTHIER, at Lambeth County Court, dated Jan. 22, 1957, dismissing their claim for possession of premises known as No. 117, Waterloo Square, Lomond Grove, Camberwell, against the tenant, Kenneth Gibbard.

On Aug. 16, 1955, the tenant completed and signed a form, addressed to the landlords' agents, applying for a tenancy of a flat at Waterloo Square. The rateable value of the premises was £7 a year. By a written agreement, dated Aug. 23, 1955, and made between the landlords and the tenant, after a recital that the landlords were not willing to grant a lease to which the Rent Restrictions Acts would apply, it was agreed that, in consideration of the sum of £35 then paid by the tenant to the landlords, the landlords agreed to grant to the tenant a lease of flat No. 117, Waterloo Square, for one year from Aug. 30, 1955, at a quarterly rent of £1. On Aug. 30 the lease of the premises for one year, at the rent of £1 a quarter, was executed. It contained a covenant by the tenant to deliver up the premises on the expiration of the term. The tenant remained in occupation of the premises after the expiry of the lease. In proceedings for possession of the premises, the landlords contended that, as the rent payable was less than two-thirds of the rateable value of the premises, the tenancy was excluded from the protection of the Rent Restrictions Acts by s. 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The county court judge held that the tenancy was protected by the Rent Restrictions Acts because the £35 paid by the tenant on the execution of the agreement dated Aug. 23, 1955, was to be regarded as commuted rent, which, together with the quarterly rent, was the true consideration for the letting.

R. E. Megarry, Q.C., and *E. A. Bramall* for the plaintiffs, the landlords.
The defendant, the tenant, did not appear and was not represented.

LORD EVERSHED, M.R.: The sole question raised in this appeal is whether the rent payable in respect of certain premises, known as 117, Waterloo Square, Lomond Grove, Camberwell (which were the subject of a tenancy made in August, 1955) was less than two-thirds of the rateable value of the premises. The rateable value was at all relevant dates £7 per annum, and, therefore, if the rent payable in respect of the tenancy was less than two-thirds of £7, the inevitable effect of s. 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, is that the tenant cannot claim, as he has sought to do, the protection of the Rent Restrictions Acts. The tenant, having succeeded before His Honour JUDGE CLOTHIER in the county court, has not thought it necessary to appear in person or by counsel to support the judgment in this court. Counsel for the landlords has, therefore, been in the somewhat embarrassing situation of having no opponent, and he has very properly drawn our attention to a number of authorities which might be thought to help, or which do help, in deciding questions of this kind. We are indebted to him for the care with which he has presented the case. I have, however, come to the conclusion that we cannot disturb the decision of the county court judge.

The premises are described as flat 117, Waterloo Square, but the subject-matter of the tenancy appears to have been two rooms in the building, the tenant having the right to share the kitchen and the lavatory with other occupants. The subject-matter being of this somewhat meagre character, the tenant, if he had reflected on it, must have been somewhat surprised by the extraordinary elaboration of the arrangements for the letting with which he was presented. The documents at which we have to look were three in number, and a period of a week separated the second from the first and the third from the second. Anticipating for a moment the oral evidence which was given before the learned judge, this elaboration was the declared policy of the landlords, Samrose Properties, Ltd., and, as the second of the three documents plainly and quite properly declares, their object was to avoid the impact on the premises of the rent restriction legislation. In matters where the Rent Restrictions Acts might be said to apply, the court must properly ask itself whether the transaction, viewed as a whole and according to the substance of it, is in truth one which (to use the phrase of counsel for the landlords) is on that side of the line which frees the premises from the impact of the Acts, or whether it is within the mischief which the Acts were designed to avoid.

My authority for that view is taken from the language of COHEN, L.J., in *Regor Estates, Ltd.* v. *Wright* (1) ([1951] 1 All E.R. 219, at pp. 223, 224), in a passage from his judgment which was cited by me in this court in *Woods* v. *Wise* (2) ([1955] 1 All E.R. 767 at p. 773). It is unnecessary to read again the passage which I cited there, but I may perhaps venture to refer to a passage in my judgment in *Woods* v. *Wise* (2) which the learned county court judge in the present case also invoked. I said ([1955] 1 All E.R. at p. 776):

> " In cases under the ordinary law, unaffected by the Rent Acts, the question, how much rent should be payable under, and what other considerations there should be for, a demise were matters for free bargaining. A landlord might charge any sum that he could get for rent. If he preferred, he could charge a low rent and demand a ' premium ' or lump-sum payment. There was no purpose such as now exists in any attempt to disguise the one in the shape of the other. In these circumstances the word ' rent ', even though not confined to the old common law meaning of that for which distress might be levied, would naturally and ordinarily be used to signify the periodic payments under a demise in contrast to lump-sum or other kinds of consideration."

A little later, after considering whether a lump-sum payment called a "premium" might none the less be rent, I said (ibid.):

> " I cannot for my part think that the arm of the law would be so short as to disable it from dealing appropriately with such a case as that last suggested, if it appeared that the so-called premium was, in truth and substance, nothing more or other than the rent quantified and provided for in ' an abnormal form '."

I, therefore, approach the present case with that principle to guide me. I fully accept the proposition, which counsel for the landlords made the foundation of his case, that a landlord is entitled so to arrange his affairs that the legal result will bring him outside the statutory provisions; but, on the other hand, merely giving a label to a particular type of payment will not necessarily have the effect indicated by the label; for the truth and substance, in cases of this kind, must be examined. There are, I think, three circumstances which convince me that the learned judge in the present case was well entitled to reach the conclusion which he did. The first is the disproportion which the arrangements made bear to the subject-matter of that arrangement. We are dealing here with a tenancy of two rooms, and for a term, a period of occupation, which was limited to twelve months. This is not a case of a lease of some piece of land or a house for fourteen years, or some other long period, at a ground rent on payment of a sum designed to produce the effect that the periodic rent will be small; we are not dealing with that kind of case, and I do not find it necessary to indicate where any line should be drawn.

The second point is that the vital document, on its face, seems to have, not only the declared object which it is intended to serve, but also an important inconsistency in itself. Thirdly, I think that on further examination it is seen that this vital second document is very largely if not altogether unnecessary. I shall elaborate those reasons in a moment, but the cumulative effect of them is, as I think, to justify the judge's conclusion. Let me, however, repeat that I am not for a moment suggesting that there is any deception or impropriety on the part of the landlords. They acquired the premises in 1952, and they adopted this method of procedure which they instructed their agents to require from all proposed tenants, in the hope, belief and expectation that thereby

A the premises would not be within the scope and restrictive effect of the Rent Restrictions Acts. If they fail, that does not, therefore, reflect on the ethics of their business methods.

In order to make clear those grounds which I have indicated, I can do no better than refer in such detail as is necessary to the three documents which were executed and which form the three stages of this elaborate superstructure B for the letting of two rooms, together with the use of the kitchen and lavatory, in Waterloo Square. The first was a document called "Application for Tenancy," signed by the tenant, and bearing the date Aug. 16, 1955. It is addressed to the landlords' agents and reads: "I hereby apply for a tenancy of a flat at Waterloo Square, Lomond Grove, Camberwell". The tenant gave his name in full and his then address. He said how long he had been where he was then C residing. He also said that he was married and had one son aged five years living with him; that he required two rooms; that his occupation was that of a lorry driver. He gave the name and address of his employer, his weekly wages, the income of his wife, and the name and address of his then landlord. Finally, he stated the rent which he was then paying and gave two references. It will be observed that the questions which were asked enabled the landlords D to obtain a lot of information about the proposed tenant's status and circumstances, and that, most important of all, the proposed tenant gave the names and addresses of two referees. A week then passed, and on Aug. 23 the second document, which is the real foundation of the landlords' case, was executed. The form of that document is as follows: "An agreement made Aug. 23, 1955, between" the landlords and the tenant. The document recites:

E

> "(i) The applicant is desirous of being granted a lease of the premises hereinafter mentioned. (ii) The [landlords are] not willing to grant a lease such that the Rent and Mortgage Interest Restrictions Acts would apply to the said premises. Now it is hereby agreed as follows:—1. In consideration of the sum of £35 now paid by the applicant to the [landlords] (the F receipt whereof the [landlords] hereby [acknowledge]) the [landlords agree] to grant and the applicant agrees to take a lease of all that flat No. 117 Waterloo Square, Lomond Grove, Camberwell, London, S.E.5 for the term of one year from Aug. 30, 1955, at the quarterly rent of £1 payable in advance the first of such payments to be made on the execution of the said lease and subsequent payments at intervals of three calendar months thereafter. 2. The said lease shall be in the form of the draft annexed G hereto. 3. Completion of the said lease shall subject as hereinafter provided take place on Aug. 30, 1955. The said lease and a counterpart thereof shall be prepared by the [landlords'] solicitors and shall be executed by a director on behalf of the [landlords] and the applicant respectively on or before the said date for completion. 4. This agreement is conditional upon the [landlords] being satisfied in [their] absolute discretion that the H applicant will in all respects be a suitable tenant and the applicant shall accordingly furnish references forthwith. In the event of the [landlords] not being satisfied as aforesaid with the suitability of the applicant, then the [landlords] shall refund to the applicant the said sum of £35 and this agreement shall be null and void."

I Then there were two features which might have been regarded by the tenant as "stings in the tail". Paragraph 5 reads:

> "On completion the applicant shall pay to the [landlords] the sum of £5 5s. as a contribution towards the [landlords'] costs in respect of this agreement and the said lease."

Finally, it was part of the arrangement that, in addition to paying those sums for legal costs, the tenant should himself consult a solicitor, who was required to sign the following certificate at the foot of this agreement:

> "I [followed by the name of the solicitor] hereby certify that I have explained the above proposed agreement to the applicant therein named and that he appeared fully to understand the same. I further certify that he has instructed me that he is entering into such agreement in reliance only on its contents and he acknowledges that there is no verbal agreement or representation relating to the subject-matter thereof."

A week later the lease, bearing the date Aug. 30, was executed. It is a lease of the same flat at the rent of £1 per quarter. There is no reference in it to the previous agreement. There are certain covenants in common form though not commonly found in tenancies for one year only for two rooms in a building of this kind. They included a covenant: "On the expiration or sooner determination of the said term"—that is one year—"to deliver up the said premises . . ."

On the first of the three points which I mentioned[*], I think that I need add little, if anything. When the subject-matter is borne in mind, this superstructure, if I may so describe it, is clearly disproportionate. Secondly, I draw particular attention to this important circumstance: by the second recital in the agreement dated Aug. 23, the landlords stated that they were not willing to grant a lease such that the Rent and Mortgage Interest Restrictions Acts would apply. They were saying, in effect—perfectly properly, of course: "We are asking you to embark on this elaborate arrangement because we are not willing, if we can help it, to grant such a lease as will bring the Rent Restrictions Acts into force as regards the premises". It is interesting to see how they proceeded to achieve their declared purpose: the consideration for the £35 was stated, in para. 1, to be the landlords' agreement to grant the lease. It wil not be forgotten, however, that there was then a provision that the agreement to grant the lease was not a positive agreement so to do; for, in para. 4, the whole instrument was expressed to be "conditional on the [landlords] being satisfied in [their] absolute discretion that the applicant will . . . be a suitable tenant". Presumably, so long as the landlords acted bona fide, they could, for any reason at all, say that they were not satisfied that the proposed tenant would be a suitable tenant. Therefore, it is not really true to say that the £35 was paid as consideration for a promise, in any real sense of the term, on the landlords' part to grant a lease. It will also be observed that para. 4 went on to say that "the applicant shall accordingly furnish references forthwith".

That brings me to the third of my grounds, for it will not be forgotten that the tenant had already produced the references a week before the date of the agreement. Whether a week would have been sufficient for the referees to be consulted is a question which, I think, has some light thrown on it by the fact that, in the document of Aug. 23, the completion date of the lease was stated to be a week—no more—from the date when the document was executed. As I said earlier, this agreement practically serves no useful purpose at all. It was stated (and I have no doubt that it was the fact) that the form of the lease was already agreed; it was to be prepared by the landlords. No real purpose, therefore, was served by making these intermediate arrangements, the landlords already being in possession of all the information which they required about the tenant, including the name of his referees.

I think that these considerations amply justify the conclusion at which the judge arrived. Before I make a brief reference to the way in which he expressed that conclusion, I should say that two witnesses were called for the landlords. It is a point made, and made with force, by counsel for the landlords that although the tenant said in his defence that the vital agreement or the general substance of it was a sham, he did not come forward to say so, nor did he call any evidence. If by the use of the word "sham" the tenant was suggesting that there was some deception on the part of the landlords, I entirely disagree with him: the matter was entirely above board in that sense. It was made plain to the tenant that this was the means whereby the landlords were openly saying that they were proposing to keep outside the scope of the Rent Acts. The witnesses, however, showed two things: first, that the scheme of operations which resulted in the three documents was part of the deliberate policy of the landlords, designed, as was freely admitted, for the purpose expressed in the recital. The other matter which, I think, is of some significance appeared in an answer of the first witness, the landlords' agent, in cross-examination. The evidence, as recorded by the judge, is this:

---

[*] See p. 504, letter G, ante.

> "We have made lettings of other flats in block at about 13s. a week. On expiration of term of lease the tenant can apply for a new lease. The terms of the new lease 'might not be the same'."

I ask myself: What is really the effect of that ? If the landlords are right, what will happen at the end of the year in what I take as a hypothetical case, where the tenant says: "Can I please have another year" ? This performance will have to be gone through again. Will it be found that there will be a series of arrangements whereby, for a payment of £X down and the promise to pay a periodic rent of, say, £1 a quarter, the tenants will on such occasion get the right to occupy their respective premises for another year and no more ? If the matter is looked at over a period of time, it would, I think, be impossible to avoid the conclusion that the whole twelve-monthly consideration in each succeeding case formed, in truth, the compensation, the money payment, for the use of the flat; that is to say, it was the rent. I think that that consideration clearly entered into the conclusions of the learned judge, for he referred to the evidence which had been given before him. His conclusion is summarised in these terms:

> "While giving every consideration to the argument, that the plaintiffs are entitled to evade the Acts, I feel it is my duty to scrutinise very carefully the scheme proposed for this purpose. In my view the scheme fails. In my judgment, if the agreement and the lease are viewed together, it becomes clear that the real substance of the transaction is the landlords' demand of £39 for a year's occupancy, and that this is simply divided into an immediate payment of £35, and the balance by quarterly instalments of £1 each. I regard the £35 as commuted rent, which, in my view, together with the quarterly rent, is the true consideration for the letting. If I am right, this tenancy is one protected by the Acts."

On a consideration of all the evidence, the intrinsic evidence of the documents and the evidence of the witnesses, I think that the learned judge was well entitled to reach the conclusion which he did, and I agree with it. It is to be noted that £39 a year is 15s. a week. I am not saying that that was an excessive rent, but it may have a bearing on the way in which this sum was calculated. However that may be, I think that the judge was entitled to reach the conclusion which he did, that he rightly reached it, and I would, therefore, dismiss the appeal. I hope that counsel for the landlords will forgive me if I do not travel through the many cases which he rightly brought to our attention. None of them, I think, can be said to form any authority governing the present case. I have taken the principle from the decision of this court in *Woods* v. *Wise* (2), as did the learned county court judge, and I do not find it necessary to refer to any of the many other cases cited.

MORRIS. L.J.: I have reached the same conclusion. When the landlords brought their claim for possession, the tenant relied on the Rent Restrictions Acts. The landlords, in turn, said that the tenancy was not subject to the Rent Acts, and reliance was placed on s. 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. As counsel for the landlords pointed out, that sub-section is in quite general terms:

> " Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy . . . and this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed."

Counsel for the landlords submitted that Parliament had, by that sub-section, drawn a line. He pointed out that the provisions, so enacted, had remained ever since 1920. That is all entirely correct; but the question which is raised in this case is whether the tenant's rent was a rent of £4 for the year, or whether, in fact, it was a higher rent, namely, a rent of £39. In the documents the so-called " rent " is £4. That amount was fixed because it was just below two-thirds of the rateable value, which was £7 a year. If the true state of affairs was that the rent was £4 and only £4, then it is clear that the Rent Acts did not apply to the tenancy. If that was the true state of affairs, then the fact that the parties had ordered their dealings with the intention that the Rent Acts should not apply would be immaterial. On that basis the parties would be availing themselves openly of the provisions of the Acts. They would not be evading the Acts: they would be making them operative.

In *Foster* v. *Robinson* (3) ([1950] 2 All E.R. 342 at p. 348), Sir Raymond Evershed, M.R., referred with approval to some words which are to be found in Megarry on the Rent Acts (5th Edn.) (1950), at p. 10*:

> " . . . there is nothing to prevent the parties from so arranging matters that there is nothing to which the Acts can apply, provided the transaction in question is a genuine transaction and not a mere sham . . . "

Rather to the same effect were some words which were used by Scott, L.J., in *Maclay* v. *Dixon* (4) ([1944] 1 All E.R. 22 at p. 23):

> " There was no shadow of deception practised by the landlord upon the tenant. In my opinion, they were both entitled so to arrange the matter, as not to attract the control of the Acts, or, putting it positively, as to prevent the Acts from applying. If the actual transaction was not within the Acts, it made no legal difference that the parties had intentionally kept it out of the Acts."

I think that a most helpful approach to the problem presented in this case was contained in the words used by my Lord in his judgment in *Woods* v. *Wise* (2) ([1955] 1 All E.R. 767 at p. 776), in the passage which he has cited†. In *O'Connor* v. *Hume* (5) ([1954] 2 All E.R. 301), where the facts were rather different, Somervell, L.J., also indicated that in cases of this kind a measure of care in approach is necessary. I need not refer to the facts of that case, but in his judgment Somervell, L.J., said (ibid., at p. 303):

> " If the proper construction of this agreement, with any admissible extrinsic evidence, were that the £47 was a premium, and the rent, with any sums which could properly be treated as rent, was only 2s. a week, then it is plain—and this was the view of the learned county court judge—that the landlord is entitled to an order for possession . . . if the court be satisfied that the document purporting to set out the rights between the parties is a ' sham '—I am not attempting to define what a sham is—then the court will accept and consider evidence as to the real bargain between the parties. Having had the evidence and the correspondence between the parties read to us, I see no ground for regarding the agreement in the present case as a " sham ', whatever that may mean. It is clear that there was no trickery or anything of that sort. The landlord made it plain that he wished the transaction to be arranged in this way at this low rent because he did not want to part with possession for more than a year. The tenant's replies and the letters indicate, as, indeed, counsel agreed, that that was well understood."

---

* The statement appears in the 8th Edn. (1955), at p. 15.

† See p. 504, letters C to E, ante.

SOMERVELL, L.J., then added (ibid.):

> " . . . there is nothing contrary to the provisions of s. 2 of [the Landlord and Tenant (Rent Control) Act, 1949] in agreeing to a premium in the case of a tenancy where the rent is below two-thirds of the rateable value. On the other hand, I think it is right to say that, in such a case, the court would scrutinise a sum which was put forward as a premium."

Counsel for the landlords in the present case submitted that, there being here no substantial extrinsic evidence and there being no rule of law, as he said, governing the matter, the judgment of the learned county court judge ought not to stand unless his conclusion could be supported by intrinsic examination of the documents. It seems to me that, in a case of this kind, one can only seek to ascertain what was the true nature and effect of the transaction; what was the substance of the matter; what was the reality of it, not being guided unduly by any labels that may have been used. My Lord has stated the facts of this case, and the decision depends on an appreciation of these facts. The property in question, called a " flat ", consists only of two rooms in oldish property, there being a right to share a kitchen and lavatory accommodation with others. We have these three documents, and, like my Lord, I pose the question: What possible useful purpose was served by the second of the three documents in this case ? One must consider all the facts and see whether they afford some pointers towards forming a conclusion as to what was the reality of the matter. The permissible rent of the two rooms, we are informed by the evidence, would have been something over 6s. 4d. a week. The so-called rent, the stated rent, was put at £1 quarterly, which is approximately 1s. 6d. a week. There is a £35 premium and then this so-called rent of £4 a year, equivalent to 1s. 6d. a week. The contrast between those two figures in relation to a tenancy for a short period of one year is one pointer. Furthermore, the formality and the elaboration of the documents which effected a letting of these two rooms in this oldish property, for this relatively short time, at a so-called rent equivalent to about 1s. 6d. a week, constitute another pointer which, in my judgment, one can consider when forming a conclusion on what was the real substance of the matter, without being deluded by its form. Looking at the totality of the circumstances, I am led to the view which was reached by the learned county court judge. I think the reality of the matter was that the tenant was paying £39 by way of rent. The real substance of the transaction was that the landlords required £39 rent and the tenant was willing to pay that rent and to pay £35 of it in advance as commuted rent. I am, therefore, of the opinion that the learned county court judge was amply warranted in his conclusion and that he came to a correct conclusion.

PEARCE, L.J.: I agree.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Meaby & Co.* (for the landlords).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

A

REGIS PROPERTY CO., LTD. *v.* DUDLEY.

[COURT OF APPEAL (Jenkins, Sellers and Pearce, L.JJ.), December 12, 13, 16, 17, 18, 1957, February 7, 1958.]

Rent Restriction—Rent limit—Adjustment for repairs—Appropriate factor—Basis of determination—Whether determination a decision of fact—Rent B *Act,* 1957 (5 *&* 6 *Eliz.* 2 *c.* 25), *s.* 1 (1), *Sch.* 1, *Part* 1, *para.* 1 (2), (3).

Rent Restriction—Rent limit—Reasonable charge for services provided by landlord—Depreciation of plant—Profit on services—Rent Act, 1957 (5 *&* 6 *Eliz.* 2 *c.* 25), *s.* 1 (1) (*b*).

In determining the "appropriate factor" under s. 1 (1) of, and Sch. 1, Part 1, para. 1 (2), (3) to, the Rent Act, 1957, for the purpose of ascertaining C the rent limit of a controlled house the Court of Appeal may vary the determination of the county court judge, if it is based on an erroneous conclusion regarding the nature and extent of the burden of the landlord or the tenant as to repairs (see p. **514**, letter G, post); but, in the absence of such an error, the county court judge's determination of the appropriate factor is a decision of fact and of discretion from which appeal does not lie (see p. **519**, letter D A, and p. **514**, letter F, post).

In computing, for the purpose of ascertaining the rent limit of a controlled house, what is a reasonable charge for services provided by the landlord for the tenant—

(a) allowance should be made for depreciation (not replacement cost) of landlord's installations for providing such services as, e.g., lifts and hot E water (see p. **520**, letters A, G and H, post), and

(b) allowance should be made for reasonable profit in the provision of services, except in relation to installations for which depreciation is allowed and except where there are unusual circumstances excluding the allowance of profit (see p. **522**, letters C, E and F, post).

A rent-controlled flat was let to a tenant on a monthly tenancy under an F agreement in writing; it was in a large block in London and was assessed for rating purposes at £54 gross value, £39 rateable value, and was not, therefore, decontrolled by the Rent Act, 1957. The rent limit of the flat under s. 1 of the Act was to be composed, apart from rates, (i) of a sum consisting of the gross value (£54) multiplied by the "appropriate factor" (viz., a figure of $\frac{4}{3}$, where the responsibility for repairs was wholly on the G tenant, or $\frac{6}{3}$, where the responsibility for repairs was wholly on the landlord, or a figure between the two where the burden of repair was divided) and (ii) of a "reasonable charge" for services provided by the landlord for the tenant. Under the tenancy agreement the tenant undertook to keep "the interior of the flat together with all the fixtures and fittings . . . in good and substantial repair and clean sanitary condition (fair wear and tear and damage H by accidental fire excepted)"; and, under r. 1 of a schedule of rules incorporated in the tenant's contractual obligations, the tenant undertook to keep baths, sinks, cisterns and other internal pipes, clean, open and in proper repair and order, and to be responsible for damage occasioned by his failure so to do or by his negligence. The landlords had the burden of all exterior repairs, of all interior repairs necessitated by fair wear and tear, and of certain I plumbing (viz., re-washering and re-seating water taps) which they had assumed by notice given to the tenant. They supplied the tenant with a wireless set, a refrigerator and a gas cooker, and they provided central heating with radiators and towel rails and constant hot water for the flat, a lift, and the lighting and cleaning of the common parts of the property. Certain maintenance services were provided by a wholly owned subsidiary company of the landlords to which a full, but fair, charge was paid by the landlords for the work; a rebate was allowed by the subsidiary company

A to the landlords. The landlords applied to the county court to determine
the " appropriate factor " and what amount was a reasonable charge for
services. The county court judge decided that the appropriate factor was
$\frac{5}{8}$ (i.e., midway between the lower and the upper limit), regarding the tenant's
burdens in relation to repair as being roughly equal to the landlords' by
reason of the high cost of accidental damage (including the tenant's express
B obligation for damage caused by his negligence) that might fall on the tenant.
He decided further that in computing the reasonable charge for services
no allowance might be made for depreciation of plant used for providing
the services (e.g., lifts, boilers, etc.) and that the landlords should not be
allowed an overall profit on the cost of services provided. On appeal,

Held: (i) the county court judge's determination of the appropriate factor
C would stand because, on the assumption that the Court of Appeal would
make (viz., that the exception of fair wear and tear applied to limit the
tenant's obligations under r. 1) the county court judge's determination
was not based on an erroneous conclusion regarding the burden of repairs as
between landlords and tenant, for he was entitled to take into consideration
the tenant's express obligation for damage caused by his negligence, and,
D though the estimate of the tenant's burden of repair was generous, the determination
was one of fact not open to appeal.

(ii) allowance for depreciation of certain plant (viz., boilers, hot water
plant, lifts, radiators and electrical wiring for use in passages, but not hot
water towel rails or radiators, etc., within flats) should be taken into consideration
in determining the reasonable charge for services; the annual allowance
E for depreciation should be the cost of existing installations divided by the
number of years of their estimated life.

(iii) profit on services should be allowed in determining the reasonable
charge for services, as it was a normal element in a reasonable charge, but
(a) no further profit should be allowed to the landlords in the services
provided by their wholly owned subsidiary company, since the charge for
F those services was allowed as the cost of the services and it included profit
for the subsidiary with a rebate for the landlords and (b) no percentage
profits should be allowed in relation to installations for which depreciation
allowance was made; in the particular circumstances of this case the
percentage of profit allowed would be five per cent., on a simple interest
basis, but this figure was not intended as any guide to what might be
G proper in other cases.

Per CURIAM: the Rent Act, 1957, gives no specific guidance as to any
principles on which the court is to determine the " appropriate factor ",
but it is plain that the court must be guided by the extent of the burden
short of full repairing liability cast on the tenant by the terms of the letting
(see p. 514, letter E, post.)

H Appeal dismissed on (i) and allowed on (ii), (iii) above.

[As to permitted increases of rent under the Rent Restrictions Acts, see 20 HALSBURY'S LAWS (2nd Edn.) 322-326, paras. 381-387; and for cases on the subject, see 31 DIGEST (Repl.) 678-681, *7713-7732.*

For the Rent Act, 1957, s. 1 (1) and Sch. 1, Part 1, para. 1, see HALSBURY'S STATUTES, Interim Service 167, 193.]

I Cases referred to:

(1) *Terrell* v. *Murray,* (1901), 17 T.L.R. 570; 31 Digest (Repl.) 363, *4945.*
(2) *Citron* v. *Cohen,* (1920), 36 T.L.R. 560; 31 Digest (Repl.) 362, *4933.*
(3) *Brown* v. *Davies,* [1957] 3 All E.R. 401.
(4) *Taylor* v. *Webb,* [1937] 1 All E.R. 590; [1937] 2 K.B. 283; 106 L.J.K.B. 480; 156 L.T. 326; 31 Digest (Repl.) 296, *4332.*
(5) *R.* v. *Paddington North & St. Marylebone Rent Tribunal, Ex p. Perry,* [1955] 3 All E.R. 391; 119 J.P. 565; 3rd Digest Supp.

(6) *Bell Property Trust, Ltd.* v. *Hampstead Borough Assessment Committee*, [1940] 3 All E.R. 640; [1940] 2 K.B. 543; 109 L.J.K.B. 792; 163 L.T. 292; 104 J.P. 411; 2nd Digest Supp.

Appeal.

The landlords appealed against three orders made by His Honour Judge Hargreaves on Aug. 29, 1957, on three applications made by the landlords in respect of premises known as flat 248, Chelsea Cloisters, Sloane Avenue, S.W.3, in the county of London (a flat in a large block), let by the landlords to the tenant, as follows: (i) an order declaring that £14 4s. 3d. per month was the rent limit in respect of the flat; (ii) an order declaring that the appropriate factor by which the gross value of the flat should be multiplied for the purpose of ascertaining the rent limit applicable to the flat was five-thirds; and (iii) an order determining that a reasonable charge for services provided for the tenant in respect of the flat was £44 0s. 9d. per year. The services so provided were: central heating, constant hot water, electricity, porterage and cleaners, lift maintenance, refrigerator maintenance, electrical maintenance to common parts, pump maintenance, cleaning equipment maintenance, radio service maintenance, insurances, vermin control, refuse disposal, management and supervision, cleaning materials, carpets to landings and corridors, linoleum covering to staircase and hot water to towel rails. The landlords sought to have each order set aside and such sum (or in the case of order (ii) such factor) declared or ordered or determined as might seem just to the Court of Appeal.

The conclusion of the calculations resulting from the determinations of the county court judge was as follows. The gross value of the flat being £54, and the appropriate factor being five-thirds, the sum of £36 must be added to the gross value, making £90. The rates of the flat, assuming them to have been correctly agreed at £36 10s. 7d. had to be added, and to that must be added the reasonable charge for services, £44 0s. 9d. The total thus reached was £170 11s. 4d. as against the existing rent of £145 17s. 5d. Thus the increased rent which would result would be £24 13s. 11d.

Neil Lawson, Q.C., and *Brian Galpin* for the landlords.

Ian Campbell, Q.C., and *G. Avgherinos* for the tenant.

Cur. adv. vult.

Feb. 7. **JENKINS, L.J.:** The judgment about to be delivered by Pearce, L.J., is the judgment of the court in this case.

PEARCE, L.J.: These are three appeals from three orders made by His Honour Judge Hargreaves in the West London County Court. All three orders are made under the Rent Act, 1957, with regard to one flat, No. 248, Chelsea Cloisters, S.W.3. The case is not strictly a test case, but it is brought before us on the basis that its decision may give guidance on various principles involved in this new legislation in respect of a large number of flats owned by the appellant landlords. For that reason they have indemnified the respondent tenant against the costs of the case.

No. 248, Chelsea Cloisters, is an unfurnished flat in a large block containing 804 flats, built in 1939. The block consists of a basement and ten floors. Some 679 of the flats are let on unfurnished lettings. No. 248 contains two rooms, a kitchenette, a hall and a bathroom. The landlords supply a wireless set, a refrigerator and a gas cooker. They provide central heating with radiators and towel rails and constant hot water. They also provide a lift, and light and clean the common parts of the premises. The flat was let to the tenant on Apr. 10, 1956, by a written agreement on a monthly tenancy at an inclusive rent of £139 16s. 9d. per annum, payable monthly. At the date when the Rent Act, 1957, came into force, namely, July 6, 1957, owing to increases of rates, the rent had been increased to £145 17s. 5d. per annum. The gross value of the flat is £54 per annum. The rateable value is £39. Therefore, since it is in London and the rateable value does not exceed £40, it remains under the control provided by the Act of 1957.

In the case of controlled houses the new Act has departed from the principle of the standard rent. The landlord is allowed, on compliance with the somewhat complicated provisions as to notices of increase contained in s. 2 of the Act, to charge a rental calculated in the way mentioned below on the 1956 gross value of the dwelling-house, together with certain additions for services provided by the landlord and for rates where the landlord is responsible for them. There are thus three elements in the permitted rent. These are—(1) the basic rent which is the gross value multiplied by a figure (termed " the appropriate factor ") ranging from two where the tenant is under no responsibility for repairs to $\frac{4}{3}$ where the tenant is responsible for all repairs, the intermediate figure appropriate to any case in which the tenant is partially but not wholly responsible being such as may be agreed between the parties in writing or determined by the county court: (2) the rates which the landlords bear; and (3) a reasonable charge for services, which may be agreed in writing or determined by the county court.

In this case the landlords made three applications to the county court to obtain determinations under the Act of:—(a) the amount of the appropriate factor; (b) the amount of a reasonable charge for services provided by them, and (c) the resultant rent which they could properly charge, so that they might give the appropriate notice of increase under s. 2. From the orders made on each application the landlords now appeal.

To refer in greater detail to the provisions of the Act on which the present case turns: by s. 1:

> " (1) Subject to the following provisions of this Act the rent recoverable for any rental period from the tenant under a controlled tenancy shall not exceed the following limit, that is to say a rent of which the annual rate is equal to the 1956 gross value of the dwelling multiplied by two (or, if the responsibility for repairs is such as is specified in Part 1 of Sch. 1 to this Act, by the appropriate factor specified in the said Part 1), together with—(a) the annual amount, ascertained in accordance with Sch. 2 to this Act, of any rates for the basic rental period, being rates borne by the landlord or a superior landlord; and (b) such annual amount as may be agreed in writing between the landlord and the tenant or determined by the county court to be a reasonable charge for any services for the tenant provided by the landlord or a superior landlord during the basic rental period or any furniture which under the terms of the tenancy the tenant is entitled to use during that period.
>
> " (2) The limit on the rent recoverable under a controlled tenancy for any rental period (hereinafter referred to as ' the rent limit ') shall be subject to adjustment from time to time under s. 3 to s. 5 of this Act and to reduction as provided by Part 2 of Sch. 1 to this Act in case of disrepair."

By para. 1 of Part 1 of Sch. 1 to the Act:

> " (1) The following provisions shall have effect in ascertaining the rent limit by reference to the 1956 gross value.
>
> " (2) If under the terms of the tenancy the tenant is responsible for all repairs, the appropriate factor shall be four-thirds.
>
> " (3) If under the terms of the tenancy the tenant is responsible for some, but not all, repairs, the appropriate factor shall be such number less than two but greater than four-thirds as may be agreed in writing between the landlord and the tenant or determined by the county court."

By para. 2 of the same part of the same schedule:

> " (1) In the foregoing paragraph the expression ' repairs ' does not include internal decorative repairs . . ."

The sub-section then deals with matters not material to this appeal. By s. 25, the " appropriate factor " is defined as the number by which the 1956 gross value is to be multiplied in determining the rent limit; and the " basic rental period " is defined as being " the rental period comprising the commencement of this Act ". The Act was passed on June 6, 1957, and by s. 27 (2) it came into force at the expiration of one month thereafter.

It may be noted that, while s. 3 and s. 4 of the Act respectively provide for the adjustment of the rent limit to meet variations in rates or in the amount which it is reasonable to charge for services, there is no provision for the alteration of what we have termed the basic rent (i.e., the rent so far as fixed by applying the appropriate factor to the 1956 gross value) save in respect of improvements under s. 5. The basic rent in the present case would be £108 with an appropriate factor of two and £72 with an appropriate factor of four-thirds. It may also be noted that the allowance of a reasonable charge for services in fixing the rent involved a fundamental departure from the earlier Acts. Broadly speaking, prior to 1957 any question affecting the landlord's right to increase his rent by any allowance for repairs or charge for services rendered was based on the landlord's actual expenditure. There is here a dispute: (a) as to what is the appropriate factor in this case, and (2) as to what is a reasonable charge in this case.

The question of what is the appropriate factor turns on the repairing obligations of the tenant. Having regard to those obligations, at what figure between the figure two, which would have been applicable if he had been under no obligation to repair, and the figure of one and one-third, which would have been applicable if he had been under full repairing obligations, should the appropriate factor be set ? The Act gives no specific guidance as to any principles on which the court is to make that determination, but it is plain that the court must be guided by the extent of the burden short of full repairing liability cast on the tenant by the terms of the letting in deciding whether the just rent is near the upper limit of two or the lower limit of one and one-third or somewhere else between those two figures. The fixing of the exact figure is, in our view, a matter of discretion. Here, the judge fixed it exactly half-way between those limits on the ground that the burden of the tenant's liability for repairs was roughly equal to that of the landlord. If he is correct in his view as to their respective burdens, this court plainly should not interfere. If, however, the learned judge came to an erroneous conclusion as to the nature and extent of the tenant's or landlords' legal obligation as to repairs, it follows that his discretion would have been exercised on a wrong basis and it would be proper for us to vary his conclusion.

Under cl. 1 of the tenancy agreement the flat is expressed to be let

> " Together with the use of all the fixtures and fittings therein And together with the right in common with the landlord and the tenants of the other flats in the said building and all others having the like right to use for purposes only of ingress to and egress from the flat the entrance hall passages stairs and passenger lifts of the said building . . ."

and subject to reservations which include the right for the landlords to enter the flat at all reasonable times for the purpose of inspecting and repairing the same. The obligations of the tenant under the agreement are, inter alia, as follows. Under cl. 2 (c):

> " To keep the interior of the flat together with all the fixtures and fittings now or hereafter therein (including the doors windows sanitary and water apparatus thereof) in good and substantial repair and clean sanitary condition (fair wear and tear and damage by accidental fire excepted), and so to deliver up at the end or sooner determination of the tenancy."

A Under cl. 2 (e):

> " To observe and perform the rules and regulations specified in the schedule thereto or any reasonable modifications thereof or additions thereto made from time to time by the landlord for the proper conduct of the building and of which notice shall be given to the tenant in writing or left for the tenant at the flat. The tenant shall accept as final and binding the landlord's decision upon any matter arising out of the said rules and regulations or any such modifications thereof or additions thereto." B

Rule and reg. (1) reads:

> " Tenants shall keep all baths sinks cisterns and waste and other internal pipes in or connected with their flats clean and open and in proper repair C and order and shall be responsible for all damage occasioned to their own or other flats through any breach of this rule or through the improper use or negligence of themselves or their servants or through the stopping up or bursting of the said baths sinks cisterns or pipes due to the negligence of the tenants or their servants and shall carry out during the tenancy any works required to the internal water pipe fittings apparatus, etc., to comply with D any notices served by the Metropolitan Water Board or the local sanitary authority."

The obligations of the landlords under the agreement are inter alia as follows: Under cl. 3 (b):

> " To pay the rates . . . charged on or payable in respect of the flat . . . together with the sum payable in respect of the wireless relay service E to the flat."

Under cl. 3 (c):

> " To supply and use its best endeavours to maintain at all times at its own cost an efficient service of hot water for domestic purposes through the central heating installation and for the heating of the radiators to the flat F through the central heating installation . . ."

Under cl. 3 (d): " To light the staircase landings and corridors of the building . . ."

As to the tenant's responsibility for repairs, the learned judge read r. 1 as being subject to the fair wear and tear clause in cl. 2 (c), and held that the landG lords could not put on the tenant under r. 1 any obligation which would be excluded by an express fair wear and tear clause. He also held that in fact the landlords had taken on themselves to repair washers, etc., and, by sending a notice to tenants, had in practice modified the effect of r. 1. That notice reads as follows:

> " Re: Water taps. In cases where taps require washering (that is to H say where water continues to drip when the tap is turned off) or re-seating (where there is noise or vibration when the tap is turned) tenants are particularly requested to report this to the porter's lodge, when the landlords will be pleased to effect repairs without charge to the tenant."

The learned judge heard a considerable body of evidence. In particular he I had before him two experienced surveyors, Mr. Dale on behalf of the landlords, and Mr. Russell Davies on behalf of the tenant. Mr. Dale had the advantage of actual figures spent by the landlords on this and similar flats in respect of exterior repairs, and actual figures spent by the landlords for interior repairs in respect of comparable furnished flats where they had a liability for them. In the result the learned judge held that the landlords were liable in this case for: (a) all exterior repairs; (b) all interior repairs necessitated by fair wear and tear; and (c) plumbing repairs for which they had assumed responsibility under the notice to tenants that I have read. He held that the tenant's responsibility under cl. 2 (c) and reg. 1 was only to do repairs that were not due to fair wear and tear, i.e., repairs due to a wrongful act or inadvertence of the tenant. He assessed these as about equal to the landlords' responsibility for repairs. In his judgment on p. 10 he said:

> "Mr. Dale's evidence is based on a mathematical calculation of annual expenditure by the landlords over a period of five years in the case of Chelsea Cloisters. It appears to me to amount to this. The landlords' liability should be arrived at by allowing the sum of £5 10s. for the flat in respect of the exterior and common parts of Chelsea Cloisters, so far as they are part of the 'dwelling' under the interpretation clause of the Act (excluding therefore the restaurant and squash court, and everything in fact which is not included in a dwelling), and taking £4 (later agreed by the parties at £4 5s.) as the yearly sum attributable to the interior repair of the flat. Mr. Dale deducts from this figure 10s. 9d. for the tenant's four-thirds liability under cl. 2 (c) of the agreement, which contains the fair wear and tear clause, and also £2, that being his estimate of the tenant's liability under sch. 1 of the rules and regulations attached to the tenancy agreement. This means that the landlords' liability for repairs to the flat amounts to £5 10s. plus the figure of £4 5s., less the £2 10s. resting on the tenant, which reduces the £4 5s. to £1 15s. In other words, the landlords' liability is £7 5s., whereas the tenant's liability will be 10s. 9d. (about) under cl. 2 (c) of the agreement, plus another £2 under the regulations, which makes the tenant's liability £2 10s. 9d. in all. That is a proportion of fourteen to six as between the landlords and the tenant."

In dealing with the other evidence the learned judge continued on p. 12:

> "So far as expenditure on the exterior and common parts of the building is concerned, I take the view that Mr. Dale's figures are more probably, indeed almost certainly, correct, and I allow £5 10s. for this item. So far as the repairs to the flat itself are concerned, I will accept Mr. Dale's figure of £1 15s., which is based on actual expenditure by the landlords over five years (i.e., £4 5s. less the tenant's liability of £2 10s.) as correct. That leaves a total to the landlords of £5 10s. plus £1 15s., or £7 5s. in all. That is the sum total of the landlords' liability for repair of the flat. In my view, however, the tenant's liability should be put at a far higher figure than the £2 10s. that Mr. Dale allows, even taking into account the fair wear and tear clause, as of course I must do. My reason for forming this opinion is that, in the case of a flat such as this, where most of the fixtures and fittings are metal or porcelain, or where all are indoors, the fair wear and tear will be very small and may be regarded in some cases as almost negligible. The main articles that will have to be replaced by the landlords under the fair wear and tear clause are the electric light bulbs and the washers on the taps. These latter the landlords have specifically undertaken to be responsible for by circulating the undated slip to which I have already referred, although it appears to me that under the fair wear and tear clause the landlords will be liable for this in any case. The tenant, however, remains liable for all the rest of the repairs inside the flat. I have in mind such items as the following: (a) keeping waste pipes unblocked, and (b) repairing basins cracked by dropping articles into them, e.g., tooth glasses, bottles, hairbrushes or tumblers; breaking the chain or the handle, or whatever the contrivance is, of the lavatory cistern; chipping the bath enamel; repairing damage to the walls, caused, e.g., by driving in nails or Rawlplugs for pictures and photographs; breaking the bath panel or a window pane; damage to the fittings of the kitchenette; damage to the woodwork from cigarette ends, where more serious than mere decoration can repair; and, more rarely, damage from the flooding of his own or adjoining flats. All

> these are the sort of things that happen in flats, and they cannot be regarded as fair wear and tear. I take the view that, even allowing for the fair wear and tear clause, the tenant's liability should be assessed at not less than £7 7s. per annum in all. This view does not necessarily conflict with Mr. Dale's figures, because tenants who do damage which is obviously not fair wear and tear have no motive for reporting it, and are more than likely to put it right without the landlords knowing anything about it. If they do report it the landlords' manager will probably tell them that the landlords are not responsible for the carelessness of the tenant. As I take the view, therefore, that, as nearly as I can form an estimate, the cost of repairs to the dwelling is shared about equally between the landlords and tenant, I hold the appropriate factor to be 1-2/3rds of the gross value."

Counsel for the landlords argues that the learned judge was in error in taking that view; that, on a proper reading of the agreement and the Act, the tenant's liability should, by virtue of the fair wear and tear exception, be considered nominal; and further that one must exclude all liability of the tenant that does not arise solely under the agreement. The tenant would be liable for damages caused by acts of negligence at common law, but this liability should not be regarded as a liability for the purpose of this investigation, since the Act specifically refers to the tenant's responsibility under the terms of his agreement. Moreover, he argues, it is wrong on common-sense grounds to credit the tenant, so to speak, with repairs that are due to his own negligence, since this is putting a premium on negligence. The only repairs that can properly be debited to the tenant are those which are not fair wear and tear, yet are not sufficiently blameworthy to be described as negligence or to make the tenant liable at common law apart from the covenant. If these arguments are correct, the learned judge has, as a matter of law, put the wrong weights into the scales, and therefore this court should alter his findings.

The question of what effect the wear and tear exception has on the tenant's liability has been much canvassed before us. The cases are not altogether easy to reconcile and no doubt each case must largely depend on its particular facts. We think that the clearest definition is that which was given by BRUCE, J., in *Terrell* v. *Murray* (1) ((1901), 17 T.L.R. 570) where he said (ibid., at p. 570):

> " that it was a little curious that there was no very satisfactory authority as to the meaning of the words fair or reasonable wear and tear. He could not agree with [counsel for the plaintiff] when he said that no meaning ought to be given to the words at all, nor could he agree that they had no operation in regard to the outside of the premises. The meaning of the covenant in his opinion was that the tenant was bound at the end of the tenancy to deliver up the premises in as good condition as they were in at the beginning subject to the following exceptions, that was to say, dilapidations caused by the friction of the air, dilapidations caused by exposure, and dilapidations caused by ordinary use."

That definition was adopted by SANKEY, J., in *Citron* v. *Cohen* (2) ((1920), 36 T.L.R. 560). To that definition we would add the words of LORD EVERSHED, M.R., in *Brown* v. *Davies* (3) ([1957] 3 All E.R. 401 at p. 406), with reference to a fair wear and tear exception:

> " I do not think it necessary or right that I should attempt to give an exposition of the exact scope of this provision. I am satisfied to put it no higher than that, if proof is given that the tenant is not keeping the premises in a fair and tenantable manner and not keeping the interior clean and well repaired and decorated, then, at the very least, the tenant must establish that the matters complained of ought to be attributed to dilapidation or damage resulting from reasonable wear and tear and to nothing else."

Romer, L.J., said (ibid., at p. 408):

> "The truth is that, in order to find out the scope and effect of a qualified covenant to repair, one has to look at the document as a whole, and it appears to me to be going far beyond anything that was said by any of the judges in *Taylor* v. *Webb* (4) ([1937] 1 All E.R. 590) to say that one merely has to find an exception for reasonable wear and tear to reduce the scope of the covenant to practically nothing at all."

The tenant's repairing covenant in this case being only in respect of the internal repairs, no consideration of the effect of the weather comes into it; and by the terms of the Act any element of decorative repair has to be eliminated from it for the purposes of this inquiry.

We do not feel able to accept the view that the fair wear and tear exception in cl. 2 (c) should be read without qualification into r. 1, since it seems inappropriate to the obligations in regard to various specific matters imposed by the rule. On the other hand, cl. 2 (c) expressly applies the fair wear and tear exception to "sanitary and water apparatus" and it is difficult to hold that the rule wholly displaces the exception with regard to the very same matters. If that was the intention, the references to negligence in the rule would appear to be superfluous. The solution may perhaps be that the exception qualifies the requirement of the rule as to keeping the pipes, etc., open and in proper repair and condition to the extent of absolving the tenant from liability for major works of replacement or repair (as distinct from ordinary current maintenance in regard to such matters as replacement of washers), where such works are necessitated by the ordinary effects of reasonably careful use as distinct from careless treatment or abuse. But the learned judge's view on this question was in favour of the landlords, whose only complaint on this part of the case is that the learned judge, while rightly construing the agreement in regard to the application of the exception of fair wear and tear, was wrong in holding that, on the construction of the agreement, the tenant was liable for anything more than a nominal share of the liability for repairs. On the other hand the tenant, while submitting that, on the true construction of the agreement, the exception of fair wear and tear does not apply to r. 1 of the schedule, is content to accept the figure at which the learned judge arrived. In these circumstances it seems to us that for the purpose of our decision we can assume, while by no means deciding, that the learned judge was right in applying the fair wear and tear exception to r. 1, and proceed to consider whether on that footing we can properly hold that he set the tenant's share of the liability for repairs too high and consequently made the appropriate factor too low.

The learned judge held that there was an appreciable amount of repair necessitated by what he described as

> "the sort of things that happen in flats, and they cannot be regarded as fair wear and tear,"

of which he gave the instances that we have already read. In our view it cannot be said that there was no evidence on which he could so find. The question is whether in law he could properly throw those occurrences into the tenant's scale as matters for which the tenant was responsible under the terms of the agreement. They were in fact matters for which he was so responsible. Counsel for the landlords argues that the tenant's liability for them at common law makes it incorrect to describe them as a responsibility under the terms of the agreement. We cannot accept that argument. Such repairs are in fact a responsibility under the express terms of the agreement. The fact that there may be a concurrent liability at common law does not alter that fact. If one applies the test of common sense and practice, one can hardly imagine a landlord claiming against a tenant in respect of them other than under the express covenant.

It is true that the learned judge has estimated such tenant's repairs at a generous figure (a higher figure, perhaps, than that at which we would ourselves have been inclined to put them) with a consequential lowering of the appropriate factor; but we cannot go so far as to say that he was wrong in so doing. This is a county court appeal, and on questions of fact the judgment is not open to appeal. For these reasons, we are of opinion that this court should not alter the appropriate factor.

The next question is what is a reasonable charge for services. The Act does not define services. LORD GODDARD, C.J., in *R.* v. *Paddington North & St. Marylebone Rent Tribunal, Ex p. Perry* (5) ([1955] 3 All E.R. 391 at p. 395), said:

> "The contractual services set out are: central heating, constant hot water, passenger and service lifts, lighting and heating of lounge, hall, passages and staircases. Every one of these seems to me to be a service. If the landlords contracted to provide a lift, the maintenance of it is a service, because the lift has to be worked. It is one of the most important services for the tenants. The non-contractual services provided are: porterage, cleaning common parts, removal of refuse, pest control, floor coverings to common parts. The only questionable item is the floor coverings to common parts. That, however, is as much a service as heating and lighting the staircase; it is an amenity which gives a better appearance to the place."

The parties have very sensibly tabulated and to a large extent agreed a large number of items which have to be considered in arriving at a reasonable charge. These items include (as one would expect) various items for wages of porters, depreciation of carpets on stairs, fuel for central heating and the like.

Two questions have been raised in the appeal in connexion with a reasonable charge for services. The first is in respect of replacement or depreciation of boilers, hot water service, lifts, radiators, towel rails and electrical wiring and fittings for use in the passages. In respect of all these the learned judge disallowed a depreciation or replacement item in computing the reasonable charge. The second arises in respect of the landlords' claim to be allowed an element of profit on all the items of cost and in particular certain items of cleaning and maintenance which are carried out by a wholly owned subsidiary of the landlords. The learned judge disallowed the ten per cent. overall profit which the landlords claimed.

So far as the first point is concerned, it seems to us that, once it is conceded (as it must be and is in this case) that the plant in question is necessary in order to provide the services, some provision for its depreciation or replacement must be included in any computation of the reasonable charge for those services. In 1956 the landlords spent £5,000 in renewing the boilers; in 1955 they spent £3,500. They have not brought these sums into account, since in their view it would be capricious and unscientific to take particular years; they prefer to put forward an item representing an average annual allowance for depreciation or sinking fund for replacement, calculated on the estimated life of the plant. In our view, no computation of a reasonable charge can be made without taking some such item into consideration. The life of plant used in providing a service is one of the important matters to be considered in finding out both what the provision for the service costs and what is a reasonable charge for it.

The learned judge held that these items were almost as much a part of the original building as the roof and staircase. He said:

> "They belong rather to what is actually let to the tenant, that is they appear to be part of the dwelling rather than to be part of the services supplied with it."

He also held that they were really items for replacement and were

> "a charge against the present tenants for the benefit of the landlords in many years time."

With respect to the learned judge, we think that this is an erroneous view. With any wasting asset such as plant some allowance must as a rule be made for depreciation if one is to arrive at a reasonable charge. We cannot accede to the argument that this was a pure question of fact and that here the judge was entitled to disregard those items as a matter of discretion. In our view, he was wrong in excluding depreciation or replacement from consideration.

The learned judge held the view that, if any such item were allowed, the appropriate basis would be replacement rather than depreciation and that "replacement" as distinct from "repair" could not reasonably be regarded as a service to the tenant. But the question is not whether a provision for depreciation or replacement is a service to the tenant but whether a provision in one or other of these forms for the wearing out of the plant can properly be allowed as part of the cost of providing the services for the provision of which the plant is required.

The landlords' claim under this head is in fact based on the estimated cost of replacement which, in view of the great increase in prices which has taken place since 1939, would be much more favourable to them than an allowance based on a yearly depreciation allowance calculated on the original cost. As the learned judge observed, the replacement basis "from the point of view of prudent business dealing" is "the only safe way of calculating a sinking fund". But it does not follow that the whole of the yearly provision which prudent business dealing might dictate can reasonably be charged against the tenant as part of the cost of the services which he enjoys. As we understand the evidence, the landlords' calculation involves (a) estimating the total cost of providing at present prices new plant comparable to the existing plant; (b) estimating the period to be taken as representing the future life of the existing plant from the present time onwards; and (c) dividing the estimated cost at present prices of new plant of each category by the number of years representing the estimated future life of the existing plant of each category. The resulting figure with respect to each category of plant is then brought into the computation of the cost of providing the services rendered by means of the plant. It seems to us that this method of calculation places too heavy a burden on the tenant. It saddles him with the proportion attributable to his flat of the cost of providing the landlords with new plant which in fact may never be provided during his tenancy. The matter is not free from argument, but it is, we think, concluded by the fact that the landlord can always apply to the court under s. 4 to increase his charge if and when he instals his expensive new plant. In our view, depreciation and not replacement is the correct element to consider under this heading, and the yearly figure of depreciation should be arrived at with respect to each category of plant by taking the actual cost of such plant when originally installed (whether in 1939 or at some later date) and dividing it by the number of years comprised in its actual past and estimated future life. In our view, the figure allowed for depreciation should not take into account the hot towel rails and radiators in the flat. Although they are an indispensable adjunct to the hot water service, yet they were in fact expressly let as part of the fixtures in the flat and as such fall to be dealt with in matters relating to the rent and not as an item in estimating what is a reasonable charge for the provision of hot water. We understand that, once the principle is decided, the parties will have no difficulty in calculating the resulting figures, and we are not to be concerned with the details. It seems therefore that it will not be necessary to send the case back for re-hearing.

There remains the question whether there should be allowed to the landlords any item of profit and, if so, how it should be calculated. The landlords claim that ten per cent. on the total costs should be allowed as profit. They urge that this is a small percentage compared to the common run of commercial profits. They point out that, if their figures were accepted in toto, the charge to the tenant would still be reasonable, namely, 24s. per week for central heating, wireless, porters, lifts, and cleaning, heating and lighting of communal parts of the building, whereas in fact the learned judge allowed about 15s. per week which they say is unreasonably low.

The learned judge considered an observation of GODDARD, L.J., in *Bell Property Trust, Ltd.* v. *Hampstead Borough Assessment Committee* (6) ([1940] 3 All E.R. 640 at p. 647), that quarter sessions had allowed a deduction for profit on the ground that

> " the landlords would not provide these services and amenities for the bare cost, but would want a return on their outlay ",

and that that seemed very reasonable to the learned lord justice. The learned judge went on to say:

> " To the credit of the landlords in the present case I do not think this consideration applies, as it is conceded that they are good landlords, anxious for the comfort and welfare of the tenants. They are unlikely, I feel, to reduce their services unless they are allowed a profit on them. On the whole, therefore, I take the view that dealing as I am with a new Act of Parliament I am intended by the legislature to be free to decide either way whether a reasonable charge for services should in this particular case include a profit or not. If it had been intended that I should not be free to include profit the simplest way would have been to allow merely the actual cost of services, instead of using the phrase ' a reasonable charge ', and I must, therefore, decide whether in the present case a reasonable charge for services should include a profit on such services. I have come to the conclusion that in this particular case it should not, and my reasons are the following: (i) that even at the present rent Chelsea Cloisters is not being run at a loss, and can show a profit after setting aside a fund for replacements and after meeting rates; (ii) that what is more important still is that the sum allowed for repairs under the Act, that is to say the difference between £54 plus 1/3rd (that is £72), and twice £54 (that is £108) which is £36, of which I am allowing one-half to the landlords and one-half to the tenant, will show them a greatly increased profit, as a result of this Act, on what they are now making. Generally speaking, the result of the Act, without allowing a profit on the cost of the services, will be to add very considerably to the profit already being made by the landlords out of the running of Chelsea Cloisters, and this profit, naturally and quite properly, will be at the expense of the tenants. The further reason is that a profit on some of the services appears to me to be made by the landlords' maintenance company, and that should not be made twice over. Consequently, in this particular case, I have come to the conclusion that a reasonable charge for services should not include a profit on them."

The last reason given by the learned judge seems to us an adequate reason for not allowing any profit on the items of maintenance done under contract by the landlords' wholly owned subsidiary company. The evidence seems to us to establish that that company, having made a full (but fair) charge including a profit to themselves, then gave to the landlords a rebate consisting of the resulting profit to that company. As the learned judge allowed the subsidiary company's full charges, it followed that the rebates received by the landlords constituted a profit to them in respect of those items.

So far as concerns other items, however, we do not feel that the two reasons given by the learned judge are valid reasons for allowing no profit. We find no clear evidence that the unit of Chelsea Cloisters (which is one of many properties owned by the landlords) was in fact not being run at a loss. There was certainly no evidence that the controlled tenancies therein were not being run at a loss; but in any event this could not, we think, be a good reason for eliminating a profit element. Profit is a normal element in a reasonable charge. The landlord has the ultimate responsibility and it is fair that he should have some profit to compensate for this. Moreover, the sums expended in providing the services could if not so expended be profitably employed in some other direction. Had the Act otherwise intended, we think that it would have used words based on " cost " instead of the words " reasonable charge ". Nor could the fact that the increase in rent under the Act was substantial be a good reason. The permitted rent was still a controlled rent far lower than the economic rent which the flats could command. There is nothing in the Act to suggest an intention that permitted increases or the fact that a landlord was not running at a loss should affect the amount of " a reasonable charge ".

Each case must depend on its own circumstances. But, holding, as we do, that prima facie some profit should be allowed in a reasonable charge, we see nothing in the facts of this case to justify the court in not allowing some profit on services other than those of the maintenance company. We can envisage unusual circumstances in which it would be proper to disallow any profit in computing a reasonable charge, e.g., when owing to uneconomical management the addition of a profit margin makes the resulting charge higher than is reasonable; but there is no such suggestion in this case.

A convenient method of allowing a profit is by allowing a percentage on the overall costs. What percentage would be a fair one in this particular case ? Many considerations apply in deciding such a point. Though one naturally wishes to encourage a landlord to provide services, it must be remembered in this case that the services are a subsidiary activity of a landlord and have for them the collateral advantage of making their property attractive. In this aspect the landlords are in a wholly different position from a company whose main activity is in providing services, not to their own tenants, but to the public at large, and whose commercial raison d'etre is based on profit derived from that source. We think that, in the computation of a reasonable charge in this case, there should be allowed to the landlords a five per cent. profit on all items other than the item of maintenance by their subsidiary company and the item of depreciation on boilers, hot water service, lift and electrical wiring and fittings for use in the passages. We wish to emphasise strongly that the figure which we have allowed for profit in this case is one that seems to us in our discretion and purely as a question of fact to be a fair figure in the particular circumstances. We have fixed a figure in order to save the costs of a further hearing before the learned judge and it is not intended as any guide to what other tribunals should decide in other cases.

It must be remembered that, in deciding the appropriate factor or computing what is a reasonable charge, a broad approach is necessary. It is impossible to seek to define any hard and fast rules or considerations. The most for which one can hope is an approximate estimate of what is fair and reasonable in the particular case. Too much precision and rigidity is apt to defeat this object.

As we have differed from the learned judge in some matters we should perhaps add that we have been very greatly helped by the full, careful and clear judgment in which he dealt with complicated and difficult problems.

Counsel for the tenant: May I ask one question by way of clarification as to the five per cent. on the other profit ? That is five per cent. on the simple interest basis, not on the compound interest basis ?

JENKINS, L.J.: Yes, five per cent. on the simple interest basis.

Appeal in respect of the " appropriate factor " dismissed. Appeals in respect of the allowance for services and the rent limit allowed. Matters remitted to county court to determine the figures on the principles laid down, if not agreed between the parties. Leave to appeal to the House of Lords granted to both parties, the landlords undertaking to pay the costs of any appeal in any event on the issue of the appropriate factor.

Solicitors: *Stikeman & Co.* (for the landlords); *Graham Page & Co.* (for the tenant).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

SILVER *v.* SILVER.

[Court of Appeal (Lord Evershed, M.R., Parker and Sellers, L.JJ.), February 4, 5, 1958.]

Husband and Wife—Title to property—Matrimonial home—Presumption of advancement—Wife legal owner—Part of purchase money defrayed by mortgage to building society—Repayments out of money provided by husband—Married Women's Property Act, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 17.

In 1933 a dwelling-house was purchased in the name of a wife, whose parents provided £90 of the purchase price in cash, the rest (£805) being borrowed on the security of a mortgage granted to a building society. The husband joined as a party to the mortgage deed as guarantor, and deposited with the building society a policy of insurance as security. The mortgage repayments were provided out of a sum of money which the husband paid each week to the wife for household and other expenses. In 1944 the house was sold for £1,700, and another house was bought in the wife's name for £2,000, of which £1,500 was borrowed on the security of a mortgage. In 1948 that house was sold for £4,500, and another house was bought. Again part of the proceeds of sale of the house sold was used in the purchase of the new house, the rest being borrowed on a mortgage. Later that house also was sold, and another purchased in the wife's name, part of the purchase money being raised by means of a mortgage. In the case of each house purchased, the mortgage arrangements were similar to those adopted in the purchase of the house bought in 1933, viz., the husband joined as guarantor and provided for the repayments of the money borrowed. Each house was successively the matrimonial home. In 1956 the husband and the wife parted, and a summons was issued under the Married Women's Property Act, 1882, s. 17, for the determination of the question who was beneficially entitled to the house last purchased. It was conceded by the wife that if she were entitled to the house her interest would be charged with mortgage instalments falling due after the date of the separation and paid by the husband as guarantor, he being thus subrogated to the mortgagees' rights.

Held: the wife was entitled to the house (subject to the mortgage instalments falling due after the date of the separation) because there was a presumption that the mortgage moneys repaid by the husband were gifts to the wife, as the houses had been bought successively in the wife's name, and, having regard to the scanty evidence, the court would not interfere with the decision of the county court judge that this presumption of advancement was not rebutted.

Rimmer v. *Rimmer* ([1952] 2 All E.R. 863) distinguished.

Per Parker, L.J.: in the case of a family asset such as the home or the furniture, acquired for the joint use of the spouses, the presumption of advancement can easily be rebutted. It is different from the case where what is acquired is for the wife's personal use (see p. 528, letter B, post).

Appeal dismissed.

[As to summary proceedings between husband and wife as to property, see 19 Halsbury's Laws (3rd Edn.) 898-902, paras. 1488-1494; and for cases on the subject, see 27 Digest (Repl.) 263-265, *2119-2133*.

For the Married Women's Property Act, 1882, s. 17, see 11 Halsbury's Statutes (2nd Edn.) 804.]

Cases referred to:

(1) *Rimmer* v. *Rimmer*, [1952] 2 All E.R. 863; [1953] 1 Q.B. 63; 3rd Digest Supp.

(2) *Fribance* v. *Fribance*, [1957] 1 All E.R. 357.

(3) *Newgrosh* v. *Newgrosh*, (June 28, 1950), unreported.

(4) *Moate* v. *Moate*, [1948] 2 All E.R. 486; 2nd Digest Supp.

Appeal.

This was an appeal by the applicant from a judgment of His Honour JUDGE ARMSTRONG at Bournemouth County Court, given on Oct. 14, 1957, dismissing an application under the Married Women's Property Act, 1882, s. 17, to which the applicant's wife was respondent, for a declaration that the applicant was beneficially entitled to the property known as and situated at 11, St. Ledger's Road, Bournemouth, and consequential relief.

The applicant and respondent were married in 1931. In 1933 a house, No. 132, Fairway, North Wembley, was bought for £895 of which £90 was provided by the respondent's parents and the rest was borrowed from a building society. In 1944 that house was sold for £1,700 and a house at Bournemouth was bought for £2,000 of which £1,500 was borrowed from the building society. In 1948 that house was sold for £4,500 and another was bought for £3,400 of which £1,385 was borrowed from the building society. In 1950 that house was sold for £3,450 and 11, St. Ledger's Road, was bought for £4,950 of which £2,500 was borrowed from the building society. All houses were conveyed into the name of the respondent. In each mortgage the applicant joined as guarantor and the mortgage payments of principal and interest were paid out of a weekly allowance made by the applicant to the respondent.

M. G. King for the applicant, the husband.
T. R. Crawford for the respondent, the wife.

LORD EVERSHED, M.R.: This was an application made under the Married Women's Property Act, 1882, s. 17, by a husband seeking an order to the effect that property in Bournemouth known as 11, St. Ledger's Road, was held by the respondent, the wife, on trust either for him, the husband, or for the two of them jointly. In this court the husband has confined his claim to the latter alternative, and he has also in this court said that if such an order were made, he would regard himself as under a continuing obligation to discharge certain mortgage instalments. The house in question, 11, St. Ledger's Road, Bournemouth, is in fact the fourth of what I might call a series of houses which constituted the matrimonial home over a long period of time of the husband and the wife and their children. It is indeed a peculiar tragedy of this case that husband and wife having been married in 1931 and having lived together more than a quarter of a century, their marriage came to grief at the end of 1956, when the husband left the wife and the matrimonial home in St. Ledger's Road, Bournemouth.

The essential facts as regards the value, price and so forth of the four constituents of what I have called the series will be found in the answer of the wife to the husband's application in the county court, and I can I think summarise the matter still further. In 1933 the first of the premises bought was a house in North Wembley, London. The sum required was £895, and of it £90 was paid in cash and the balance was the subject of a mortgage repayable in instalments to the Burnley Building Society, who have remained mortgagees in these transactions throughout. Some eleven years later, the house was sold at a substantially improved price, viz., £1,700; and another house was bought at a price of £2,000. In that case £1,500 of the £2,000 was left on mortgage. That house, which was in Richmond Wood Road, Bournemouth, was sold four years later at a very greatly enhanced figure, viz., £4,500; and the last two items in the series, houses in Brockenhurst Road, Bournemouth, and St. Ledger's Road, Bournemouth, were again houses of increasing values according to the figures, bought as to part by using the proceeds of sale of what preceded them, the remainder being left on mortgage. It is, however, to be noted that in the one case of Richmond Wood Road, Bournemouth (the second house bought) where, as I have said, a very greatly enhanced price was obtained on the sale, there was available after the purchase of the new house a sum of something in the neighbourhood of £1,000 which might be described, to use language which was used in *Rimmer* v. *Rimmer* (1) ([1952] 2 All E.R. 863), as a windfall. It was a substantial profit which had been made by good fortune in the purchase of these houses, though it must be emphasised that they were bought not for investment purposes, but as the matrimonial home. In every case the house was conveyed to the wife and into her name. She accordingly was the mortgagor, but the husband joined in the mortgage deed as a guarantor—a transaction which I imagine is common enough. His obligations as guarantor, we were told, were secured by the deposit of a policy of insurance on his life. The mortgage instalments have throughout, so far as the evidence goes, been paid directly or indirectly by the husband. I use that phrase, " directly or indirectly ", for this reason: it seems that the husband throughout the time that husband and wife lived together, paid his wife a weekly sum out of which she paid, among other things, household expenses, and so forth. She also provided out of it—either by handing the money back to him or otherwise—the mortgage instalments.

Those are the broad circumstances, and the question is, now that unhappily the husband and wife are parted, in what shares ought this house to be treated as being held beneficially? Where the subject-matter is such as the matrimonial home or what might be called part of the matrimonial joint stock—furniture and so forth—it is obviously tempting to say that equity delighteth in equality, and that the subject-matter should be treated as a joint investment in the true sense, so as to allow each to share equally in it. However tempting it is, I think that there are difficulties in the way of so broad and general a view. If Parliament had thought that that would be a fair solution in these cases, it could have so provided. There is a rule of equity which still subsists, even though in this day and age one may feel that the presumption is more easily capable of rebuttal—a rule that if a husband makes a payment for or puts property into the name of a wife, he intends to make an advancement to her. As was said by SIR GEORGE JESSEL some time ago, such a disposition by the husband, unless otherwise explained, will be treated in equity as intended to effect a gift.

In the case before us the question is, as I have said, one to be determined according to s. 17 of the Act of 1882, the language of which, so far as relevant, is:

> " In any question between husband and wife as to the title to . . . property, either party . . . may apply [to a judge named, who] may make such order with respect to the property in dispute . . . as he shall think fit . . ."

In this case the learned judge heard the husband and the wife. On one very important matter of fact he showed a clear preference for the wife's evidence; and having heard all the evidence, and bearing in mind, as he was bound to do, the existence of the equitable rule, he came to the conclusion that no reason was established here for saying that this property, vested as it is exclusively in the name of the wife, belonged wholly or in part to the husband. We are invited in this court to take a different view, but I must say at once that, having given the case anxious consideration—not the less anxious because, as has been pointed out, there is a certain air of unreality in these cases in trying to discern an intention in acts and circumstances which occurred when the present events were quite outside contemplation—I have in the end concluded that we should not be justified in disturbing the learned judge's conclusion.

This is not a case, which is commonly met with today, in which husband and wife are both wage-earners, where both may contribute, either equally or unequally, to some subject-matter of acquisition. In *Rimmer* v. *Rimmer* (1), which I have mentioned, the husband and wife had both so contributed, though in unequal shares. The property was there vested in the husband—not the wife—and the question was, in the circumstances, how beneficially ought the property to belong? At first instance it had been thought proper to make the beneficial interests proportionate to the figures of the total contributions; but we thought in this court that that was too artificial a result and that in the circumstances the appropriate order to make under s. 17, and that most in accordance with what the two parties should be taken as having meant, was to say that they were entitled equally. The learned judge thought that this case was not covered by *Rimmer* v. *Rimmer* (1) and was to be distinguished from it, and I think rightly. To begin with, in *Rimmer* v. *Rimmer* (1), as I have said, the property was in the husband's name and both had contributed out of their earnings towards it. Here the property was—as were all the preceding items in the series—in the wife's name. On the other hand, the wife contributed nothing in cash herself. She was not a wage-earner and unfortunately now is obviously incapable of being one, since she appears to be crippled by arthritis; but the learned judge has, I think rightly, looked back to the beginning of the series of transactions to try to see what the right answer is.

I have said already that of the price of the first house bought, amounting to £895, £90 had to be provided in cash. That sum in fact was provided by the wife's parents. The husband said that he had repaid that sum. The wife disagreed with that evidence, and on this matter the judge expressed a preference for the wife's evidence. So that there is this to start with; that here is a property in the name of the wife, the cash requisite for which had been provided by the wife's father or parents; and she was herself as owner the mortgagor, though the husband was the guarantor. On the face of it, it was plainly the wife's property. Over this long period the husband paid the mortgage interest and instalments, and the matter which the judge had to determine was, what was the proper inference from that long-continuing conduct? His conclusion, as I have said, was that in so far as he made these contributions he must be taken to have been advancing to the wife, since they were to the benefit of the equity of redemption, which belonged to the wife. I mention again at this stage the important matter of the sale of the second house in the series, when there was what I have called a cash windfall. There is some evidence about that and it is to this effect: it was not put into joint names; it was handed to or taken by the wife; but she provided out of it £400 or thereabouts towards the purchase of a new motor car by the husband for himself and for his own use; and we are also told, though there is no recorded evidence about it, that the wife utilised other parts of the £1,000 in making provision for the children; and it is said that of that figure there is virtually at any rate nothing left now.

I said earlier that in cases of this kind concerned with the matrimonial home, there is an obvious temptation to say that a fair result would be to say that there was a joint enterprise and the two should be jointly entitled; but if we so concluded, we should be in effect inventing a case. The material before us in the way of the record of evidence is extremely slender. Unfortunately the learned judge was not even invited to look at the note taken of his reasons for judgment, and on such note as we have I think it would be usurping the functions which more properly belong to the trial judge for us to say that he should have found facts which he did not find. Indeed I feel that if in this case the Court of Appeal were to say that equity favoured equality, we should determine by anticipation that nearly all cases relating to the matrimonial home should likewise follow suit. I do not think that would be right. The learned judge did not find on the material before him sufficient to justify that conclusion, and he thought that, following the principles which still apply and having regard to the fact that the house was in the wife's name, he should treat the case as one in which the husband had not rebutted the presumption that arose from his having paid in the wife's favour all these instalments.

One result of such a conclusion which counsel for the wife accepts is this: after the unhappy separation the husband did not pay off the mortgage instalments—at any rate for a little time; arrears accumulated. The matter was brought to his attention and he then paid because the mortgagees drew his attention to his obligation as guarantor so to do. Counsel for the wife concedes that from the date of the separation sums which the husband paid and will have to pay as guarantor are sums which as between husband and wife he can treat as charged on her interest. It would appear as a matter of figures that about £1,300 will eventually have to be so charged, and to that extent the husband will be entitled in effect to be subrogated to the mortgagees' rights against the wife. This is conceded. It was, on the other hand, conceded by counsel for the husband that if we were persuaded to hold that the right answer was to treat the beneficial interests as joint and equal, then he should continue at his own cost and out of his own resources to pay off the rest of the mortgage. That is no doubt a sensible result, but it rather emphasises, I venture to think, what I said earlier, that we really should be substituting for the facts proved, such as they appear from the note before us, what we should regard as a sensible settlement of the unhappy differences between husband and wife; because I find great difficulty in discerning any basis on this material for such an arrangement, such an obligation on the husband's part, to go on in such circumstances paying all the instalments; and if there were no such obligation, I am not quite clear what, on the husband's view, the result would be as regards the future payments. However, I need not pursue that further. As I said earlier on, I have on the whole come to the conclusion in this case, having regard to the very slight material we have, that we should not be justified in interfering with the conclusion which the judge reached after hearing and observing the two parties, the husband and the wife. I think he applied without error the principles which are applicable in cases of this kind. I would, therefore, dismiss the appeal.

PARKER, L.J.: I have come to the same conclusion, though I confess with considerable reluctance. We are here considering what I may call a family asset, the matrimonial home, something acquired by the spouses for their joint use, with no thought of what is to happen should the marriage break down. In these circumstances it seems to me that, in the present age, common sense dictates that such an asset should be treated as the joint property of both, in the absence of evidence to the contrary. This view is well expressed by DENNING, L.J., in *Fribance* v. *Fribance* (2) ([1957] 1 All E.R. 357 at p. 359); and also in *Rimmer* v. *Rimmer* (1) ([1952] 2 All E.R. 863). I need only refer to the passage in his judgment in the latter case. He said ([1952] 2 All E.R. at p. 869):

> " It seems to me that when the parties, by their joint efforts, save money to buy a house which is intended as a continuing provision for them both, the proper presumption is that the beneficial interest belongs to them both jointly. The property may be bought in the name of the husband alone or in the name of the wife alone, but, nevertheless, if it is bought with money saved by their joint efforts and it is impossible fairly to distinguish between the efforts of one and the other, the beneficial interest should be presumed to belong to them both jointly."

In both of those cases the family asset, the matrimonial home, was bought in the husband's name and not in the wife's name. When, however, the house is bought in the wife's name, as here, there is no doubt that the presumption of advancement applies; it is presumed to be a gift, in the absence of evidence of a contrary intention. That principle is too well established to be disregarded, and DENNING, L.J., in dealing obiter in *Rimmer* v. *Rimmer* (1) with a house put into the wife's name could not, I think, have had that principle in mind. It is quite true, as my Lord has said, that s. 17 of the Act of 1882 leaves a very wide discretion in the court; but, as BUCKNILL, L.J., said in the unreported case of *Newgrosh* v. *Newgrosh* (3) (June 28, 1950), which is quoted in *Rimmer* v. *Rimmer* (1), it does not entitle the court to make an order which is contrary to any well-established principle of law.

Turning to the present case, it seems to me that the learned county court judge properly directed himself. The question posed was whether the husband had satisfied him that the parties had a contrary intention. He answered that question in the negative, and I do not see how on this question of fact this court can interfere. I think that in the case of a family asset such as the home or the furniture, acquired for the joint use of the spouses, the presumption of advancement can be easily rebutted. It is different from a case where what is acquired is, for instance, for the wife's personal use. Here the instalments of principal and interest payable to the building society all came out of the husband's pocket. When a house was sold and a new one was purchased, the full proceeds of sale were not invested in the new house: part was retained and expended—true by the wife, but, broadly speaking, for the joint benefit of the spouses; and again in regard to the new house the husband undertook the payment of the instalments to the building society. Those actions to my mind are much more consistent with a joint endeavour by the spouses to save by building up a family asset rather than with a succession of gifts by husband to wife, as was held to be the case in *Moate* v. *Moate* (4) ([1948] 2 All E.R. 486). However, the learned county court judge saw the witnesses; he heard a considerable amount of evidence of which we have but a very scanty note; and in those circumstances I cannot see how this court can interfere. Accordingly, I also would dismiss the appeal.

SELLERS, L.J.: I agree, but I do so with no feeling of satisfaction. In the abbreviated note of the learned judge's judgment there appears towards the end of it a note to the effect that

> " There is no evidence here that the parties ever thought it was to be their joint property. The matter was not raised."

Were it not for those observations of the learned judge, I should have been more ready to take the view that the matter was open for consideration by this court, and would have striven, I think, to have applied the statement of the law, to which my Lord, Parker, L.J., has referred, enunciated by Denning, L.J., in the two cases which were quoted. It seems to me, on the facts of this case, that those observations might well have been applied and have resulted in a decision that there was here a joint holding of this property. However, in all the circumstances, the learned county court judge having taken a different view and not having misdirected himself and the facts being for him, I agree with regret that this court cannot interfere. Therefore this appeal in my view must be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Andrews, Wetherall, McQueen & Co.*, Bournemouth (for the applicant); *Peacock & Goddard*, agents for *Trevanion, Curtis & Walker*, Bournemouth (for the respondent).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

HARDIE *v.* FREDIANI.

[COURT OF APPEAL (Lord Evershed, M.R., Parker and Sellers, L.JJ.), February 12, 1958.]

Rent Restriction—Possession—Reasonableness—Discretion of judge—Matters for consideration—Lesser hardship to another tenant of landlord—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5 *c.* 32), *s.* 3 (1).

The landlord claimed possession of a dwelling-house to which the Rent Restrictions Acts applied, as a residence for his married daughter. It was occupied by the tenant, F., his wife, three children and a nephew. The landlord lived in a substantial house with four bedrooms. One bedroom and one living room of his house were let to a Mr. and Mrs. S., the remainder was occupied by the landlord, his wife, his daughter who expected a baby, his son-in-law and his son. It was conceded by the daughter that if Mr. and Mrs. S. were to leave, there would then be enough room for herself, her husband and the baby. The county court judge found that the landlord reasonably required F.'s dwelling-house for occupation as a residence for his daughter, but that it was not reasonable to make an order for possession, because the landlord should have tried to obtain possession of the two rooms in his own house from Mr. and Mrs. S.

Held: the fact that sufficient accommodation for the landlord's daughter and her family would be available if another tenant left or was evicted, and the circumstances of that tenant, were relevant when considering whether or not it was reasonable to make an order for possession under s. 3 (1) of the Act of 1933; as there was no misdirection by the county court judge, and as there was evidence on which he could reach his conclusion, the Court of Appeal would not interfere with his decision.

Appeal dismissed.

[**Editorial Note.** Though the present case is concerned with what may be taken into consideration for the purpose of determining whether it is reasonable that an order for possession of controlled premises should be made at the landlord's instance, yet it may well be compared with such a decision as *Harte* v. *Frampton* ([1947] 2 All E.R. 604), which turned on the defence of greater hardship. That case showed that the effect of the order for possession on everyone affected by it should be considered in relation to the question of greater hardship; the present case shows that, on the test of reasonableness, the possibility of lesser hardship to others, who might be evicted instead but against whom no order is being sought, is a factor to be considered.

For the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1), see 13 HALSBURY'S STATUTES (2nd Edn.) 1048.]

Appeal.

This was an appeal by the landlord from an order of His Honour JUDGE FRASER HARRISON at Liverpool County Court on Nov. 19, 1957, dismissing his action for possession of a dwelling-house known as 15, Selwyn Street, Liverpool. The county court judge held that the landlord established ground for possession under para. (h) of Sch. 1 to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, that the defence of greater hardship was no longer available to the tenant but decided that it was not reasonable to make an order in the circumstances and dismissed the action.

The landlord appealed to the Court of Appeal. Since it has been decided in *Piper* v. *Harvey* (ante, p. 454) that the proviso which follows the wording of para. (h) in Sch. 1 to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, has not been repealed by the Rent Act, 1957, Sch. 6, para. 21, the present case is reported solely for the observations of the Court of Appeal on reasonableness.

Andrew Rankin for the landlord.
G. Newman for the tenant.

LORD EVERSHED, M.R., after referring to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, and the proviso to Sch. 1 thereto and stating that the problem of the application of the proviso did not arise in view of the decision that the court had reached, continued: I return to the language of s. 3 (1) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, and the two points which have to be established in a case such as this, namely, first, that it is reasonable for the landlord to want the accommodation, as he said, for his daughter, and, secondly, that even so, still it is reasonable for the judge to make the order. The family facts, if I may use that phrase, as stated in the evidence were these. The house in which the landlord was and is living, No. 23, Church Road, Liverpool, is a substantial house with four bedrooms; but it is well occupied. The landlord and his wife, who are both fifty-two years of age, live there with their daughter, Mrs. Garrod, recently married and aged twenty-two, and also with the son-in-law, the daughter's husband, Mr. Garrod, and the plaintiff's son. In addition, there are a Mr. and Mrs. Sedgewick, who have, so far as I can see, what would constitute on the face of the evidence a separate dwelling-house, consisting of a living-room and a bedroom, and the exclusive use of the butler's pantry for their cooking. A further circumstance of very high significance is pressing itself on the landlord's mind. The daughter, Mrs. Garrod, in the natural course of events, having been married last March, is expecting a baby this coming March, and as a father the landlord took the view that, first, it would make things uncomfortably crowded when this child arrived, and secondly, that on general grounds it was not a good thing and would not bode well for the happiness of Mrs. Garrod as a married woman, and her husband and child, if the whole of the present occupants were living on top of each other, she and her mother and the father and husband in the same house. With that view the learned judge agreed, and he had, therefore, no difficulty (particularly since he took a most favourable view of the plaintiff and his daughter as witnesses) in concluding that it was entirely reasonable for the landlord to seek possession of 15, Selwyn Street, as a home for the daughter, her husband and the child.

That is not, as it seems to me, the end of the matter. The judge must still say whether it is reasonable to make the order. That question he decided adversely to the landlord, and in deciding it he took these facts certainly into account: that the tenant had three children aged sixteen, eleven and ten years, two only of them going to school; and that if anybody had got to move, the right and proper course was for Mr. and Mrs. Sedgewick to move. On the evidence that he had before him the judge was able to conclude that the Sedgewicks were reasonably decent people who might well, in the circumstances, go at once without any difficulty, and I do not see how anyone could cavil at that conclusion. It was suggested with force by counsel for the landlord that presumably the Sedgewicks themselves had the benefit of a controlled tenancy under the Rent Acts, and that it was not simply a question of waving your hand and saying to the Sedgewicks " Go ", and their going. It might involve further proceedings. Indeed, that being so, counsel for the landlord's contention was twofold: first, that even if (contrary to his submission) the position of the Sedgewicks could properly be taken into account, when answering the question whether it was reasonable for the landlord to seek the order which he sought against the tenant, yet the admissibility of taking into account the presence of the Sedgewicks had then certainly been exhausted for all purposes of this case; and it was not legitimate to take their presence into consideration in determining

A the further question, whether it was reasonable to make the order. Secondly, and alternatively, counsel says that in any case there was no evidence that the Sedgewicks were, in any sensible use of the term, movable. Moreover, where was this matter going to end? The landlord appeared to own a number of houses, and he might go from place to place seeking unsuccessfully to get orders for possession and be constantly told that it was far better to get the other man B to go. He might eventually, after a long, expensive, and litigious journey, arrive at the position from which he started.

I cannot take quite so gloomy a view of his prospects. In any case, however, I am unable to agree that the question of the Sedgewicks and their movability is something not to be taken into account on this question of the reasonableness of making the order. This question is one to be determined as a matter of fact C on a consideration of all relevant circumstances. So much has clearly been established, and I see no ground on which this particular matter could fairly and properly be excluded. It is a question of the weight you would attach to the circumstance that here are two people, Mr. and Mrs. Sedgewick, no part of the family, occupying an appreciable proportion of 23, Church Road, as to which Mrs. Garrod conceded in evidence that, if they did go, then there would be room D enough. How much weight is to be given to that fact, knowing that the Sedgewicks may try to remain, may seek to raise the defences of the Act, and so forth?

Turning to the second alternative argument, I can see no ground for supposing that the judge here acted without any basis of evidence. I think he was entitled to take the view that the Sedgewicks, being decent people, might well make no difficulties, but if they did raise the defences of the Act, that he should also E consider what the chances are likely to be, and to conclude that in all the circumstances it was not reasonable to evict the Fredianis and their three children. On such a matter of fact, I think on well-established principles, it would not be right for us to interfere, and I see, indeed, no basis which would justify interference. On the whole, therefore, though I do indeed share the sympathy which the judge obviously felt for the plaintiff and Mrs. Garrod, I do not think F we can or should interfere with the order made. I would therefore dismiss the appeal.

PARKER, L.J.: I agree.

SELLERS, L.J.: I agree.

Appeal dismissed.

Solicitors: *Purchase, Clark & Treadwell*, agents for *Rollo & Mills-Roberts*, Liverpool (for the landlord); *T. L. Hurst*, Liverpool (for the tenant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

RUTHERFORD *v.* R. E. GLANVILLE & SONS (BOVEY TRACEY), LTD.

[Court of Appeal (Lord Goddard, C.J., Morris, L.J., and McNair, J.), February 10, 1958.]

Factory—Dangerous machinery—Duty to fence—Abrasive carborundum wheel—Disintegration of wheel—Guard shifted by flying parts of wheel and injuring workman—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 14 (1), *s.* 16.

The plaintiff was employed in the defendants' factory on a cutting machine which had an abrasive carborundum wheel driven at about four thousand revolutions per minute. The carborundum wheels frequently disintegrated, and there was a guard or hood on the machine to protect the operator against the danger of bits of wheel flying out with great force. Whilst the plaintiff was working on the machine the wheel disintegrated, and flying parts of it caused the hood to rise and turn; the hood cut the plaintiff's wrist. In an action against the defendants for damages for breach of statutory duty under s. 14[*] of the Factories Act, 1937, as extended or explained in s. 16[*], to fence securely the wheel,

Held: the wheel had not been securely fenced, nor (per Morris, L.J., and McNair, J.) had the hood been securely maintained or kept in position (as required by s. 16), and therefore the defendants were in breach of s. 14 of the Factories Act, 1937; the injury was caused by that breach, notwithstanding that it was the hood and not a part of the wheel that inflicted the injury, and the plaintiff was entitled to damages.

Nicholls v. *Austin* (*Leyton*), *Ltd.* ([1946] 2 All E.R. 92) distinguished.

Appeal allowed.

[**Editorial Note.** It was admitted that s. 14 of the Factories Act, 1937, applied to protect a workman against dangerous portions of the machine flying out by force of their motion (see p. 535, letter F, post). *Nicholls* v. *Austin* (*Leyton*), *Ltd.*, supra, which decided that the section did not afford protection against things flying out, was a case in which the thing that flew out was part of the material that was being worked, not part of the machine.

As to the duty to fence dangerous machinery and the maintenance of fencing, see 17 Halsbury's Laws (3rd Edn.) 74, 75, para. 126 and 77, para. 128; and for cases on the duty to fence, see 24 Digest (Repl.) 1053-1055, *207-218*.

For the Factories Act, 1937, s. 14 (1), s. 16, see 9 Halsbury's Statutes (2nd Edn.) 1009, 1011.]

Case referred to:

(1) *Nicholls* v. *Austin* (*Leyton*), *Ltd.*, [1946] 2 All E.R. 92; [1946] A.C. 493; 115 L.J.K.B. 329; 175 L.T. 5; 24 Digest (Repl.) 1091, *419*.

Appeal.

This was an appeal by the plaintiff from a judgment of Streatfeild, J., given on June 11, 1957, whereby he dismissed the plaintiff's claim for damages caused by the defendants' negligence and/or breaches of statutory duty under s. 14 and s. 16 of the Factories Act, 1937. The plaintiff appealed on the question of breach of statutory duty only.

John Thompson, Q.C., and *E. H. Laughton-Scott* for the plaintiff.

Montague Berryman, Q.C., and *D. P. Croom-Johnson* for the defendants.

LORD GODDARD, C.J.: The defendants have a small engineering works at Bovey Tracey and employ a few men. Among the machines in their works is an abrasive wheel cut-off machine which consists of an abrasive carborundum wheel driven at a very high speed—about four thousand revolutions a minute.

---

[*] The relevant terms of these enactments are printed at p. 534, letters H and I, and p. 535, letter D, post.

A That machine is controlled by a switch and a handle, and has a guard on it. The machine is exactly like a circular saw except that the cutting is done by the carborundum wheel and not by a saw. As everybody knows, human ingenuity has never yet found a satisfactory or complete guard for a circular saw; that is why people's fingers are frequently cut off. Very good photographs have been given to us of the machine, two of which show a man actually at work on it, B and it can be seen at once that a slip of his hand on the material on which he is working might bring his hand in contact with the lower part of the carborundum wheel, although no doubt the top part of the machine is protected. It seems to be common knowledge that these carborundum wheels are apt to disintegrate; they break from time to time because of the high speed at which they are working. If they break and if the parts of the wheel fly about the shop there is a great C danger that people may sustain serious injury, and so this guard, which is in the shape of a hood, goes over the machine and will or should protect the workman if the wheel disintegrates in the course of the working of the machine.

On the day in question the plaintiff was working this machine and the carborundum wheel did disintegrate. It had been put in two days before and, as the learned judge found, it had been put in carefully and properly by the foreman. D When this wheel disintegrated, the guard was lifted and turned towards the plaintiff in some way and cut his wrist. It was a most unhappy and unfortunate accident because the cut was very small, and in the ordinary course of events would not have hurt anybody, but unfortunately it severed the particular nerve in the wrist which controls the grip of the hand and this, one might say, comparatively trivial accident caused a serious injury to the plaintiff. I find great E difficulty in understanding why this guard behaved in the way that it did and how it came up. For myself I should have thought that it was because the nuts were loose; if the two nuts which hold the guard in position were loose the guard would rise when this disintegration took place. When the disintegration of the wheel takes place the pieces fly inside this hood and no doubt strike up with great force, and an expert who was called on behalf of the plaintiff stated F that when the wheel exploded (as he put it, because it is tantamount to an explosion) it would disintegrate in the way which I have endeavoured to describe, and the pieces would hit the top of the hood and lift it. It is not necessary for us to come to any definite decision how the guard lifted in this way, save that it was a direct consequence of the disintegration of the carborundum wheel.

We have not been asked to decide this case on the basis of the common law G liability of the defendants. The learned judge rejected the common law liability, and I assume that his judgment was right. We have been asked, however, to reverse his finding on the liability which is alleged to exist here by reason of breach of s. 14 and s. 16 of the Factories Act, 1937. I need not read those very well known sections: s. 14 provides that all dangerous parts of machinery must be fenced when they are working, and s. 16 provides for the proper main- H tenance of the fences which under s. 14 must be provided. This machine had to be fenced because there is a risk of the carborundum wheel disintegrating and thereby causing injury. The wheel did disintegrate and there can be no doubt whatever that the disintegration by some means or other caused the guard to shift and to cut the plaintiff's wrist.

I Now it is said, following the decisions of the House of Lords*, which are very well known, that the object of s. 14 of the Factories Act, 1937, is not to prevent material on which the machine is working from flying out, but to prevent the contact of the human body with the dangerous part of the machine. From that it is argued that unless the human body comes into contact with the dangerous part of the machine, no liability is incurred under the provisions of the Factories

---

* See e.g., *Nicholls* v. *Austin* (*Leyton*), *Ltd.* ([1946] 2 All E.R. 92); *Carroll* v. *Andrew Barclay & Sons, Ltd.* ([1948] 2 All E.R. 386); *John Summers & Sons, Ltd.* v. *Frost* ([1955] 1 All E.R. 870, at pp. 875, 876).

Act, 1937. There has never been, however, a case on all fours with the present, and it would be a very curious and narrow reading of the Factories Act, 1937, if one could say that no liability was incurred on the plain facts of this case. The Factories Act, 1937, s. 14 (1), requires the dangerous part of the machine, which is the carborundum wheel, to be fenced and one of the reasons why this carborundum wheel is dangerous is because of the risk of disintegration. There was disintegration and personal injury resulted because the disintegration affected the guard in some way. The guard actually caused the injury because the disintegration of the wheel caused it to shift. I cannot myself see that it would be otherwise than a very unfortunate and remarkable result if the wheel having disintegrated with such force that it caused a fracture in the guard and a piece of the carborundum wheel having struck the plaintiff, he would be able to recover, whereas if it did not cause a fracture, but the force of the disintegration bent or turned the guard on to the plaintiff's hand, then he could not recover. Again it would be a remarkable result that if the explosion fractured the guard and a piece of the carborundum wheel flew out of the guard and hit the plaintiff, he would be able to recover, but if as the result of the fracture a splinter of the guard flew up and injured the plaintiff, he would not be able to recover.

In my opinion this machine cannot be said to be securely fenced if it does not protect the workman when the very thing happens against which the fence is required to protect him. I look on it as a case in which the machine has to be fenced because of the risk of disintegration and if there is disintegration, personal injury will probably result. There was disintegration and personal injury did result and the personal injury resulted because the guard did not effectively prevent that personal injury happening when there was disintegration. In my opinion, therefore, this machine was not securely fenced and, accordingly, I would allow this appeal.

MORRIS, L.J.: I am of the same opinion. Counsel for the plaintiff has not invited us to deal with the case on the common law basis, but has invited us to deal with the position under the Factories Act, 1937. It seems to me that there are two main questions: In the first place, was there a breach of the obligations under s. 14 ? In the second place, if there was such a breach, did the injury which the plaintiff suffered result from the breach of s. 14 ? It is common ground that the abrasive wheel was a dangerous part of the machinery. LORD GODDARD, C.J., has described the machine and has referred to the dangerous features of the abrasive wheel when in use. There was the danger that the hand of somebody operating the machine might come into contact with the wheel revolving at four thousand revolutions a minute; but another and possibly the chief danger was that described by my Lord, the danger that the abrasive wheel after being in use for some time might break up and split into a number of fragments, which fragments would be ejected with the centrifugal force resulting from revolutions at the rate of four thousand a minute. That was clearly a considerable danger. It is, therefore, I think, not in dispute that the wheel was a dangerous part.

Section 14 (1) provides that:

> " Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced . . ."

and there are certain exceptions which need not be mentioned. If s. 16 is to be regarded as defining or explaining the extent of the obligations under s. 14, then from s. 16 it is seen that fencing and other safeguards which have to be provided in pursuance of s. 14 must be

> " . . . of substantial construction, and constantly maintained and kept in position while the parts required to be fenced or safeguarded are in motion or in use . . ."

In the present case it appears that by the action of the disintegrating parts of the wheel the guard or fence was thrust up so as to rise apparently in a vertical direction. Following on that the plaintiff suffered his injury. It seems to me impossible to hold on those facts that the fence that was provided was secure or that it was of substantial construction and constantly maintained and kept in position while the wheel was in motion or in use. The obligation under s. 14 (1) is an absolute obligation, and it seems to me that the admitted facts of the present case lead inevitably to the conclusion that there was a dangerous part of this machine which was not securely fenced: the fence was not kept in position. I cannot appreciate the notion which is advanced that there was secure fencing albeit by a fence that was admittedly insecure inasmuch as it left its position. On the first question I am of the opinion that there was a dangerous part which had to be securely fenced and which on the facts of the present case was not securely fenced. There was, therefore, a breach of the obligation under s. 14.

The next question is whether it is shown that the plaintiff's injury was caused by that breach of s. 14 (1). The proviso to s. 14 (1) has the words:

> " . . . if a device is provided which automatically prevents the operator from coming into contact with that part."

The concluding part of s. 14 is as follows:

> " The Secretary of State may, as respects any machine or any process in which a machine is used, make regulations requiring the fencing of materials or articles which are dangerous while in motion in the machine."

Cases have arisen in which the question has been raised whether damages under s. 14 can be recovered where materials being worked in a machine are ejected so as to cause injury. A point which has been taken by counsel for the defendants and which was taken by junior counsel for the defendants at the trial, was thus expressed by the learned judge in his judgment. He said:

> " It is conceded by counsel for the defendants that s. 14 does apply not only to protecting workmen from coming into contact with the dangerous part but also to protect them against dangerous portions of the machine from flying out. It is also said by counsel for the defendants that a dangerous part of this machine was not the thing which did the damage but the guard, which was there to prevent the damage."

Junior counsel for the defendants, in his submission in this court has said that before the plaintiff could recover on the facts of this case it would have to be shown that the guard itself was a dangerous part of the machine. I cannot agree with that submission and it seems to me that it would lead to a very artificial result. Reliance was placed in support of that submission on some passages in the speeches of their Lordships in the House of Lords in *Nicholls* v. *Austin* (*Leyton*), *Ltd.* (1) ([1946] 2 All E.R. 92). In that case the appellant, while operating a circular saw belonging to her employers, the respondents, was injured through a piece of wood flying out of the machine which was fenced so as to comply with the requirements of the Woodworking Machinery Regulations, 1922, which by s. 159 (1) of the Act of 1937 were to be deemed to have been made under that Act. LORD THANKERTON said (ibid., at p. 95):

> " My Lords, on consideration of the terms of s. 14, I am of opinion that there is a simpler answer to the contention of the appellant, namely, that the obligation to fence imposed by sub-s. (1) is an obligation to provide a guard against contact with any dangerous part of a machine, and that it does not impose any obligation to guard against dangerous materials or articles ejected from the machine in motion, that matter depending solely on the making of regulations by the Secretary of State under the discretionary power conferred on him by the last paragraph of the section"—

that is the section to which I referred. Lord Macmillan referred also to the point that was there under consideration. He said ([1946] 2 All E.R. at p. 96):

> "The question of importance in the case is whether the statutory duty imposed by s. 14 of the Act of 1937 to fence securely every dangerous part of any machinery is fulfilled when the dangerous part is so fenced as to prevent the operator from coming into contact with it; or whether the duty also extends to fencing the dangerous part so as to prevent any part of the material on which the machine is working from flying off and striking the operator."

We were, of course, referred to passages in the other speeches and notably to passages from the speech of Lord Simonds (ibid., at p. 98 and p. 99)

It does not seem to me that their Lordships in that case were dealing with the rather unusual situation that occurred in the present case. If a piece of the wheel that disintegrated had by the force of the disintegration gone straight through the guard and struck somebody working in the factory, then junior counsel for the defendants for the purposes of this case concedes that there would be liability. He says, however, that if it was not a part of the wheel itself which struck the plaintiff, but if it was a piece of the guard that was projected outwards by the piece of the wheel, then there would be no liability. That seems to me to be so artificial a distinction that it could not be right and it does not appear to me to be rational. Here was an obligation to fence a dangerous part. The obligation was imposed by a section of the Act that dealt with safety. There was an obligation to prevent the dangers that would result from this dangerous part of this machine. The dangers to which the plaintiff was exposed included the liability to encounter the forces of disintegration. It was those very forces which came into being and which projected the guard itself so as to cause it to be the actual immediate instrument of the physical injury to the plaintiff.

It seems to me that on those facts the only reasonable conclusion is that there was causation of the injury by the breach. I do not think that it was the intention of their Lordships in *Nicholls* v. *Austin* (1) to say anything, in the passages to which I have referred, leading to a different result. It is quite clear that if in the present case there had been a fence which was secure or a fence which was kept in position or a fence which was an adequate fence for its purpose of containing anything that was the result of disintegration, then there would have been no accident. Whether it is enough to put it in that way or not, it seems to me that this injury was, on a common-sense analysis, caused by the fact that there occurred the very danger that was contemplated, the danger against which there should have been protection, the danger against which there should have been fencing, and by the fact that there was no fencing which guarded against the consequences of the danger. In this case the fencing was insecure, inadequate and not kept in position. It was fencing which failed to do what it was there to do. It failed to prevent the very danger which was realised to be a danger and which might result in injury to somebody working in close proximity to that danger. It seems to me, therefore, on the second question I propounded, that it is shown here that the injury to the plaintiff was caused by the breach of s. 14. I therefore think that the plaintiff was entitled to recover as on a breach of statutory duty.

McNAIR, J.: I agree that this appeal should be allowed. In deference to the learned judge, from whose views we are differing, I should like to add a few words of my own which do not substantially differ from what has been stated by my Lords.

The two questions quite clearly are, first, has the plaintiff established that there has been a breach of s. 14 of the Factories Act, 1937, as extended or explained by s. 16 ? Secondly, has he established that his injuries were the result of that breach ? The learned judge in his judgment describes this machine and in particular describes the characteristics of the carborundum wheel. He says:

> "As is pretty well known, and indeed requires little imagination, carborundum wheels of this nature are very liable to break. If the slightest excessive pressure is put on the handle, it may well be that it will cause the disc wheel to disintegrate, and it is for that reason it is of the utmost importance, obviously, that the abrasive wheel shall be securely guarded, not only to prevent a man from inadvertently catching his hand against the wheel but also to prevent the scattering of fragments when a wheel happens to break, which is a common experience occurring almost daily."

It seems to me, and it is in line with what the learned judge has said, that this wheel was a dangerous part of the machinery within the meaning of s. 14 of the Factories Act, 1937, because the wheel revolving at four thousand revolutions per minute had this potentiality of disintegration, as the result of which forces would be set up and one of the forces would be the flying of the pieces of fragmentation. Section 14 (1) requires such a dangerous part of the machinery to be securely fenced and s. 16 adds to that the requirements that the fencing or other safeguards shall be of substantial construction and constantly maintained and kept in position. The first question is: Was this hood, which admittedly came unseated through the operation of these forces of disintegration, such that it securely fenced the dangerous part ? In my judgment you cannot say that a hood provided as a guard for this type of machinery, is a secure fence unless the forces of disintegration which are known to be likely to be set up in the normal working of the machine, including the flying of fragments of the wheel in all directions, are really taken care of and taken up by the hood. Accordingly, in my judgment, it is quite clear that this hood or guard did not form a secure fence for this machine.

The next question is whether it has been established that injury was caused, in the sense of directly caused, by that breach. I bear in mind that these sections do not entitle an injured person to recover if the injury can properly be said to be the indirect result of the breach, as was observed by Lord Simonds in *Nicholls* v. *Austin* (*Leyton*), *Ltd.* (1) ([1946] 2 All E.R. 92 at p. 98). In the present case, if the facts are, as I apprehend them to be, that no independent cause came into operation between the disintegration of the wheel and the impact of the guard on the man's wrist, it seems to me that the disintegration of the wheel which resulted in fragments of the wheel itself being thrown against the guard so that the guard struck the man's wrist means that the flying of those fragments against the guard was the direct cause of the guard striking the man's wrist, or, putting it the other way round, that the injuries flowing from the striking of the man's wrist were the direct result of the flying fragments of the wheel coming into contact with the guard. In those circumstances the plaintiff has, in my judgment, established the two points which it is necessary for him to establish and, in my opinion, this appeal should be allowed.

Appeal allowed.

Solicitors: *Arnold Carter & Co.*, agents for *Hamlyn Taylor & Neck*, Paignton (for the plaintiff); *Pullan, Davies & Co.*, Leeds (for the defendants).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

Re RICHARDSON'S WILL TRUSTS. PUBLIC TRUSTEE *v.* LLEWELLYN-EVANS' TRUSTEES AND ANOTHER.

[CHANCERY DIVISION (Danckwerts, J.), February 11, 12, 1958.]

Will—Forfeiture clause—Protective trusts—Court order that principal beneficiary should charge his interest to secure maintenance—No charge executed—Whether court order caused forfeiture—Trustee Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 19), *s.* 33 (1) (ii).

By his will dated July 5, 1930, a testator who died on Mar. 22, 1935, directed his trustees to hold a fund on the protective trusts contained in the Trustee Act, 1925, s. 33, for his grandson until he reached the age of thirty-five years and thereafter for him absolutely, " provided that he has not attempted to do or suffer any act or thing or any event has happened . . . whereby he would then or at any time thereafter be deprived of the right to receive the capital or income or any part thereof ". If the grandson, on attaining thirty-five, had made such an attempt, the fund was to be held on protective trusts for him during his life in accordance with s. 33 of the Act of 1925. On June 3, 1955, an order was made in the Probate, Divorce and Admiralty Division of the High Court in divorce proceedings brought by his wife that the grandson should charge his interest under the will of the testator with the payment of £50 per annum interim maintenance for the petitioner and that the necessary deed to give effect to that charge should be settled by conveyancing counsel of the court. No deed was settled. On Oct. 24, 1955, the grandson attained the age of thirty-five. On Aug. 27, 1956, he was adjudicated bankrupt.

Held: the order of June 3, 1955, created, or attempted to create, an equitable charge on the property to which it related (*Hyde* v. *Hyde*, [1948] 1 All E.R. 362, applied); therefore the grandson's right to receive the income of the fund determined on June 3, 1955, and a discretionary trust thereof thereafter subsisted in accordance with the Trustee Act, 1925, s. 33 (1) (ii), the grandson never becoming entitled to an absolute interest in the fund.

[As to the effect of forfeiture clauses, see 34 HALSBURY'S LAWS (2nd Edn.) 422, 423, para. 469; and for cases on the subject, see 44 DIGEST 1231-1233, *10,646-10,660.*

For the Trustee Act, 1925, s. 33, see 26 HALSBURY'S STATUTES (2nd Edn.) 102.]

Cases referred to:

(1) *Waterhouse* v. *Waterhouse,* [1893] P. 284; 62 L.J.P. 115; 69 L.T. 618; 27 Digest (Repl.) 626, *5870.*

(2) *Maclurcan* v. *Maclurcan,* (1897), 77 L.T. 474; 27 Digest (Repl.) 630, *5907.*

(3) *Hyde* v. *Hyde,* [1948] 1 All E.R. 362; [1948] P. 198; [1948] L.J.R. 641; 27 Digest (Repl.) 629, *5898.*

Adjourned Summons.

This summons was issued by the sole trustee of the will of John Billingsley Richardson, deceased, for the determination of a question relating to a legacy of £2,000 three per cent. local loan inscribed stock settled by the said will on Douglas William Llewellyn-Evans, viz., whether on the true construction of the will and in the events which had happened (a) the trust property representing the said legacy vested for an absolute beneficial interest in the said Douglas William Llewellyn-Evans on his attaining the age of thirty-five years on Oct. 24, 1955, and accordingly was held by the plaintiff on trust for the first defendant as trustee in bankruptcy of the said Douglas William Llewellyn-Evans; or (b) by reason of an order dated June 3, 1955, made in proceedings in the High Court of Justice, Probate, Divorce and Admiralty Division (Divorce) the said Douglas William Llewellyn-Evans forfeited his contingent absolute interest therein.

P. A. Goodall (*Robert S. Lazarus* with him) for the plaintiff, the sole trustee of the will.

P. S. A. Rossdale for the first defendant, the trustee in bankruptcy of the legatee.

Charles Sparrow for the second defendant, the infant son of the legatee.

DANCKWERTS, J.: This case raises the question whether there has been a forfeiture of the interest of Mr. Douglas William Llewellyn-Evans, who is now a bankrupt, and whose trustee in bankruptcy is the first defendant. The other defendant, David Seymour Llewellyn-Evans, is a child of his, who is an infant. The will on which the matter depends is dated July 5, 1930. There were two codicils which are not material. The testator died on Mar. 22, 1935. The matter depends on orders which were made in the Divorce Court by which it is alleged on behalf of the infant defendant that a forfeiture was created.

By the terms of the will a fund was to be held on trust to invest the same and to hold the income from the investments for the time being representing the same on protective trusts for the benefit of the testator's grandson, the said Douglas William Llewellyn-Evans, during his life and until he attained the age of thirty-five years in accordance with the Trustee Act, 1925, s. 33:

> " And on his attaining the age of thirty-five years provided that he has not attempted to do or suffer any act or thing or any event has happened (other than any advance under any statutory or express power) whereby he would then or at any time thereafter be deprived of the right to receive the capital or income or any part thereof To pay the capital and income to the said Douglas William Llewellyn-Evans absolutely And if he has made such attempt or sufferance or such event has happened then I direct the said trustees to hold the income thereof on protective trusts for the benefit of the said Douglas William Llewellyn-Evans during his life in accordance with s. 33 of the Trustee Act, 1925, And if the said Douglas William Llewellyn-Evans shall die before attaining the age of thirty-five years or the protective trusts for his benefit after his attaining that age shall come into operation then on his death I direct the said trustees to hold the capital and income of the trust fund Upon trust for such of his children who shall attain the age of twenty-one years equally between them and if there be one such child then the whole to that one child."

It is that contingent interest which is represented by the second defendant in the present proceedings.

There were divorce proceedings between Mr. Douglas William Llewellyn-Evans and his wife in which a decree absolute of divorce was made on the petition of the wife against him on Nov. 15, 1954. Previously to that, on Oct. 13, 1954, an order was made in the Probate, Divorce and Admiralty Division

> " That the respondent [Douglas William Llewellyn-Evans] do secure to the above-named petitioner for her life until further order as from the date upon which the decree nisi herein be made absolute, the annual gross sum of £50 upon security to be agreed or referred to a registrar."

I need not read the rest of the order. The only point on that order and its only materiality is that maintenance of £50 per annum was fixed by it. On June 3, 1955, the order was made which it is contended created a forfeiture of Mr. Douglas William Llewellyn-Evans' interest. By that order it is ordered

> "that the above-named respondent [Douglas William Llewellyn-Evans] do charge his interest under the will of his grandfather Dr. John Billingsley Richardson [the testator] with the payment of £50 per annum interim maintenance directed to be secured by the respondent in favour of the petitioner pursuant to the said order dated Oct. 13, 1954, and that the deed necessary to give effect to the said charge be settled by conveyancing counsel of the court."

No deed has ever been settled. On Oct. 24, 1955, Mr. Llewellyn-Evans attained the age of thirty-five years. On Aug. 20, 1956, a receiving order was made against him, and he was adjudicated bankrupt on Aug. 27, 1956.

In considering whether there has been a forfeiture, the first question is: what was the effect of the order of June 3, 1955, on the footing that it was never completed by the execution of any deed? The matter has been very well argued before me, and I have been taken through a number of cases. I am satisfied, on three decisions, that the effect of the order of June 3, 1955, in itself was to create an equitable charge, if that were possible, on the interest of Mr. Llewellyn-Evans under his grandfather's will. The cases in question are *Waterhouse* v. *Waterhouse* (1) ([1893] P. 284), *Maclurcan* v. *Maclurcan* (2) ((1897), 77 L.T. 474) and *Hyde* v. *Hyde* (3) ([1948] 1 All E.R. 362). In the last of those cases BARNARD, J., applied what previously had been no more than the dicta of LORD LINDLEY and CHITTY, L.J., that the effect of an order referring to specific property, in the manner of this order which I have to consider, created (on the date of the order) an equitable charge on the property to which reference therein was made.

That being so, the next thing to consider is what was the effect of that order which created that equitable charge. There are two portions of the will which involve the question of forfeiture. First of all, there is the part which invokes the Trustee Act, 1925, s. 33, before the grandson had attained the age of thirty-five, and then the part which describes what is to happen on his attaining that age. Referring to s. 33 (1) of the Act of 1925, the trusts of the will before he attains the age of thirty-five years must be taken to be expressed in this form:

> "Upon trust for the principal beneficiary [the grandson] during the trust period or until he . . . does or attempts to do or suffers any act or thing, or until any event happens, other than an advance under any statutory or express power, whereby, if the said income were payable during the trust period to the principal beneficiary absolutely during that period, he would be deprived of the right to receive the same or any part thereof . . ."

It seems to me that the effect of the order was that an equitable charge was created, or attempted to be created, on his interest under the testator's will. When this order was made, if he had been absolutely entitled, he would have been deprived of the right to receive part of the income, because part of the income was to be payable to his former wife to the extent of £50 a year. Consequently, it seems to me that there was a forfeiture at that date. In any case, however, he never attained his absolute interest under the express terms of the will, and the protective trusts which were to take effect during the rest of his life in accordance with the Trustee Act, 1925, s. 33 (1) (ii) came into effect. The direction was that the protective trusts were to come into effect, if there occurred an event "whereby he would then or at any time thereafter be deprived of the right to receive the capital or income or any part thereof": so when the order of the Probate, Divorce and Admiralty Division was made on June 3, 1955, an event happened whereby he would either then or at some time thereafter " be deprived of the right to receive the capital or income ", or part of it.

An argument was put forward on behalf of the trustee in bankruptcy that I must construe the order made by the registrar in accordance with the numerous cases on the subject which have come before the court in such a way as to give effect to the order and avoid any forfeiture. It was argued that the proper way to construe the order was as a direction that on attaining the age of thirty-five years, then, and not until then, the charge was to operate on the interests of the grandson under his grandfather's will. I am unable to do that. I have to deal with the order as I find it. Undoubtedly, on its terms, and on the cases to which I have been referred in which orders of this kind have been construed in the Probate, Divorce and Admiralty Division, the effect of such an order is to attempt at any rate to create an immediate charge. The result of the forfeiture provision in the will is that that attempt is unsuccessful, but that is the way in which the forfeiture provisions in the will operate. An event occurs by which, if an absolute interest had been taken by the person in question, he would have been deprived of the income; but, owing to the forfeiture provision followed by the discretionary trust, he is in fact not necessarily deprived of the income, but receives discretionary payments from the trustees under the protective trusts which follow. I have come to the conclusion that in the events which have happened in this case, by the time Mr. Llewellyn-Evans became bankrupt his interest under the will had been forfeited, and a discretionary trust had come into effect. Consequently the trustee in bankrupcty cannot take any part of the property which is subject to the testator's will.

Counsel on behalf of the trustee in bankruptcy wished to make an argument as to the effect of certain sections of the Bankruptcy Act, 1914, on the order of June 3, 1955; in my view, it is not open to me to consider this matter in the absence of Mr. Llewellyn-Evans' former wife, and I express no opinion on that matter at all.

Order accordingly.

Solicitors: *Joynson-Hicks & Co.*, agents for *Turner, Turner & Sheldon*, Torquay (for the plaintiff); *Tarry, Sherlock & King* (for the first defendant); *Kingsford, Dorman & Co.*, agents for *Williamson & Barnes*, Deal (for the second defendant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

IAN STACH, LTD. *v.* BAKER BOSLY, LTD.

[Queen's Bench Division (Diplock, J.), February 3, 4, 1958.]

Sale of Goods—Payment—Confirmed letter of credit—F.o.b. contract—Time when credit should be opened.

If, under an ordinary f.o.b. contract (where the responsibility of arranging shipping and of selecting a date for shipment within a period is on the buyer) payment is to be by a confirmed letter of credit the prima facie rule, in the absence of express stipulation, is that the credit must be opened, at the latest, by the earliest shipping date, viz., the beginning of the shipping period (see p. 549, letter C, post).

On July 6, 1956, the sellers, who were dealers in steel, negotiated a contract to sell to the buyers five hundred metric tons of ship plates of West German origin at $205 a ton. On the same day the sellers entered into a contract to purchase the steel from suppliers at the price of $190 a ton. By the terms of a written contract signed by the sellers and buyers on July 10, the goods were to be delivered f.o.b. a Benelux port for shipment to Canada, delivery was to be in August/September, 1956, and payment was to be by confirmed irrevocable transferable and divisible letter of credit in favour of the sellers' nominees. The buyers had the right to select the port and the date of shipment, and the responsibility of making arrangements for shipment. Except in regard to the purchase price and the quantity, the terms of the contract between the sellers and their suppliers were similar to those of the contract between the sellers and the buyers, and the sellers required the letter of credit to be opened by the buyers before the sellers could obtain the goods from their suppliers. Although the sellers repeatedly asked the buyers to open their letter of credit, the buyers had failed to do so by Aug. 14, and the sellers then treated the contract as repudiated and began to try to sell the goods elsewhere. On Sept. 14 they entered into a contract to sell the goods to other buyers at the price of $194 a ton, which was the market price at the time. In an action by the sellers for damages against the buyers for breach of contract, the buyers contended that, as they were entitled to call for shipment at any time within the shipping period and the sellers were not required to commence the performance of any of their obligations under the contract until they had received the shipping instructions, it was unnecessary for the buyers to open the letter of credit until a reasonable time before Sept. 30, the end of the shipping period.

Held: the buyers were liable in damages for breach of contract because it was their duty to open the letter of credit by Aug. 1, 1956 (the earliest shipping date) and, as the buyers must have known that their failure to provide the letter of credit would make it impossible for the sellers to carry out the transaction, the measure of damages was the sellers' loss of profit on the transaction.

[As to confirmed credits, see 29 Halsbury's Laws (2nd Edn.) 213, para. 283; and as to payment under f.o.b. contracts, see ibid., p. 226, para. 304.]

Cases referred to:

(1) *Malas* v. *British Imex Industries, Ltd.*, ante, p. 262.

(2) *Sinason-Teicher Inter-American Grain Corpn.* v. *Oilcakes & Oilseeds Trading Co., Ltd.*, [1954] 2 All E.R. 497; *affd.* C.A., [1954] 3 All E.R. 468; 3rd Digest Supp.

(3) *Pavia & Co., S.P.A.* v. *Thurmann-Nielsen*, [1952] 1 All E.R. 492; [1952] 2 Q.B. 84; 3rd Digest Supp.

(4) *Plasticmoda Societa per Azioni* v. *Davidsons* (*Manchester*), *Ltd.*, [1952] 1 Lloyd's Rep. 527.

(5) *Trans Trust S.P.R.L.* v. *Danubian Trading Co., Ltd.*, [1952] 1 All E.R. 970; [1952] 2 Q.B. 297; 3rd Digest Supp.

(6) *Etablissements Chainbaux S.A.R.L.* v. *Harbormaster, Ltd.*, [1955] 1 Lloyd's Rep. 303.

(7) *Dix* v. *Grainger*, (1922), 10 Lloyd's Rep. 496.

(8) *N. V. Handel My. J. Smits Import-Export* v. *English Exporters* (*London*), *Ltd.*, [1957] 1 Lloyd's Rep. 517.

(9) *Cunningham, Ltd.* v. *Munro* (*R. A.*) *& Co., Ltd.*, (1922), 28 Com. Cas. 42; 39 Digest 530, *1435*.

Action.

In this action the plaintiffs, Ian Stach, Ltd., claimed damages against the defendants, Baker Bosly, Ltd., for breach of a contract whereby the defendants agreed to buy from the plaintiffs five hundred metric tons of ship plates, at a price of $205 a ton f.o.b. a Benelux port, delivery to be in August/September, 1956. It was an express term of the contract that payment was to be by confirmed, irrevocable, transferable and divisible letter of credit in favour of the sellers' nominees. The plaintiffs, the sellers, alleged (among other things) that it was an implied term of the contract that the defendants, the buyers, would establish the letter of credit not later than Aug. 1, 1956, or alternatively, forthwith on being thereafter called on to do so by the plaintiffs; that, in breach of the contract, the defendants failed to establish the letter of credit by Aug. 1, or when called on to so do by the plaintiffs, or at all; alternatively, that the defendants evinced an intention no longer to be bound by the contract; and that by reason of the defendants' breach of contract, or repudiation of the contract, the plaintiffs had suffered loss and damage in the sum of £1,964 5s. 7d., that being the difference between the purchase price under the contract and the market price of $194 a ton, at which the plaintiffs sold the goods to other buyers on or about Sept. 14, 1956. By their defence, the defendants denied that it was an implied term of the contract that they were to establish the letter of credit by Aug. 1, 1956, or on being called on to do so by the plaintiffs, and claimed that they were entitled to establish the letter of credit on Sept. 23, 1956, that is to say, in time to allow the plaintiffs to make delivery on or before Sept. 30 to the ship selected by the defendants. Alternatively, the defendants alleged that, if there was an implied term in the contract that they were to establish the letter of credit at the time claimed by the plaintiffs, that term had been waived by the plaintiffs.

M. R. E. Kerr for the plaintiffs, the sellers.

Neil Lawson, Q.C., and *J. Lloyd-Eley* for the defendants, the buyers.

DIPLOCK, J.: This case raises the question at what time under an f.o.b. contract, where payment is by a confirmed letter of credit, must the buyer open the credit ? International trade has to an increasing extent over the last thirty or forty years been financed by bankers' confirmed credits. So much so that the classic f.o.b. and c.i.f. contracts of the text-books providing for cash or acceptance against documents without the intervention of the banker are now probably the exception rather than the rule; and it is a little surprising that the question which I have to answer in this case is not already the subject of authoritative decision, but it appears that it is not.

The relevant facts are fairly short. Both the plaintiffs and the defendants were merchants dealing in steel, among other metals. As each knew, neither was a manufacturer or stockist or a user of steel: they were both middlemen. The sums involved in contracts which they had on hand at any particular time were large, and (as is usual in the trade) beyond their own financial resources.

Their method of carrying on business (again usual in the trade) was to enter into practically simultaneous contracts of purchase and sale, and to rely on the bankers' credits opened by the buyers to enable them to pay the purchase price to the person from whom they had, in turn, bought. Where (as in this case) there is a string of merchants' contracts between the manufacturer or stockist and the ultimate user, the normal mechanism for carrying out the various contracts is the familiar one which was intended to be used in this case. The ultimate user, under the terms of his contract of sale, opens a transferable, divisible credit in favour of his seller for his purchase price; his seller, in turn, transfers so much of the credit as corresponds to his own purchase price to his seller or, more probably, his own contract with another merchant, and also calls for a transferable, divisible credit and procures his own banker to issue a back-to-back credit—that is to say, he lodges the credit in his favour with his own banker, who, in turn, issues a transferable, divisible credit for the amount of his purchase price to his own seller. So the process is carried on, through the string of merchants, until the banker of the last merchant in the string issues the credit in favour of the actual manufacturer or stockist. The reason why they issue fresh credits is that in banking practice a transferable credit is regarded as transferable once only, and (as is obvious) in this sort of trade it is desired, naturally enough, by any merchant in the string to conceal from his buyer and his seller who his own customer is. That is the way (as both parties to the present transactions knew) in which this type of business is normally carried on.

On July 6, 1956, the plaintiffs negotiated a contract for the sale of five hundred metric tons of ship plates of West German origin to the defendants at the price of $205 per ton. The amount involved in that substantial contract was in the neighbourhood of £30,000. At the same time the plaintiffs negotiated a contract with their suppliers, Amalgamated Exporters (Steel & Machinery), Ltd. [referred to hereinafter as "Amalgamated Exporters"], for the purchase of six hundred tons of similar material, of which this five hundred tons was to form part, at a price of $190 per ton. On the same day the final contract between Amalgamated Exporters and the plaintiffs was signed. That provided for the purchase of six hundred metric tons at a price of £68 (which I have translated into dollars as $190 per ton):

> "Terms: F.O.B. Benelux port (probably Amsterdam/Rotterdam) for destination Canada. Delivery: August/September, 1956. Payment: By confirmed, irrevocable, transferable and divisible letter of credit in favour of our nominees."

On July 10 a written contract between the plaintiffs and the defendants was signed. It was for five hundred metric tons, eight feet by thirty feet by five-eighths inch, at a price of $205 per ton:

> "delivered F.O.B. Benelux port (probably Amsterdam/Rotterdam) . . . Destination: Canada. Delivery: August/September, 1956. Payment: By confirmed irrevocable letter of credit divisible and transferable and assignable to our nominees in Western Germany. Performance Bond: We are prepared to establish a two per cent. performance bond immediately we receive a pre-advice from your bank that the letter of credit is being established."

On the face of that document it may be a matter of doubt whose was to be the responsibility of finding shipping space and for determining shipping port and shipping date. Prima facie, under an f.o.b. contract that is the duty and responsibility of the buyer, but there are probably as many exceptions to the rule as there are examples of the rule. It appears from a letter, dated July 11, from the defendants to the plaintiffs, that the defendants took the view that the option to select the port of shipment within the limits of Benelux ports lay on the sellers;

but a letter in reply, dated July 12, which is one of the contractual documents, makes it clear, in my view, that the final contract became a classic f.o.b. contract in which the buyer had the right and the responsibility of selecting the port and of making arrangements for shipment and choosing the date of shipment. The relevant paragraph of the letter is the third, which reads:

> " As regards shipment we have discussed the matter with our suppliers and we learn that Antwerp is not a suitable port for them, but they are quite prepared to arrange delivery to Rotterdam, or if necessary Amsterdam, as you may require. We will also arrange to deliver not more than two hundred and fifty tons per steamer. It is understood, of course, that it is your responsibility to obtain the necessary shipping space, and we hope that you will be able to send us calling forward instructions as soon as possible. We are now urgently awaiting either a pre-advice from your bank that the credit is being established, or else the actual credit itself, whichever may be most convenient to you."

Between that date and Aug. 8 there were various telephone conversations between the plaintiffs and the defendants in which the plaintiffs asked for the letter of credit to be opened, and as a result of those conversations they learned that the defendants were having difficulty in obtaining the letter of credit from their buyer, with the consequence that they were not in a position to finance their contract until they got the credit from their buyer. These telephone conversations and requests having failed to obtain any result, and no suggestion having been made by the defendants that it was not their duty to produce the credit, a letter, dated Aug. 8, 1956, was written by the plaintiffs to the defendants in the following terms:

> " Referring to the above-mentioned contract, we must request you to open immediately your letter of credit covering this order, as the mills are pressing us for this most energetically. We regret having to point out to you that in case you should be unable to establish a letter of credit as per the terms of our contract No. 433A, you will have to bear all consequences arising from your failure to adhere to these terms. We hope, however, that everything will be duly attended to by you and no unpleasant situation will arise."

To that letter there was no reply, and in the following days various conversations took place in an endeavour to ascertain what the position was. The plaintiffs, almost immediately, started to offer similar goods for sale at a lower price than the $205 which was the contract price.

No answer having been received to the letter of Aug. 8, the plaintiffs found themselves on Aug. 14 confronted by a demand from their sellers, Amalgamated Exporters, for the opening of their letter of credit, and giving the final date by which this must be opened as Aug. 15. On the same date (Aug. 14), the plaintiffs wrote to the defendants in the following terms:

> " We regret to note that you have neither replied to our letter of Aug. 8, nor have we received any advice of the letter of credit having been established. In view of your failure to adhere to the conditions of the above-mentioned contract we must hold you responsible for all consequences arising out of this and have no option but to place the matter into the hands of our legal advisers."

To that there was a reply on Aug. 15:

> " With reference to the above matter, we wish to advise you that we are still waiting for further news from our customers in connexion with the

> opening of their letter of credit. We will communicate with you again immediately upon receipt of further news from them . . ."

To that the plaintiffs replied on Aug. 16:

> " We acknowledge receipt of your letter of Aug. 15, but regret to say that its contents are not satisfactory. We have no option but to refer you to our letter of [Aug. 14]."

[HIS LORDSHIP read further correspondence between the parties, which was relevant to the plea of waiver put forward by the defendants, and continued:] The first question which I have to decide is the question of law to which I referred in starting this judgment: When was it the duty of the defendants to open the letter of credit or to forward the banker's pre-advice—the alternative of the banker's pre-advice having been put forward in the letter of July 12 from the plaintiffs to the defendants. As has been pointed out in numerous cases, the commercial purpose of a banker's confirmed credit is more than a mere method of payment: it creates a direct liability on the banker, independent of the contract of sale, and is an undertaking by the banker that, if the seller presents the required document in the required time, he will receive payment of the contract price. The commercial importance of this independent undertaking constituted by opening a confirmed credit is illustrated in a recent case in the Court of Appeal, *Malas* v. *British Imex Industries, Ltd.* (1) (ante, p. 262), where the Court of Appeal refused an injunction to restrain the defendants from making use of the credit. I need merely refer to a passage in the judgment of JENKINS, L.J. (ante, at p. 263), where he said:

> " . . . it seems to be plain that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes on the banker an absolute obligation to pay, irrespective of any dispute which there may be between the parties on the question whether the goods are up to contract or not. An elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character, and, in my judgment, it would be wrong for this court in the present case to interfere with that established practice. It has also to be remembered that a vendor of goods selling against a confirmed letter of credit is selling under the assurance that nothing will prevent him from receiving the price. That is no mean advantage when goods manufactured in one country are being sold in another. Furthermore, vendors are often re-selling goods bought from third parties. When they are doing that, and when they are being paid by a confirmed letter of credit, their practice—and I think it was followed by the defendants in this case—is to finance the payments necessary to be made to their suppliers against the letter of credit. That system of financing these operations, as I see it, would break down completely if a dispute between the vendor and the purchaser were to have the effect of ' freezing ', if I may use the expression, the sum in respect of which the letter of credit was opened."

As I have said, a letter of confirmed credit constitutes a direct undertaking by the banker that the seller, if he presents the required documents in the required time, will receive payment; and, where there is a provision in a contract that a confirmed credit is to be provided, then, as was pointed out by DEVLIN, J., in *Sinason-Teicher Inter-American Grain Corpn.* v. *Oilcakes & Oilseeds Trading Co., Ltd.* (2) ([1954] 2 All E.R. 497 at p. 502), the undertaking from the banker should be obtained before the seller embarks on those operations which lead directly to the performance of his obligations under the contract. There is clear authority binding on me that in c.i.f. contracts the confirmed credit must be opened at latest by the beginning of the shipment period. That was decided by the Court of Appeal in *Pavia & Co., S.P.A.* v. *Thurmann-Nielsen* (3) ([1952] 1 All E.R. 492), where SOMERVELL, L.J., said (ibid., at p. 494):

> " When a seller is given a right to ship over a period and there is machinery for payment, that machinery must be available over the whole of that period."

DENNING, L.J., put the matter succinctly in the following words (ibid., at p. 495):

> " The question in the present case is this. In a contract which provides for payment by confirmed credit, when must the buyer open the credit ? In the absence of express stipulation, the credit must be made available to the seller at the beginning of the shipment period. The reason is because the seller is entitled, before he ships the goods, to be assured that, on shipment, he will get paid. The seller is not bound to tell the buyer the precise date when he is going to ship, and whenever he does ship the goods he must be able to draw on the credit. He may ship on the very first day of the shipment period. If the buyer is to fulfil his obligations, he must, therefore, make the credit available to the seller at the very first date when the goods may be lawfully shipped in compliance with the contract."

That, I think, is as far as the binding authorities on c.i.f. contracts go. It is, however, to be observed that in *Sinason-Teicher Inter-American Grain Corpn.* v. *Oilcakes & Oilseeds Trading Co., Ltd.* (2) ([1954] 3 All E.R. 468), in the Court of Appeal, DENNING, L.J., said (ibid., at p. 472):

> " We were referred to *Pavia & Co., S.P.A.* v. *Thurmann-Nielsen* (3). I agree with what DEVLIN, J., said about that case. It does not decide that the buyer can delay right up to the first date for shipment; it only decides that he must provide the letter of credit by that date at latest. The correct view is that, if nothing is said about time in the contract, the buyer must provide the letter of credit within a reasonable time before the first date for shipment. The same applies to a bank guarantee for it stands on a similar footing."

I think that those observations, although entitled to great respect, are obiter and were not necessary for the decision in that case—as, indeed, appears from the judgment of DEVLIN, J., in the lower court, where he referred to the matter ([1954] 2 All E.R. at p. 501) and said that it was unnecessary to decide it. Neither of the other lords justices appears to have expressed any view on the matter.

Those being the cases on c.i.f. contracts, counsel for the plaintiffs (to whom I am much indebted for his researches among the case law) drew my attention to five cases which deal with f.o.b. contracts. They are *Plasticmoda Societa per Azioni* v. *Davidsons* (*Manchester*), *Ltd.* (4) ([1952] 1 Lloyd's Rep. 527); *Trans Trust S.P.R.L.* v. *Danubian Trading Co., Ltd.* (5) ([1952] 1 All E.R. 970); *Etablissements Chainbaux S.A.R.L.* v. *Harbormaster, Ltd.* (6) ([1955] 1 Lloyd's Rep. 303); a cryptic judgment by BAILHACHE, J., in *Dix* v. *Grainger* (7) ((1922), 10 Lloyd's Rep. 496); and, finally, *N. V. Handel My. J. Smits Import-Export* v. *English Exporters* (*London*), *Ltd.* (8) ([1957] 1 Lloyd's Rep. 517). In each of those cases it was either held or assumed that the confirmed credit had to be opened at latest by the shipment date. It does not, however, seem to me that any of them is an authority for the proposition of counsel for the plaintiffs. In *Plasticmoda Societa per Azioni* v. *Davidsons* (*Manchester*), *Ltd.* (4) dates of shipment were fixed—there was not a period of shipment, as in the present case. In *Trans Trust S.P.R.L.* v. *Danubian Trading Co., Ltd.* (5) the provision was that the letter of credit should be opened forthwith. In *N. V. Handel My. J. Smits Import-Export* v. *English Exporters* (*London*), *Ltd.* (8), it was not a classic f.o.b. contract, in that the seller had the duty and responsibility of fixing the shipping; and in *Etablissements Chainbaux S.A.R.L.* v. *Harbormaster, Ltd.* (6) it was rather an exceptional contract, and a manufacturer's contract at that.

The distinction between those cases and the present case is that this is a classic f.o.b. contract in that the buyer is entitled to call for shipment at any time within the shipping period and until the end of the shipping period. The authority for that, if any be wanted, is to be found in *Cunningham, Ltd.* v. *R. A. Munro & Co., Ltd.* (9) ((1922), 28 Com. Cas. 42). It is said, therefore, that there is a distinction to be drawn between a c.i.f. contract and a classic f.o.b. contract, and a distinction to be drawn between a classic f.o.b. contract and those f.o.b. contracts which were the subjects of the cases to which counsel for the plaintiffs referred, namely, that in the classic f.o.b. contract, where the buyer can dictate the date of shipment, the seller is not obliged to commence any of the operations directed to performing his obligations under the contract until he has had shipping instructions or calling forward instructions from the buyer. It was contended by counsel for the defendants that, applying the ratio decidendi in the c.i.f. contract cases (such as *Pavia & Co., S.P.A.* v. *Thurmann-Nielsen* (3)), the time at which the confirmed credit had to be opened was a reasonable time before the shipping instructions took effect. The rival contention by counsel for the plaintiffs was that the credit had to be opened a reasonable time before the earliest shipping date; but in his reply he was prepared to put it as, at the latest, by the earliest shipping date. Counsel for the defendants, on the other hand, said that it must be a reasonable time before the actual shipping date.

As I have said, there is no authority which guides me in this matter. It seems to me, however, that the contention of counsel for the plaintiffs is the sensible one, and, since it is the sensible one, and since there is no authority to the contrary, the one which I am inclined to hold, and do hold, is good law. I am fortified in this view by the fact that it is apparent from the correspondence and from the conduct of the parties in this case (and, so far as one can see, from that of the parties to the other contracts) that it was their view that that was the requirement of the contract. In a trade of this kind, where (as is known to all parties participating) there may well be a string of contracts, all of which are financed by, and can only be financed by, the credit which is opened by the ultimate user, and which goes down the string, getting less and less until it comes to the ultimate supplier, it seems to me that the business sense of the arrangement requires that by the time the shipping period starts each of the sellers should receive the assurance from the banker that, if the seller performs his part of the contract, he will receive payment. That seems to me to have the advantage that there would, at least, be a definite date at which the parties know that they have to fulfil the obligation of opening a credit.

The alternative view put forward by counsel for the defendants, namely, that the date for opening the credit has to be a reasonable time before the actual shipping date, seems to me to lead to an uncertainty on the part of buyer and seller which I should be reluctant to import into any commercial contract. I asked counsel for the defendants, whether when the court had to consider what was a reasonable time (which must depend on the circumstances), it depended on the circumstances known to the parties at the time of the contract, or the circumstances as ascertained later on before the shipping instructions were given, or, as a third alternative, the circumstances as they actually were, whether known to the parties or not. It seems to me that that sort of uncertainty is open to the same criticism which SOMERVELL, L.J., directed to the argument put forward to him in *Pavia & Co., S.P.A.* v. *Thurmann-Nielsen* (3). It was argued in that case that the buyers need not open the credit until the sellers were ready to deliver and had got bills of lading. SOMERVELL, L.J., said ([1952] 1 All E.R. at p. 494):

> " My view is that the suggestion which counsel for the buyers put forward —that the buyers under this form of contract were under no obligation

until a date, which they could not possibly know and which there was no machinery for their finding out, namely, when the sellers actually had the goods at the port ready to be put in the ship—is unworkable."

In the present case, too, the contention of counsel for the defendants was that the buyer's obligation did not arise until a date which the buyer could not possibly know because it was a date which must depend on circumstances, and on circumstances which would not normally be known to the buyer: he did not know, and would not normally know, how long a chain there was between him and the actual manufacturer or stockist; he would not know how long it would take to bring the goods from the place where they were and transport them to the port: he would not know in a case of this kind, and the defendants in this case did not know, whether or not the goods had to be rolled to order or whether they were in stock or whether they were partly rolled. It seems to me that in a case of this kind, and in the case of an ordinary f.o.b. contract financed by a banker's confirmed credit, the prima facie rule is that the credit must be opened at the latest (and that is as far as I need go for the purposes of this case) by the earliest shipping date. In that way one gets certainty into what is a very common commercial contract, and in any other way one can only get a position in which neither buyer nor seller knows what his rights are until all the facts have been ascertained—and it may become necessary for two or three courts to direct their minds to the question whether in all the circumstances that was a reasonable time.

I, therefore, hold that it was the duty of the defendants under this contract to open their letter of credit or to get a banker's pre-advice of it by Aug. 1, 1956, at the latest. That then makes it necessary for me to consider the second line of defence, namely, that the plaintiffs waived their right to treat the contract as repudiated by the defendants when they failed to open their letter of credit within the appropriate time. [HIS LORDSHIP, after reviewing the correspondence between the parties, held there had been no waiver and that the defendants had clearly recognised that the contract had been rescinded. HIS LORDSHIP continued:]

There remains one final matter, namely, the question of damages. In accordance with the judgment in *Trans Trust S.P.R.L.* v. *Danubian Trading Co., Ltd.* (5), in a case of this kind, where there is a string of contracts which, it is known (as it was known in this case), can only be financed by a letter of credit from the ultimate buyer, prima facie the measure of damages is the loss of profit on the transaction, since the defendants must have known that their failure to provide the letter of credit would make it impossible for the plaintiffs to carry out the transaction, just as the failure of the defendants' buyer to provide the defendants with a letter of credit made it impossible for the defendants themselves to carry out the transaction. I think, therefore, that probably the right basis is loss of profit. The matter was pleaded in that way in the alternative by amendment, which I allowed at a late stage on terms that it did not increase the amount of damages recoverable. Counsel for the plaintiffs sought damages on the difference between the contract price, namely, $205 per metric ton, and the market price at the time. He says that the market price at the time was $194, being the price at which Thyssen-Export G.M.B.H. were prepared to buy from his clients on Sept. 14. Counsel for the defendants sought to argue that some higher price represented the market price. I observe that, when the defendants themselves were trying to sell these goods, the asking price was $195 per ton. The asking price in this business, as in other businesses, does not represent a price less than the market price, and I find that the market price here at the relevant time is fairly represented by the figure of $194, which the plaintiffs received. They are, therefore, in my view, entitled to damages in the sum claimed.

[In view of a possible successful appeal, His Lordship decided that a reasonable time before Sept. 30, 1956, for the establishment of the letter of credit, would be three weeks before that date.]

Judgment for the plaintiffs.

Solicitors: *Matthew Trackman, Lifton & Cunnington* (for the plaintiffs); *Rising & Ravenscroft* (for the defendants).

[*Reported by* E. Cockburn Millar, *Barrister-at-Law.*]

PUBLIC TRUSTEE *v.* INLAND REVENUE COMMISSIONERS.

[Chancery Division (Danckwerts, J.), February 4, 13, 1958.]

Estate Duty—Exemption—Interest as holder of an office—Share of income of residuary estate given to trustee for life while a trustee—Death of trustee—Passing under s. 1 *and not under s.* 2 (1) *of the Finance Act,* 1894—*Whether capital of share exempted from liability to duty—Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *s.* 1, *s.* 2 (1) (*b*).

By his will a testator appointed A. and another to be his executors and trustees and directed, among other things, that the income of his residuary trust fund should be paid " As to three equal one hundredth parts of the said income to the said [A.] during his life so long as he shall act as executor and trustee of this my will by way of remuneration for so doing and in addition to any professional charges which he may be entitled to make . . ." The testator also directed that on the failure of any of the trusts thereby declared as to the income of his residuary trust fund, the income which was the subject of those trusts which failed should be added to the income of the trusts which had not failed. On Aug. 31, 1955, A. died and at the date of his death he was in receipt, by virtue of this bequest and accruer thereto of others' shares, of in all $\frac{6}{99}$ of the income of the residuary trust fund. Estate duty was claimed on $\frac{6}{99}$ of the capital of the fund under the Finance Act, 1894, s. 1. The trustee contended that the claim for estate duty was precluded by virtue of s. 2 (1) (b) of the Act of 1894, because A.'s interest was only an interest as holder of an office. It was not disputed that the relevant charging provision was s. 1 and not s. 2 (1) (b) of the Act of 1894.

Held: the liability of the $\frac{6}{99}$ of the residuary trust fund to estate duty by virtue of s. 1 of the Finance Act, 1894, was unaffected by the fact that A. took his interest as the holder of the office of trustee, because the words in s. 2 (1) (b) excluding property on that ground exempted only such property as otherwise would become chargeable by virtue of s. 2 (1) (b).

Earl Cowley v. *Inland Revenue Comrs.* ([1899] A.C. 198), *A.-G.* v. *Milne* ([1914] A.C. 765) and *Sanderson* v. *I.R. Comrs.* ([1956] 1 All E.R. 14) considered.

Observations on the relation of s. 1 and s. 2 of the Finance Act, 1894 (see p. 556, letters D and E, post).

[As to interest in property as the holder of an office, see 15 Halsbury's Laws (3rd Edn.) 38, para. 75; and for a case on the subject, see 21 Digest 46, *297*.

For the Finance Act, 1894, s. 1 and s. 2 (1), see 9 Halsbury's Statutes (2nd Edn.) 348, 350.]

A Cases referred to:

(1) *Cowley* (*Earl*) v. *Inland Revenue Comrs.*, [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. 361; 63 J.P. 436; 21 Digest 7, *27*.

(2) *A.-G.* v. *Milne*, [1914] A.C. 765; 83 L.J.K.B. 1083; 111 L.T. 343; 21 Digest 46, *296*.

(3) *A.-G.* v. *Beech*, [1899] A.C. 53; 68 L.J.Q.B. 130; 79 L.T. 565; 63 J.P. B 116; 21 Digest 7, *26*.

(4) *Re Norfolk* (*Duke*), *Public Trustee* v. *Inland Revenue Comrs.*, [1950] 1 All E.R. 664; [1950] Ch. 467; 2nd Digest Supp.

(5) *Sanderson* v. *I.R. Comrs.*, [1956] 1 All E.R. 14; [1956] A.C. 491; 36 Tax Cas. 239; 3rd Digest Supp.

(6) *A.-G.* v. *Dobree*, [1900] 1 Q.B. 442; 69 L.J.Q.B. 223; 81 L.T. 607; 64 C J.P. 24; 21 Digest 17, *97*.

(7) *Nevill* v. *Inland Revenue Comrs.*, [1924] A.C. 385; 93 L.J.K.B. 321; 130 L.T. 802; 21 Digest 22, *128*.

(8) *De Trafford* v. *A.-G.*, [1935] All E.R. Rep. 219; [1935] A.C. 280; 104 L.J.K.B. 396; 153 L.T. 17; Digest Supp.

(9) *A.-G.* v. *Eyres*, [1909] 1 K.B. 723; 78 L.J.K.B. 384; 100 L.T. 396; 21 D Digest 46, *297*.

(10) *Dale* v. *Inland Revenue Comrs.*, [1953] 2 All E.R. 671; [1954] A.C. 11; 3rd Digest Supp.

Adjourned Summons.

The plaintiff, the trustee of the will of Viscount Northcliffe, deceased, by an originating summons under the provisions of the Administration of Justice E (Miscellaneous Provisions) Act, 1933, s. 3, applied for the determination of the question whether on the death of the late Henry Preuss Arnholz estate duty became payable on a share of the capital of the testator's residuary estate corresponding to the share of the income thereof to which the said Henry Preuss Arnholz was entitled immediately before his death under cl. 6 of the testator's will.

F *John Pennycuick, Q.C.*, and *J. A. Wolfe* for the trustee, the Public Trustee.

Sir Lynn Ungoed-Thomas, Q.C., and *E. Blanshard Stamp* for the Crown.

Cur. adv. vult.

Feb. 13. **DANCKWERTS, J.**, read the following judgment: This is a G case which arises out of the provisions of the late Viscount Northcliffe's will, and the question asked by the originating summons is whether on the death of the late Henry Preuss Arnholz (who was an executor and trustee of the will) estate duty became payable on a share of the capital of the testator's residuary estate corresponding to the share of the income thereof to which Mr. Arnholz was entitled immediately before his death under the terms of the will.

H Lord Northcliffe's will was dated Mar. 22, 1919. He also made three codicils, but I do not think that the provisions of these have any effect on the question which I have to decide. Lord Northcliffe died on Aug. 14, 1922, and his will and codicils were duly proved on Feb. 23, 1923, by the executors therein named. By his will Lord Northcliffe appointed Mr. Arnholz (who was a solicitor) and Sir George Augustus Sutton to be the executors and trustees. By cl. 6 of his will he devised and bequeathed his real and personal estate on the usual trusts for I conversion and the resulting residuary trust fund was directed to be held on trust to pay the net income arising therefrom in each year in the shares and manner directed in the following paragraphs. The direction in cl. 6 (26) was:

> " As to three equal one hundredth parts of the said income to the said Henry Preuss Arnholz during his life so long as he shall act as executor and trustee of this my will by way of remuneration for so doing and in addition to any professional charges which he may be entitled to make in accordance with cl. 23 of this my will,"

Clause 6 (27) directed the payment of seven equal one hundredth parts of the said income to Sir George Augustus Sutton during his life so long as he should act as executor and trustee of the will by way of remuneration for so doing and in addition to the specific legacy given him under cl. 1 of the will. By cl. 6 (28) Lord Northcliffe declared that on the failure (whether in his lifetime or afterwards) of each of the trusts declared respectively by paras. (1) to (27) of that clause of the will the shares or share of income which were the subject of the trust which should have failed (including all additions thereto under the present provision) should be added to the income of such of the said trusts created by such paras. (1) to (27) of cl. 6 of the will as should not have failed and to the last one of such trusts when all but one should have failed and in every case except the last such addition to each trust should be in the proportion which the income then subject to that trust (including income accrued under this present provision) should at that date bear to the income then subject to the others or other of the said trusts which should not have failed (including income accrued under this present provision).

The division of the income into one hundred shares was in fact upset by the addition of provisions for the payment of three more 1/100ths shares by the second codicil dated June 23, 1920. This difficulty was resolved by the decision of RUSSELL, J., on July 28, 1924, that the additional three shares be shared equally with the gifts in cl. 6 of the will so that everyone took so many 1/103 shares instead of 1/100 shares. By cl. 10 of the will the capital of the residuary estate was dealt with by certain charitable gifts. By cl. 19 of the will the testator conferred very wide discretionary powers on his trustees, stating that it was his intention that the said Henry Preuss Arnholz, whom he had known since the testator was ten years old, and the said George Augustus Sutton, whom he had known since 1890, both of whom were well-acquainted with his wishes and intentions with regard to his estate, and in whose business capacity and fairness and integrity he had the fullest confidence, and other the trustees or trustee for the time being of his will should have the fullest freedom of action and the widest and most absolute and uncontrolled discretion in all matters whatsoever relating to the administration of his estate and the carrying out of the purposes of his will.

Sir George Augustus Sutton died on Dec. 7, 1947. A claim to estate duty on the shares of the capital of the estate in respect of which he was receiving the income on the occasion of his death was not made by the Commissioners of Inland Revenue. Mr. Arnholz died on Aug. 31, 1955. Immediately before his death he was receiving the income of 3/49½ shares of capital of the residuary estate. On the occasion of his death a claim has been made by the Commissioners of Inland Revenue that estate duty is payable on those shares of capital under the provisions of the Finance Act, 1894, s. 1. This claim is resisted by the Public Trustee on the ground that Mr. Arnholz's interest in the income received by him under the will was " only an interest as holder of an office " within the terms of s. 2 (1) (b) of the Act of 1894. The claim is substantial, as duty at the rate of fifty-five per cent., amounting to some £80,000, is claimed, and if the claim is well founded duty at the same rate will be payable on Mr. Arnholz's comparatively small free estate of some £25,000.

The provisions of the Finance Act, 1894, s. 1, are as follows:

> " In the case of every person dying after the commencement of this Part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real and personal, settled or not settled, which passes on the death of such person a duty, called ' estate duty ', at the graduated rates hereinafter mentioned, and the existing duties mentioned in Sch. 1 to this Act shall not be levied in respect of property chargeable with such estate duty."

Section 2 (1) provides as follows:

> "Property passing on the death of the deceased shall be deemed to include the property following, that is to say:—(a) Property of which the deceased was at the time of his death competent to dispose; (b) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest; but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole."

Paragraph (c) and para. (d) bring in certain other classes of property or interests which it is unnecessary to mention. Sub-section (2) and sub-s. (3) are, however, limiting provisions, which appear to be of general application under the scheme of the Act. Sub-section (2) excludes in effect from liability to duty property situate outside the United Kingdom unless legacy or succession duty would previously have been payable; and sub-s. (3) excludes generally property held by the deceased as trustee unless it falls within the provisions as to gifts.

It is contended on behalf of the Commissioners of Inland Revenue that (i) in any case the position of Mr. Arnholz does not come within the words of exclusion in s. 2 (1) (b), and (ii) the excluding provision in that sub-section has no application to cases falling within s. 1 of the Act. It is not contested, as I understand, that the shares of the property passed on the death of Mr. Arnholz within the meaning of s. 1.

The relationship of s. 1 and s. 2 of the Finance Act, 1894, has been the subject of discussions in a number of cases in the Court of Appeal and the House of Lords. The view that s. 1 and s. 2 are mutually exclusive has been based on the remarks of Lord Macnaghten in *Earl Cowley* v. *Inland Revenue Comrs.* (1) ([1899] A.C. 198). The short facts of the case were that a father and a son, after disentailing, had mortgaged certain estates to an assurance company to secure £230,000, and had then resettled the estates so that, subject to a charge of annuity for the son during his father's life, the estates were held in trust for the father for life, and after his death for the son, with remainders over. The House of Lords held that the case fell under s. 1 of the Act, and that the property which passed on the father's death was the equity of redemption, without any deduction for the annuity. The view taken in the Court of Appeal seems to have been that s. 2 applied because the father's life interest ceased on his death. Lord Macnaghten pointed out (ibid., at p. 212) that in every case in which property comprised in a settlement passes on death the estate or other limited interest of the preceding owner must have ceased for good and all, and that the passing of settled property was specifically mentioned in s. 1. Lord Macnaghten then proceeded to say (in an often quoted passage):

> "Now, if the case falls within s. 1 it cannot also come within s. 2. The two sections are mutually exclusive. Section 1 might properly, I think, be headed 'With regard to property passing on death, be it enacted as follows'. Section 2 might with equal propriety be headed, 'And with regard to property not passing on death, be it enacted as follows'. I cannot, therefore, agree with Rigby, L.J., when he says that s. 2 is a provision 'explanatory' of s. 1. In my opinion the two sections are quite distinct, and s. 2 throws no light on s. 1. But, then, no doubt s. 2 speaks of 'property in which the deceased . . . had an interest ceasing on the death of the deceased'. And that, it may be said, was just the position of the second Earl with regard to the Mornington settled estates. So it was. But s. 2 does not apply to an interest in property which passes on the death of the deceased. That is already dealt with in the earlier section."

The House, as a whole, were satisfied that the case fell within s. 1 of the Act, though Lord Davey expressed an opinion that the same result was arrived at, whether the case fell within s. 1 or s. 2.

A.-G. v. *Milne* (2) ([1914] A.C. 765) related to a gift of property, which was caught by the provisions of the Finance Act, 1894, s. 2 (1), as amended by the Finance (1909-10) Act, 1910, s. 59. The question was whether the further settlement estate duty imposed by s. 5 of the Act of 1894 applied to property made subject to estate duty by the provisions of s. 2. The decision of the House of Lords was that s. 5 did not apply. Viscount Haldane, L.C., described s. 2 as not a definition section but an independent section operating outside the field of s. 1. Lord Dunedin, though he differed from the other members of the House as to the application of s. 5, and, therefore, dissented, had some interesting remarks to make as to the relation of s. 1 and s. 2. He said (ibid., at p. 774):

> "The paramount enacting section of the Act is undoubtedly to be found in s. 1. I need not quote it. The duty which it is the object of the Act to levy is imposed on property real and personal, settled or not settled, which 'passes' on the death of any person dying after the commencement of the Act. Now, although the word 'passes' is what I may call a neutral or vague word, it is so naturally associated with the idea of 'from' and 'to', and 'on the death', so directs attention to the death of a person who leaves property behind him, that had that section stood alone it is reasonably clear that much property would have escaped which the framers of the Act wished to tax. Accordingly we have s. 2. That section was authoritatively discussed in your Lordships' House in the case of *Earl Cowley* (1). Whether Lord Macnaghten was strictly correct or not in saying that the two sections were mutually exclusive seems to me to matter little. At any rate—and that is all that is material—s. 2 sweeps into the net various things which s. 1 would have failed to secure, or, as Lord Watson put it in the case of *A.-G.* v. *Beech* (3) ([1899] A.C. 53 at p. 59) 'it extends it to all cases where a survivor of the deceased takes a succession, or I should say rather, derives a benefit by reason of the death of the deceased dependent upon and emerging upon the death of the deceased.' How does s. 2 do this? It does not do it by being conceived in the words of a taxing section imposing the duty on certain specified kinds of property. It does it by saying that property passing on the death of the deceased—which is already taxed by virtue of s. 1—shall be deemed to include the property following, that is to say—and then follow the various sub-sections. It seems to me that that is as much as to say that the words, 'property passing on the death,' in the first section, are to be read as if the words 'including the property following, that is to say'—(and then all the sub-sections)—had been there inserted. In other words, I do not think that any one can criticise Lord Macnaghten because in *Cowley's* case (1) he talks of property being 'deemed to pass', although that expression is not actually used. The net result is that the expression, 'property which passes,' in the first section, must include property which is deemed to pass by virtue of the second section—for s. 1 is the only taxing section."

Lord Parker of Waddington observes ([1914] A.C. at p. 779):

> "The second section of the Act, by providing that property passing at the death shall be deemed to include certain kinds of property which do not in fact pass at the death, artificially enlarges the ambit of the expression 'property passing at the death'. It also artificially limits such ambit by expressly excluding certain kinds of property which do in fact pass at the death. It is in no sense a definition section."

By that, of course, Lord Parker means that s. 2 has the effect of removing from liability to tax certain kinds of property on which otherwise the tax would be imposed by s. 1. Accordingly the provisions, at any rate of sub-s. (2) and sub-s. (3) of s. 2 (limiting the property subject to tax) do relate back to s. 1

A and affect the incidence of that section. It is, indeed, not disputed that the limiting provisions in regard to foreign property and property held by the deceased as trustee in these sub-sections have the effect of cutting down the charging provisions of s. 1.

Further comments on these two sections are to be found in *Re Duke of Norfolk, Public Trustee* v. *Inland Revenue Comrs.* (4) ([1950] 1 All E.R. 664), which was B a case of a continuing annuity for more than one life given to persons in succession, held to pass under s. 1, so that duty could not be claimed as on the cesser of an interest, under s. 2 (1) (b), on a slice of the property charged with the annuity. The Court of Appeal considered that they were bound by LORD MACNAGHTEN'S construction of s. 1 and s. 2 in *Earl Cowley* v. *Inland Revenue Comrs.* (1) that, if the case fell within s. 1 a claim to tax could not be made under s. 2 (see per C SIR RAYMOND EVERSHED, M.R., ibid., at p. 666, and per JENKINS, L.J., ibid., at p. 675). But this case does not appear to me to bear very directly on the question I have to decide.

In *Sanderson* v. *I.R. Comrs.* (5) ([1956] 1 All E.R. 14), *Earl Cowley* v. *Inland Revenue Comrs.* (1) and *A.-G.* v. *Milne* (2) were considered by the House of Lords. D A settlor, who died in 1943, had voluntarily settled on trusts for his son and daughter in 1942 shares in a private company. There was no doubt that estate duty had become payable on the shares under s. 2 (1) (c) of the Finance Act, 1894. The question was whether the method of valuation, substituted by the Finance Act, 1940, s. 55 (1), for the provisions of s. 7 (5) of the Act of 1894, applied. The House of Lords held that the section was simply a valuation E section and applied equally to property passing on death under s. 1 and to property deemed to be included by the provisions of s. 2. The relationship of s. 1 and s. 2 of the Act of 1894 is discussed in some detail by LORD RADCLIFFE, and I must read some passages from his speech. He said (ibid., at p. 17):

> " Estate duty is not charged by the Act on two different kinds or classes F of property, property which passes in the natural sense and property which is deemed to pass by virtue of special statutory provision. Strictly speaking, as has often been pointed out, no property at all is ' deemed to pass ' under the Act. What s. 1 provides is that estate duty is to be charged on all property passing on death, whether real or personal, settled or not settled. It offers no other clue as to the meaning to be attached to those words. G What s. 2 provides is that property passing on death is to be deemed to include certain kinds of property or, perhaps more accurately, certain property in certain situations, and is not to be deemed to include certain property in other situations. I have never known it disputed that the exclusion provision, which is contained in s. 2 (3), applies to all property passing, whether it passes under s. 1 simpliciter, or under s. 1 as enlarged or H interpreted by s. 2 (1). But the result of this is that it is s. 1, and no other section, that imposes the charge of estate duty, that the charge so imposed is imposed on property that passes on death and no other property, and that the effect of s. 2 (1) is to give to the word ' passes ', in s. 1, a meaning wider and, if you please, less natural than it would have had if s. 2 (1) had I not been enacted. Personally, I find this approach to the general purport of the Act a more satisfactory method than that of dividing the property charged by the Act into two categories, consisting in the one case of property actually passing and in the other of property notionally passing, categories which the Act itself does not employ."

Then, after distinguishing *A.-G.* v. *Milne* (2) as being a special case, relating to the provisions as to settlement estate duty, LORD RADCLIFFE says (ibid., at p. 19)

> " I do not see that our decision can be said in any way to conflict with those earlier cases. The most that can be said in that connexion is that it will leave unexplained what exactly Lord Macnaghten meant in *Earl Cowley* v. *Inland Revenue Comrs.* (1) when he said of s. 1 and s. 2 ([1899] A.C. at p. 212) ' The two sections are mutually exclusive,' or what Viscount Haldane, L.C., meant in *A.-G.* v. *Milne* (2) by the words ([1914] A.C. at p. 769): ' Section 2 is thus not a definition section, but an independent section operating outside the field of s. 1 '. But, as Lord Macnaghten's words have been a matter of inquiry since the year 1900 (see *A.-G.* v. *Dobree* (6), [1900] 1 Q.B. 442 at p. 450, per Channell, J.), and since Lord Haldane himself gave a substantially different explanation of the relation of the two sections in *Nevill* v. *Inland Revenue Comrs.* (7) ([1924] A.C. 385 at p. 389), when he said: ' The principle is contained in s. 1. Section 2 combines definitions of such property with the extension of the application of the principle laid down in s. 1 to certain cases which are not in reality cases of changing hands on death at all . . .', I think that we may safely resign these passages to the list of the many minor mysteries of the law."

I was also referred to *De Trafford* v. *A.-G.* (8) ([1935] All E.R. Rep. 219), but that case does not seem to me to advance the matter in any way.

From the cases which I have mentioned the following propositions are deducible, it appears: (i) Section 1 of the Finance Act, 1894, is the charging section, and if a case falls within the terms of that section it is unnecessary to refer to the including or extending provisions of s. 2. (ii) None the less the restricting or excluding provisions to be found in sub-s. (2) and sub-s. (3) of s. 2 *do* affect cases which would fall within s. 1. So that foreign property in appropriate cases, and trust property (unless chargeable as a gift) which do pass on a death are excluded from the charge of s. 1.

The question still remains whether the excluding provision which is contained in s. 2 (1) (b) is capable of application to the case of property which passes within the unextended or natural meaning of s. 1 of the Act. For this purpose, it appears to me to be necessary to refer again to the precise words of s. 2 (1) (b). These are:

> " Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest; but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole."

It seems to me that grammatically the second or excluding portion of this provision must refer to the preceding or including part of the provision. The provision is saying that the situation mentioned shall be included in the ambit of the tax, but not so as to bring in cases which are then mentioned. It is not a general provision excluding from liability these cases from the ambit of the Act; it is an exclusion from the extended and artificially included case of certain things to which that artificial provision would otherwise be applicable. Counsel for the trustee has called my attention to some illogical results which this reading of the provisions will cause; but I do not feel that considerations of that kind justify a departure from the plain grammatical arrangement of the words used. Accordingly, it appears that the excluding words in s. 2 (1) (b) do not apply to the present case.

There is also another point which was taken on behalf of the Crown and with which I think that I ought to deal. It is said that the interest which Mr. Arnholz had in the present case under the provisions of Lord Northcliffe's will was not "only an interest as holder of an office"—in the words of the provision in s. 2 (1) (b)—with an emphasis on the word "only".

In *A.-G.* v. *Eyres* (9) ([1909] 1 K.B. 723) the testator had provided for the payment of "an annual sum of £200 each to the trustees or trustee while acting in the trusts by way of remuneration for their services, and in addition to any payments for professional services". CHANNELL, J., held that on the death of an original trustee, the annual sum of £200 did not attract estate duty or settlement estate duty because the interest which the deceased trustee had in the property was an interest only as holder of an office, namely, the office of trustee, within the exception in s. 2 (1) (b). It was sought to distinguish this case on the basis of an argument that in the present case, as the remuneration was not given to all the trustees from time to time and in view of the testator's reference to the personal qualities of Mr. Arnholz and Sir George Augustus Sutton, the benefit received by them was of a personal and beneficial nature and not annexed to their offices as trustees. This argument seems to me quite untenable. No doubt the appreciation of the qualities of Mr. Arnholz and Sir George Sutton by the testator was the reason of his selection of them to be trustees, but the shares of income are given to them by cl. 6 of the will only so long as they act as executor and trustee respectively and by way of remuneration for so doing. I understand that counsel for the Crown desired to keep open for argument in a higher court whether the position of trustee is an office within the meaning of s. 2 (1) (b). But I feel no doubt that it is an office and that Mr. Arnholz and Sir George Sutton received their remuneration in the form of shares of income only as holders of that office. This view is also supported by the decision of the House of Lords in *Dale* v. *Inland Revenue Comrs.* (10) ([1953] 2 All E.R. 671) that the remuneration of a trustee was "earned income"—arising in respect of any remuneration from any office or employment of profit—in regard to the "special contribution" imposed by the Finance Act, 1948. On this point, therefore, the arguments on behalf of the Crown fail.

In my opinion, therefore, the question raised by para. 1* of the originating summons should be answered in the affirmative.

Declaration accordingly.

Solicitors: *Russell & Arnholz* (for the trustee); *Solicitor of Inland Revenue.*

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

---

* This is the question stated at p. 551, letter E, ante.

O'CONNOR v. BRITISH TRANSPORT COMMISSION.

[COURT OF APPEAL (Lord Evershed, M.R., Sellers, L.J., and Harman, J.), January 16, 17, 20, February 13, 1958.]

Carriage by Railway or Canal—Carriage of passengers—Negligence—Infant passenger's fall through door of guard's van—Passengers having to pass through van to reach restaurant car—Door capable of being opened by small child.

Child—Negligence—Railway—Child and mother passengers on train—Duty of mother to look after child—Duty of railway owners to child passenger—Door of train capable of being opened by small child.

On July 24, 1953, a child three years and ten months old and his mother were travelling as passengers on an express train belonging to the defendants. During the afternoon the mother and the child left their seats and, having to wait to get into the restaurant car, which was towards the rear end of the train, waited in a guard's van through which they had had to pass. The van, in which some other people were travelling at the time, was being used as a luggage compartment, the guard being in a similar van at the rear of the train. The door of the van had an internal handle which was especially designed for the convenience of guards and which, therefore, opened more easily than the type of handle fitted in passenger compartments. While the child's mother was standing with her back to the door of the van for a few seconds in order to obtain a light for her cigarette from another passenger, the child opened the door of the van, fell out and was fatally injured. There was no defect in the handle or the lock of the door. The child's father, suing as administrator of the child's estate, brought an action in the county court for damages against the defendants, under the Law Reform (Miscellaneous Provisions) Act, 1934, alleging negligence. At the hearing of the action the case against the defendants was that they were negligent in having a door of a part of a train which was accessible to passengers fitted with an inside handle of the type which could be opened by a small child. From the evidence of a witness called by the defendants, it appeared that the type of handle on the door from which the child had fallen was used only in some guard's vans, and that, except when a train would have to be split later, a guard's van was normally at the rear of the train and, therefore, not liable to be used by passengers while they were passing up and down the train. It was not canvassed in the county court that the position of this van in the train was unusual nor was it established that the possibility of the handles being a cause of danger was a reason why such vans were usually only at the rear of trains. The county court judge held that negligence was not established. On appeal,

Held: the defendants were not shown to have failed in their duty, as carriers of passengers for reward, to take all due care to carry safely, because they were entitled to assume that children of tender years would be accompanied by persons who would take due care in looking after them; and the Court of Appeal would not, on the evidence concerning the position of the van on the train, decide the appeal on a question that was never canvassed in the county court.

Dicta of MONTAGUE SMITH, J., in *Readhead* v. *Midland Ry. Co.* ((1869), L.R. 4 Q.B. at p. 393) and of LORD SHAW OF DUNFERMLINE in *Glasgow Corpn.* v. *Taylor* ([1922] 1 A.C. at p. 61) applied.

Appeal dismissed.

A [**Editorial Note.** This case may well be compared, on the question of any inference to be drawn from the fact that the door of the guard's van was opened or did open while the train was in motion, with *Easson* v. *London & North Eastern Ry. Co.* ([1944] 2 All E.R. 425).

As to the standard of care required of carriers of passengers, and of their duty as to vehicles, see 4 HALSBURY'S LAWS (3rd Edn.) 174, 175, paras. 445, B 447; and for cases on the subject, see 8 DIGEST (Repl.) 75-78, *495-519*, 83-85, *550-573*.]

Cases referred to:

(1) *Ford* v. *London & South Western Ry. Co.*, (1862), 2 F. & F. 730; 175 E.R. 1260; 36 Digest (Repl.) 8, *18*.

C (2) *Barkway* v. *South Wales Transport Co., Ltd.*, [1950] 1 All E.R. 392; [1950] A.C. 185; 114 J.P. 172; 36 Digest (Repl.) 144, *764*.

(3) *Readhead* v. *Midland Ry. Co.*, (1869), L.R. 4 Q.B. 379; 38 L.J.Q.B. 169; sub nom. *Redhead* v. *Midland Ry. Co.*, 20 L.T. 628; 8 Digest (Repl.) 75, *496*.

(4) *Grote* v. *Chester & Holyhead Ry. Co.*, (1848), 2 Exch. 251; 5 Ry. & Can. D Cas. 649; 154 E.R. 485; 8 Digest (Repl.) 96, *636*.

(5) *Phipps* v. *Rochester Corpn.*, [1955] 1 All E.R. 129; [1955] 1 Q.B. 450; 119 J.P. 92; 3rd Digest Supp.

(6) *Glasgow Corpn.* v. *Taylor*, [1922] 1 A.C. 44; 1922 S.C. (H.L.) 1; 91 L.J.P.C. 49; 126 L.T. 262; 86 J.P. 89; 36 Digest (Repl.) 119, *597*.

E **Appeal.**

The plaintiff, Denis O'Connor, appealed from a judgment of His Honour JUDGE BENSLEY WELLS, at Marylebone County Court, dated July 29, 1957, in an action for damages against the defendants, British Transport Commission.

On July 24, 1953, the plaintiff's son, John Gerald O'Connor, then aged three years and ten months, was travelling with his mother on a railway train belonging F to the defendants when he fell out of a door of the train and was fatally injured. The plaintiff, suing as administrator of the estate of his deceased son, claimed (i) damages against the defendants under the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of loss of expectation of life, and (ii) funeral expenses, on the ground that the accident was the result of the negligence of the defendants' servants. G In his statement of claim the plaintiff alleged that as a result of the defendants' negligence his son suffered fatal injuries by falling through and out of a door on the right-hand side of the luggage van on the second coach of the train. In the particulars of negligence the plaintiff alleged failure (i) to warn passengers that it was unsafe to travel or stand in the luggage van, (ii) to employ or instruct a guard or other servant to prevent passengers H from standing in the van, (iii) to lock the doors on the right-hand side of the van, (iv) to fit on to the door a handle and lock of safe design, (v) to fit on to the door of the van a lock that could not be opened except from outside, (vi) to fit on to the door a handle or lock which held secure despite pressure from a person leaning against the door and (vii) to warn passengers by notice or otherwise that the door handles and locks of the van constituted a trap and danger to I children. The defendants by their defence denied negligence and pleaded that it was an implied term of the contract of carriage that the child would travel under the surveillance of his mother and that his mother would not allow him to play with or touch any locks on doors giving egress from the train; and that it was the duty of the child's mother to look after him whilst travelling on the train and to stop him from playing with or touching locks on doors giving egress from the train.

The county court judge dismissed the plaintiff's claim.

H. I. Nelson, Q.C., and *P. J. H. Benenson* for the plaintiff.

A. P. Marshall, Q.C., and *C. W. R. Pickthorn* for the defendants, British Transport Commission.

Cur. adv. vult.

Feb. 13. The following judgments were read.

SELLERS, L.J.: This is an appeal from His Honour JUDGE BENSLEY WELLS, sitting at Marylebone County Court, on July 29, 1957. The claim has arisen out of the sad circumstances that the plaintiff's infant son, aged three years ten months, fell out of a doorway on the Irish Mail while it was travelling from Holyhead to London on July 24, 1953, on the route between Chester and Crewe in daylight at about 4 p.m. The child was travelling with his mother, Mrs. O'Connor, and at Holyhead they had taken their seats in the second coach from the front of the train. During the journey they had left their seats and gone down the train (in a rearwards direction) to have tea in the restaurant car. The train was full and people were obstructing the corridors. As she was required to wait some ten minutes or so for tea, the mother, with her son, came up the train again to a guard's van through which she had just passed on her way to the car. A Mrs. Grehan, with her mother and a baby a year and a half old, were travelling in the van, and Mrs. O'Connor decided to wait there rather than push her way back along the corridors to her compartment. Mrs. O'Connor's account of what happened after she entered the guard's van was accepted by the judge, and was this:

> " I was not holding the child by the hand when we came into the guard's van. The child walked away from me towards the guard's door. I called him back, and he came. I told him not to go near the door. I then asked a lady passenger for a light for my cigarette. She was standing in front of the letter rack on the left-hand side of the van. While she was standing there with her lighter I had my back to the door in question. At that moment I looked round and saw the child with his right hand on the window strap of the door behind me, and he seemed to be going out of the door. He went out head first. The last I saw of him was his feet."

Then she was cross-examined, and she stated:

> " I agree that you always have to keep an eye on a child of that age. It was the first time he had ever been in a train. I called him back from the door, because I realised that the door was a danger. He came back. I was standing just in front of the letter rack on the left of the communicating door when I called the boy back. The whole thing happened in a flash."

The judge found as follows:

> " On the evidence before me I have no doubt at all that this little boy unfortunately opened that door himself; that is why this door opened, because the child interfered with it."

There was evidence that a child of this age might be able to pull down the handle sufficiently to open the door. It was suggested at the trial that the door might have swung open accidentally by someone, presumably the child, being thrust against it. This the judge rejected, and it was not relied on here. There were other complaints which were not relied on either, and I disregard them.

On the judge's finding of how the accident happened, it was alleged—and this is the sole remaining allegation—that the defendants were at fault and were responsible for the accident in having on the lock of the door of the guard's compartment the particular type of handle (a metal vertical handle, two feet from the ground to the bottom of the handle), or in having an internal handle at all. The lock was of the safety type which, if opened slightly, or if not properly pulled to, will rest securely on a latch and will not be released so as to open fully until the handle is lowered to the right between ninety-five degrees and a hundred degrees. The evidence indicated, although the judge made no specific findings, that the coach containing the guard's compartment in which the accident occurred was built in 1938 and had been overhauled and returned to service only a month before this tragic occurrence. The coach had compartments for passengers of both classes and was one of the passenger-carrying coaches of the train. The guard's compartment was in the rear of the coach and served as a luggage van. The guard of the train stated that he was in a similar van towards the end of the train with two coaches behind it, so that two such coaches were on this important main line train. A senior carriage and wagon inspector, Mr. Roe, said that there were more than twenty of such brake van and guard corridor coaches on main line services at the time. He said that the type of internal handle on the door was in use today on some guards' vans and had been since 1930. It was introduced to help the guard in his duties, so that he could get out quickly if necessary, or when carrying something. The type of handle was not in use on other railway vehicles. In the modern passenger coaches internal handles are not fitted at all, and Mr. Roe, in cross-examination, said that this was for safety reasons; but many coaches, it is well known, still have the squeeze type of handle to doors on the inside. These answers were not further pursued, nor were the points which they indicate developed or, apparently, relied on at all. I do not, therefore, feel it would be right to hold that the defendants knew or had any suspicion that the type of handle in the guard's van was in any way unsafe, or that the van in question was old and unsuitable for use on a main line train where it would be used as a thoroughfare by persons who had occasion to move along the corridors to the restaurant car and to a lavatory. The type of handle had been brought into use to assist the guard in his duties, but, as passengers were entitled (and expected) to pass through this compartment, it was necessary that the construction of the handle should have regard to their safety. If it was of such a nature that accidental pressure against it might open it, then it was to be condemned, but after careful inquiry the learned judge rejected this, and rightly so. There was nothing defective in the handle or the lock and there was no evidence or even suggestion that any such accident had occurred or had been contemplated as possible by anyone before.

In these somewhat formidable circumstances, counsel for the plaintiff submitted that the learned judge had misdirected himself in law in failing to impose a sufficiently high standard of duty on the defendants as carriers for reward and had, in effect at least, associated or identified the child with the mother. The judge said:

> " . . . if a mother is taking her child along the corridor of a train she must exercise such control over him that she does not allow him to open doors."

I do not read that as identifying the child with his mother's want of care in the sense of treating her negligence as the child's negligence, but it is an important factor in considering the duty and the alleged breach of duty of the defendants. Counsel for the plaintiff, in the course of his argument, cited this passage from the summing-up by ERLE, C.J., in *Ford* v. *London & South Western Ry. Co.* (1) ((1862), 2 F. & F. 730 at p. 732):

> " The railway company is bound to take reasonable care; to use the best precautions in known practical use, for securing the safety and convenience of their passengers."

Applying that to this case, counsel urged that, as modern passenger-carrying A coaches had no internal handles at all, the defendants failed to comply with modern standards and were, therefore, in breach of their duty. He also referred to *Barkway* v. *South Wales Transport Co., Ltd.* (2) ([1950] 1 All E.R. 392), a case of a passenger in an omnibus which overturned, and submitted that, even if the defendants had complied with the recognised and general practice, that was not necessarily sufficient. It may often prove unreliable or misleading to B extract a sentence from a judgment, still more perhaps from a summing-up to a jury, and to treat it as a complete statement of the law. In *Ford* v. *London & South Western Ry. Co.* (1) ERLE, C.J., was addressing a jury in 1862, and in the course of the summing-up he added (2 F. & F. at p. 733):

> " You are to consider what is reasonable care, and whether they have C used the proper precautions. They are entrusted with most important interests, with human lives, and a jury may reasonably require an amount of care proportioned to those interests. At the same time a jury would not be entitled to expect the utmost care that could possibly be conceived, or the highest possible degree of skill. It is to be borne in mind that railways themselves are of recent introduction, and that their management is a matter D of experience and of practical knowledge which increases day by day. It is not to be expected that the directors shall at once have in use every invention or discovery of science. It is sufficient if they use every precaution in known practical use, for the safety and convenience of the passengers."

The allegations against the defendants in that case, which concerned a train which had run off the line, were, among others, that the tyre of one of the E wheels of the tender was in an improper state and that the gauge between the two lines of metals varied somewhat in places.

In *Barkway* v. *South Wales Transport Co., Ltd.* (2) the complaint was that the omnibus ran off the road because of a defective tyre. In vehicles of either nature, on rail or on road, it is obvious that defective or unsuitable wheels are potentially dangerous and may lead to accidents; likewise, in the case of rail- F ways, a defective or inadequate railroad. These are plainly matters for those in charge of vehicles or railways to guard against and demand high standards of care, and established practices are cogent evidence. In *Ford* v. *London & South Western Ry. Co.* (1), ERLE, C.J., pointed out that railways were then in their infancy, and one can comment that they had not perhaps reached a very high standard of reliability. His words must be read, I think, in relation to G the circumstances then existing, for I do not undertand it to be universal law that every railway or omnibus or taxicab or passenger aircraft undertaking which trades for reward must have the latest standard of design in the way submitted by learned counsel. Economically and practically, it would be impossible and would involve carriers, who were, on one day, apparently fulfilling their obligations, becoming, by some improvement, automatically in H breach of duty to their customers on the next day, or at least within such reasonable time as the improvement could have been known and adopted. If the passage in *Ford* v. *London & South Western Ry. Co.* (1) (2 F. & F. at p. 732), relied on by counsel, is examined more closely, it puts passengers' convenience in the same category as that of their safety, and read literally would seem to require all passenger compartments to have the same facilities. I think that I the emphasis in the address to the jury was in regard to precautions against dangers, and the real questions in such cases are whether there was a danger and whether reasonable care and foresight should have foreseen it and avoided it.

The duty imposed on railway undertakers is, I think, correctly and conveniently summarised from the cases cited in support of the statements in 4 HALSBURY'S LAWS OF ENGLAND (3rd Edn.) 174, para. 445, and in a brief extract from p. 175, para. 447. The statement in para. 445 reads:

> "Carriers of passengers are not insurers of the safety of the persons whom they carry, neither do they warrant the soundness or sufficiency of their vehicles. Their undertaking is to take all due care, and to carry safely as far as reasonable care and forethought can attain that end."

The opening words of para. 447 are:

> "Carriers of passengers are answerable for the soundness and sufficiency of their vehicles, and are liable for any defect which careful and reasonable examination would reveal . . ."

Soundness and sufficiency of vehicles includes suitability of design in relation to safety. To those statements I would add some observations from the judgment of MONTAGUE SMITH, J., in *Readhead* v. *Midland Ry. Co.* (3) ((1869), L.R. 4 Q.B. 379), which is a leading case on this topic. MONTAGUE SMITH, J., delivering the judgment of the six judges sitting in the Exchequer Chamber, said (ibid., at p. 393):

> "We do not attempt to define, nor is it necessary to do so, all the liabilities which the obligation to take due care imposes on the carriers of passengers. Nor is it necessary, inasmuch as the case negatives any fault on the part of the manufacturer, to determine to what extent and under what circumstances they may be liable for the want of care on the part of those they employ to construct works, or to make or furnish the carriages and other things they use. See on this point *Grote* v. *Chester & Holyhead Ry. Co.* (4) ((1848), 2 Exch. 251). 'Due care' however undoubtedly means, having reference to the nature of the contract to carry, a high degree of care, and casts on carriers the duty of exercising all vigilance to see that whatever is required for the safe conveyance of their passengers is in fit and proper order."

This is familiar law with regard to the duty of those carrying passengers for reward, and I can see no indication that the learned county court judge applied any lower or different standard in arriving at the conclusion that the defendants were not in breach of duty.

The defendants, as carriers of passengers, could not, in my view, be held (apart from special agreement) to expect to carry a child under four years of age (or even considerably older) unaccompanied by a responsible person to look after him. If that were within their contemplation and experience, it seems that the defendants' junior counsel used the right term when he said that they would have to make the coaches and the journeys "baby-proof". A train normally swerves, rocks or jolts at some stage of its journey, and a young child could, if unattended, be knocked over or against the framework of the train with considerable risk of injury. In this case the mother said that the child was frightened as they crossed to get between the coaches and clung to her for safety. A train stops at stations, doors are opened, and perhaps not closed until the train is due to leave. An unattended child would be confronted with many dangers, and, indeed, would not know when he had reached his intended destination.

I think that the defendants were required to make provision for the safety of children of tender years on the basis that they would be accompanied by someone capable of looking after them. Ought, then, the defendants to have foreseen that an accident of this kind might occur to a young child accompanied by his mother, that in the course of the journey this handle might be opened by a very young child ? The trial judge thought not, and I agree with him. It is, of course, dangerous to open a carriage door when a train is in motion and highly dangerous to do so when it is travelling at any speed. It is so surprising and shocking to find that a child under four had ever got into the position that he was able to do so that it makes one wonder whether the true cause of the accident has been established; but no other explanation is forthcoming. The door could have been locked, no doubt, and that would have shut passengers in; but an emergency might have arisen when passengers might wish to get out quickly and a locked door would have prevented it and might well have been the subject of complaint. The absence of an internal handle may have its difficulties if an urgent exit is necessary on train or omnibus. The case reveals a most regrettable accident, but I agree with the judge in holding that it would be putting too high a duty on the defendants to find them responsible here. It would, in substance, be making them insurers of the child's safety and they are not so in law. I would, therefore, dismiss the appeal.

HARMAN, J.: Counsel for the plaintiff, in opening this appeal, was content to rest his case on one point, a point of law. His submission was that the learned county court judge had misdirected himself on the degree of liability of a common carrier. He would have us hold that his duty is in a category higher than that of an invitor towards his invitee, and that it lay in a territory between that and the duty of an insurer—lower than the latter, admittedly, but higher, he submitted, than the former. The learned judge based himself on *Phipps* v. *Rochester Corpn.* (5) ([1955] 1 All E.R. 129), a case of an invitee or licensee, and, therefore, rejected the submission that the fact that there was a contract of carriage for reward sufficed to heighten the degree of obligation. He himself observed, after giving judgment, that he based himself on the law, the facts being, as he thought, " so obvious ".

There were, then, in the county court no disputed facts. The real bone of contention was whether, in putting a coach of this sort in a position between dining car and passenger coaches, the defendants had fallen below the standard required of them, and what that standard was. In this court there emerged a point which, so far as appears, was never agitated in the county court at all and which, therefore, could not have been an element operating on the judge's mind. The point is this. The evidence showed that it is unusual to put a coach of this type in this position. It is a type which cannot be called antiquated, but it is obsolescent, none having been made since 1946. The door handle was especially designed for the convenience of guards, to enable them to leave the train easily with one hand full, and, therefore, the door can be opened—and this is its avowed purpose—much more easily than the " squeeze " type of door handle. Further, the evidence shows that in passenger corridors internal handles have been altogether abolished, and that for safety reasons. If, then, it could be established that the defendants do not ordinarily put this type of coach anywhere except at the end of a train because it was realised that this handle constitutes a danger to passengers, there would, I think, be a strong case to be made against them. This was the point which caused the court some anxiety, but it was, as I have said, never canvassed in the court below. The defendants' witnesses were never questioned on the point. Their evidence is consistent with the view that these coaches are not usually in the middle of a train, not because they are considered unsafe, or because of the unsuitability of this particular form of door handle, but because this is a generally unsuitable form of coach in a position where it must be used as a corridor. In my judgment there is nothing to justify this court in taking, in effect, a different view of the facts from that taken below: we should be inventing a point never considered and on which neither the plaintiff nor the judge relied.

The true question for us is that presented by counsel for the plaintiff: Did the judge take too lenient a view of the defendants' obligations and thus misdirect himself ? On that I am content to say that I agree with the observations of SELLERS, L.J. This was not, after all, a part of the train where passengers were invited or even authorised to linger. The type of door handle was well suited to the proper use of the coach, namely, as a guard's or luggage van, and it was not suggested that the handle was in any way defective, nor was it proved that the door could be opened by pressure or by anything short of turning the handle through an angle of more than ninety degrees. It seems to me that the concluding words of the passage cited by the judge from the speech of LORD SHAW OF DUNFERMLINE in *Glasgow Corpn.* v. *Taylor* (6) ([1922] 1 A.C. 44 at p. 61), cited by DEVLIN, J., in *Phipps* v. *Rochester Corpn.* (5) ([1955] 1 All E.R. at p. 139), may properly be used to decide the present case. Both the parent and the defendants must act reasonably. As LORD SHAW said ([1922] 1 A.C. at p. 61), at the end of the passage cited by the judge: " This duty rests upon both and each; but each is entitled to assume it of the other." This was a tragic case, but, in my judgment, it was not reasonable to leave a child under four years of age, who had never been in a train before, the liberty to wander across the carriage when the mother was aware of the temptation and the danger of the door. This is what she did: the defendants, in my judgment, were entitled to assume that she would not act in this way, and, therefore, are not liable for the lamentable result.

LORD EVERSHED, M.R.: I am in full agreement with the judgments which my brethren have delivered on the question of the principle of law to be applied. I agree with them that there is no special formula which imposes on the defendants, the British Transport Commission, as a common carrier of passengers, a standard of liability towards them falling somewhere between that of an insurer and that of an invitor. The standards of reasonableness and foreseeability are, I think, applicable here as they are applicable to the invitor. The practical result, however, is to be judged in the light of the circumstances attendant on the carriage of passengers by rail. The defendants offer to carry large numbers of persons of both sexes and of all ages and dispositions in trains which are frequently crowded and which are apt to be travelling at high speeds. To fall from a fast-travelling train means, almost certainly, death. Therefore, it is truly said that there is required a high standard of care to see that the trains and their component parts are free from defects. Doors in the compartments or corridors which are liable to fly open on a touch, or during the jolting of the train, would inevitably and properly involve the defendants in liability for the consequences of their doing so. There is here, however, on the judge's finding, no question of any defect; nor was the door handle in question of such a kind that it could be accidentally opened by some impact from a passenger. It was the first point preferred by counsel for the plaintiff in this court, and appears to have been the main argument in the court below, that the defendants were liable on the ground that it must be a breach of their duty of care to have in any part of the train, to which passengers had access in the ordinary course, doors capable of being opened (though in all other respects of proper design and construction) by a small child of three or four years of age. I agree with the county court judge and my brethren that this proposition ought not to be sustained; for I agree with them that the defendants are entitled to assume that a child of three or four years old, travelling with his mother, will be properly looked after by her.

If, therefore, there were no more in the case, I should be content to express my agreement with my brethren; but what has troubled me so much—and more, I think, than it has troubled them—is a certain passage in the evidence given on the defendants' behalf. The witness was a Mr. Roe, now senior carriage and wagon inspector at Manchester. At the date of the accident he was carriage and wagon inspector at Crewe, and met the train, from which the child had fallen, on its arrival at Crewe. Mr. Roe is recorded to have said in examination-in-chief that the type of internal door handle fitted to the coach from which the child had fallen was in use today on some guard's vans, but was not used on other railway vehicles; and that it had been introduced in 1930 (that is, for guard's vans) because it was quicker and easier to open from inside, a matter of importance, on occasions, for railway guards. Mr. Roe's evidence in cross-examination and re-examination (according to the judge's note) was as follows:

> " The internal handle is not fitted to passenger coaches for safety reasons. As far as I can recollect, the ordinary luggage van[s] through which passengers may have to pass to get from one part of the train to another are fitted with doors with no internal handles. These vans are not normally used in passenger trains . . . *Re-examined:* The coach of the type in question always had the corridor in the brake van. It is not common practice to insert coaches of this type into a train in such a way as to cause passengers to pass through the brake van. It is done, and has to be done, on some occasions, e.g., when a train is to be split into two at, say, Crewe; then one such coach is inserted into the middle of the train and when the train is split it is split before this coach. While such a train is being used as a whole, the middle brake van must be used as a corridor."

If the judge's note correctly records the witness's evidence, and if I am free to draw such deductions from that evidence as its language in its context seems fairly to justify, then it would appear to me that Mr. Roe could be taken as stating: (i) that the use of internal handles (other, at any rate, than " squeeze " handles), in any compartment used in the ordinary course by travelling passengers, had, at the relevant date, come to be regarded by the defendants as involving avoidable risk, that is, through being opened by careless or mischievous persons, and had for that reason been, at the relevant date, wholly discontinued in such compartments; (ii) that such handles continued, however, to be used in guard's vans because they could be quickly and easily opened by the guards; and (iii) that guard's vans were normally at the rear end of trains, and, therefore, not liable to be used by passengers in moving up and down the trains (for example, for going to and from the restaurant cars); although sometimes, where a single train had later to be split, a guard's van would be placed at the appropriate place in the middle of the train. Ought Mr. Roe further to be taken as having said: (iv) that the use of a coach having an internal handle of the kind in question—a coach which, be it observed, was not a guard's van properly so-called, but consisted of a number of ordinary passenger compartments with a corridor, having the brake van at its end so that it constituted or contained part of the corridor—was not in accordance with normal practice ? If all this is what Mr. Roe said, and, more particularly, if No. (iv) above is justified, then it seems to me that it further could be fairly inferred that the placing of the coach here in question in the position in which it was constituted a departure from the practice which, for safety purposes, was commonly adopted. In other words, the use of this coach (with an internal handle designed specially for easy opening by a guard) as part of the corridor accommodation of the passengers was a use which was abnormal, because it was regarded as involving exposure of the passengers to a foreseeable, and avoidable, risk: and no explanation or justification was given for the departure from normally accepted practice.

Counsel for the plaintiff much relied on the passage from the direction given to the jury by Erle, C.J., in *Ford* v. *London & South Western Ry. Co.* (1) ((1862), 2 F. & F. 730 at p. 732), which was cited by Sellers, L.J., but which, because of its importance, I also cite here:

> " The railway company is bound to take reasonable care; to use the best precautions in known practical use, for securing the safety and convenience of their passengers . . . They are entrusted with most important interests, with human lives, and a jury may reasonably require an amount of care proportioned to those interests. At the same time a jury would not be entitled to expect . . . the highest possible degree of skill . . . their [the railways'] management is a matter of experience and of practical knowledge

> A which increases day by day. It is not to be expected that [they] shall at once have in use every invention or discovery of science. It is sufficient if they use every precaution in known practical use, for the safety and convenience of the passengers."

The case cited was one concerning a defect in the railway apparatus. The
B language is, however, of general authority. On the other hand, it is, in my judgment, clear (and implicit, indeed, in the language of ERLE, C.J.) that a decision to abandon a particular design of coach in favour of a newer model by reason of a risk of danger appreciated or apprehended in the former, does not of itself demand the immediate and total withdrawal of the first class of vehicle. The actual operation of the railway services must, to some extent, be subject
C to the exigencies of ordinary and prudent management. In the present case, however, as I have said, no explanation or justification was given in evidence of what (if Mr. Roe's evidence may fairly be interpreted in the full sense set out above) was regarded at the time as a departure from normal (and safe) practice. If, therefore, the matter rested with me, and if it were permissible to give to Mr. Roe's evidence the full significance above suggested with all the
D inferences to be drawn therefrom, I think that I should be disposed to come to a conclusion in the plaintiff's favour. But it is pointed out by my brethren that this view of the facts does not appear to have been put to the learned judge. There is no hint of it in his judgment and no findings of fact comparable to those which I have adumbrated. Nor was this aspect of the case put to us by counsel for the plaintiff in his opening. It is, therefore, the view of my
E brethren that to draw the conclusions which, I have suggested, might be derived from Mr. Roe's evidence is to invent a case: to assume, without any warrant in the judgment of the judge who heard the witnesses, what the evidence really was. In all the circumstances, although I have thought it right to express the serious doubts which I have felt and the reasons for them, I do not, on the whole, desire to dissent from my brothers' conclusion in favour of dismissing
F the appeal.

Appeal dismissed.

Solicitors: *Claude Barker & Partners* (for the plaintiff); *M. H. B. Gilmour* (for the defendants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

NOTE.

R. *v.* BASTIAN.

[Central Criminal Court (Donovan, J., and a jury), January 29, 1958.]

Criminal Law—Capital murder—Diminished responsibility—Plea of guilty withdrawn—Insanity not alleged by accused but defence of diminished responsibility put forward—Prosecution entitled to adduce evidence of insanity—Onus of proof—Homicide Act, 1957 (5 *&* 6 *Eliz.* 2 *c.* 11), *s.* 2.

[As to the defence of insanity, see 10 Halsbury's Laws (3rd Edn.) 287, 288, paras. 530, 531 and p. 437, para. 810.

For the Homicide Act, 1957, s. 2, see Halsbury's Statutes (2nd Edn.) Interim Service, 19.]

Trial on indictment.

The accused was charged on an indictment containing two counts. The first count charged that on Dec. 18, 1957, he murdered his son, Stephen Bastian; the second count charged that on the same date he murdered his son, Francis Bastian. When arraigned the accused pleaded guilty to both counts, but after discussion between counsel and the judge that plea was withdrawn and a plea of not guilty entered on each count.

At the close of the case for the prosecution, and in the absence of the jury, counsel for the accused said that he had no instructions from the accused to put forward a plea of insanity, but that he was authorised to call the court's attention to circumstances which might bring about the application of the Homicide Act, 1957, s. 2, and so he proposed to call medical evidence to prove the defence of diminished responsibility. Counsel for the Crown said that once the state of a man's mind was in issue he (counsel) could not be stopped from inquiring from the witnesses for the defence whether that mental state did not go further and become insanity. Therefore, subject to the ruling of the learned judge, he proposed to tender medical evidence in rebuttal from the prison doctor who would say that the mental state of the accused was much more than one of diminished responsibility and amounted to insanity.

Christmas Humphreys and *J. M. G. Griffith-Jones* for the Crown.
F. H. Lawton, Q.C., and *R. H. K. Frisby* for the accused.

DONOVAN, J., ruled that where the defence put in issue the state of a man's mind by raising a plea of diminished responsibility, and where the prosecution believed that they had evidence that he was insane at the time, the court could not stop the prosecution from cross-examining the defence witnesses and calling evidence to invite the jury to return a verdict of guilty but insane.

Medical evidence was then called for the accused and the prison doctor was called by the Crown in rebuttal. Counsel for the accused asked for a verdict of manslaughter and counsel for the Crown for a verdict of guilty but insane.

DONOVAN, J., directed the jury that there was no dispute about the fact that the accused did kill his children, and the issue to be decided, therefore, was not whether he killed them, but whether he was insane at the time when he committed the act or whether his mind was so affected by some disturbance that his responsibility was diminished. In that case the proper verdict was a verdict of manslaughter.

[The jury found a verdict of manslaughter on both counts and the accused was sentenced to imprisonment for life.]

After the prisoner had left the court, Donovan, J., said that it had occurred to him after he had summed up that in any case where the prosecution contended that the accused's state of mind amounted to insanity and not merely to diminished

A responsibility it would be proper to direct the jury that it was for the prosecution to satisfy the jury that the state of the accused's mind went beyond what the defence contended and amounted to insanity.

Solicitors: *Director of Public Prosecutions* (for the Crown); *W. Timothy Donovan* (for the accused).

B [*Reported by* T. J. KELLY, ESQ., *Barrister-at-Law.*]

C

COX *v.* COX.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Collingwood, J.), January 15, 16, 31, 1958.]

Magistrates—Desertion—Reasonable and honest belief of adultery exonerating husband—Reasonableness of belief.

D *Divorce—Desertion—Defence—Reasonable belief in deserted spouse's adultery—Belief induced by conduct—Reasonableness of belief.*

The parties were married in 1954 and the wife continued to be in employment during the marriage. In May, 1957, the husband overheard a conversation between the wife and his sister in which the wife stated, in effect, that a man at her place of employment had shown affection for her and E that while waiting at the canteen for the works truck to take her and the other employees home she had embraced him in the daytime to an extent which produced sexual excitement, and that their conduct had led to jests by fellow employees. After hearing this conversation, the husband withdrew from cohabitation with the wife. On a complaint by the wife that he had deserted her the husband alleged that he honestly and reasonably F believed that she had committed adultery. The justices accepted his evidence and dismissed the complaint

Held: the husband was guilty of desertion since, as he had no evidence of opportunity for his wife to commit adultery, his belief in her adultery was not founded on reasonable grounds.

Glenister v. *Glenister* ([1945] 1 All E.R. 513) considered.

G Per CURIAM: it would be going further than is warranted by the reasoning on which the decision in *Glenister* v. *Glenister* ([1945] 1 All E.R. 513) is based to hold that a husband would be justified in leaving his wife on the belief that she had been cruel to him, or that she had given him some other ground of complaint which he reasonably believed would afford him the right to leave her.

H *Haswell* v. *Haswell & Sanderson* ((1859), 1 Sw. & Tr. 502) distinguished.

Appeal allowed.

[As to honest and reasonable belief constituting just cause for separation, see 12 HALSBURY'S LAWS (3rd Edn.) 257, para. 485, note (o); and for cases on the subject, see 27 DIGEST (Repl.) 367, *3040-3042*.]

Cases referred to:

I (1) *Sullivan* v. *Sullivan*, [1956] 1 All E.R. 611, n.; 120 J.P. 161; 3rd Digest Supp.

(2) *Glenister* v. *Glenister*, [1945] 1 All E.R. 513; [1945] P. 30; 114 L.J.P. 69; 172 L.T. 250; 109 J.P. 194; 27 Digest (Repl.) 367, *3040*.

(3) *Allen* v. *Allen*, [1951] 1 All E.R. 724; 115 J.P. 229; 27 Digest (Repl.) 84, *633*.

(4) *West* v. *West*, [1954] 2 All E.R. 505; [1954] P. 444; 3rd Digest Supp.

(5) *Haswell* v. *Haswell & Sanderson*, (1859), 1 Sw. & Tr. 502; 29 L.J.P. & M 21; 1 L.T. 69; 23 J.P. 825; 164 E.R. 832; 27 Digest (Repl.) 444, *3759*

Appeal.

This was an appeal by the wife against an order of the Tisbury and Mere justices dated Oct. 7, 1957, dismissing her complaints against the husband of desertion, persistent cruelty and wilful neglect to provide reasonable maintenance for herself and the child. The facts appear in the judgment of the court.

J. F. E. Stephenson for the wife.

D. Tolstoy for the husband.

Cur. adv. vult.

Jan. 31. **COLLINGWOOD, J.**, read the judgment of the court: This is a wife's appeal from a decision of the justices for the petty sessional division of Tisbury and Mere, sitting at Tisbury, whereby they, on Oct. 7, 1957, dismissed her complaints that her husband had (i) deserted her on June 22, 1957; (ii) been guilty of persistent cruelty to her, and (iii) been guilty of wilful neglect to provide reasonable maintenance for her and the infant child of the marriage. At the same hearing, a summons by the husband for the custody of the child under the Guardianship of Infants Acts, 1886 and 1925, was adjourned, and this was dealt with on Oct. 17, 1957, together with a cross-summons for custody by the wife under the same Acts and an order was made in her favour for 30s. weekly for the child's maintenance. The present appeal relates only to the dismissal of the complaints of desertion and wilful neglect to maintain. There is no appeal from that part of the decision relating to the charge of persistent cruelty.

As to the desertion, the wife alleged that the husband had withdrawn from cohabitation, though the parties remained under the same roof, and the case was conducted before the justices, and before this court, on the assumption that the circumstances in which the parties were living as from June 22, 1957, amounted to desertion by the husband, unless he could satisfy the court that he had a bona fide and reasonable belief, induced by her conduct, that his wife had committed adultery. It is unfortunate that no notice of the nature of the case against the wife was given prior to the hearing before the justices. That such notice should be given has been pointed out in a number of cases, including *Sullivan* v. *Sullivan* (1) ([1956] 1 All E.R. 611, n.). Here the first intimation of the line of defence appeared in the cross-examination of the wife, and while it is true that the case was not completed on the first day (Oct. 3), but adjourned part heard until Oct. 7, so that the element of surprise was to that extent diminished, nevertheless the case was not opened or presented on the wife's behalf as it would have been had such notice been given, and one of the grounds of appeal as originally drawn arose out of this, though the matter was not pressed before this court.

The justices found that the husband had proved that he had a bona fide belief that his wife had committed adultery, that he had withdrawn from cohabitation because of that belief, and that he had reasonable grounds for so believing. The grounds of appeal are that these findings are against the weight of the evidence. The facts, so far as it is necessary to state them for the present purpose, are as follows. The parties were married on Feb. 27, 1954, the wife being then eighteen years old, the husband twenty-four. There is one child, Stephen, born on June 6, 1956. After the marriage they lived with his parents for a few weeks, after which they obtained a house at Zeals in Wiltshire. The wife was in employment at the time of the marriage, and continued to work after it. The husband is employed as a lorry driver. It is common ground that the marriage was unhappy from shortly after its beginning. The wife complained that her husband consistently neglected her, adopted a domineering attitude towards her, continually complained of her deficiencies as a housewife, though giving her little or no assistance, frequently abused and threatened her, and on occasions assaulted her. The husband agreed that he did complain, and said that he had good cause for so doing, alleging that she did not look after the house, but allowed it to get into a filthy condition; did not look after him, as regards his meals or mending, and neglected the child in regard to his feeding, care and general supervision. He said in evidence that she was no good as a wife or a mother, and admitted having struck her twice, and further that he had told her many times that he had no love for her, and that she got on his nerves. Shortly after the birth of the child, in June, 1956, the husband's sister, Mrs. Oliver, came to live with them, bringing with her two children of her own, and a coloured boy to whom she was acting as foster-parent with a view to adopting him. Mrs. Oliver remained with them until July 19, 1957, and while she was there she did the bulk of the housework, and looked after the child Stephen while the wife was away at work, which was from about 6.30 a.m. to 6.30 p.m. during the week.

In May, 1957, the husband ceased to have intercourse with his wife, moving into a separate room. He did so, he says, because of certain statements which he overheard his wife make to Mrs. Oliver. There were two conversations involved, the first taking place in December, 1956, when he says he heard his wife speak of a fellow-employee, one Hall, saying that he was very handsome, and that he had said that he wished that he and she (the wife) could spend more time alone, and that he was in love with her. The wife added that she thought that he really meant it. The husband said he did not think much about this conversation, though later, in cross-examination, he said he was " suspicious ". He said that it was the second conversation which made him cease to sleep with his wife. This was in May, 1957, when he heard her tell his sister that her workmates waiting in the queue for the truck, used to convey them from the works where she and Hall were employed, had said to her " Come on Joyce, we've got homes to go to, even if you haven't ". She added that she had been kissing and cuddling Hall in the adjoining canteen, and had made Hall "conscious of himself ", and that the other drivers had said to Hall " put a coat over it, Stan ", a remark which she had subsequently repeated (she said) as a joke. Mrs. Oliver did not discriminate between the two conversations. Her version was that the wife told her that she and Stan Hall had got to the stage of kissing and cuddling in the canteen or shed; that Hall loved her; that he used to hang back (that is, delay his departure) so that she could kiss him, and that she had made him conscious that he was a man, and that his mates had told him to put a coat over himself.

The wife in cross-examination agreed that she had mentioned Hall to Mrs. Oliver, but denied having said that Hall loved her, or that she had been kissing and cuddling in the canteen. Some two days after hearing this conversation the husband spoke to the wife about it, and he says that her reply was that Hall was just a driver at the works—there was nothing in it—they were all as bad as one another, and it was not true. He says that she then added " a slice off a cut loaf is never missed ", a remark which the wife agreed she had made, but said it was at another time, and not in connexion with Hall. The husband then said to his wife " You have been having dealings with this man Hall ", to which she replied that Hall was a decent man and devoted to his wife and daughter. The husband consulted a solicitor, and thereafter, he says, he acted on the solicitor's advice.

The principle invoked by the husband in this case is that laid down in *Glenister* v. *Glenister* (2) ([1945] 1 All E.R. 513), in which case LORD MERRIMAN, P., said (ibid., at p. 518):

> " If the wife has so conducted herself as to lead any reasonable person to believe, until she gives some explanation, that she has committed adultery, the husband, becoming aware of the facts and honestly drawing that inference and leaving his wife on that ground ought not to be held to have left her without reasonable cause."

This decision has been followed frequently in this court and the principle has been approved by the Court of Appeal in *Allen* v. *Allen* (3) ([1951] 1 All E.R. 724) which was itself explained in *West* v. *West* (4) ([1954) 2 All E.R. 505).

The first question which arises is: Does the evidence support the justices' finding of fact that the husband withdrew from cohabitation because he honestly believed that his wife had committed adultery? The husband said in evidence "I thought she was having intercourse with Hall", and that he ceased to have intercourse with his wife because of the conversation which he overheard in May, 1957, and the justices accepted his evidence. It was urged on behalf of the appellant wife that on his own admission the husband had lost all interest in and affection for his wife long before May, 1957; that he regarded her as no good as a wife or a mother, and that what he did was to seize with avidity on an excuse to be rid of her. Be that as it may, we do not think that we can say there was no evidence to justify the finding of the justices on this point. The circumstances referred to, however, as to the husband's state of mind, are not without relevance to the second question, viz.: was his belief that of a reasonable man, and was it based on reasonable grounds?

His belief was founded, and founded solely, on what he had heard his wife say to his sister, together with his wife's subsequent conversation with him. The wife's statement to her sister-in-law amounts to this: that the man Hall had evinced an affection for her; that she was gratified by his attentions, and had indulged in kissing and embracing with him, to an extent which had avowedly produced sexual excitement. This had taken place in the daytime, in the canteen at the works where both were employed, at a time when, with others, they were waiting for the truck, and in circumstances in which their conduct was obvious to a number of fellow-employees, who had been moved to ribald jests. There was no evidence of any association between the two at any other time or place. In our opinion the circumstances above described preclude the commission of adultery there and then. We were invited to hold that the wife's behaviour, as disclosed in her conversation with her sister-in-law, showed that she had an inclination to commit adultery, and that her hours of absence from home of necessity afforded an opportunity of indulging that inclination. But assuming, as we are prepared to assume, that what the wife said did amount to evidence of inclination to commit adultery, as distinct from a mere willingness to indulge in amorous dalliance falling short of adultery, we do not think that the necessary element of opportunity to indulge the inclination can be left to be inferred in the absence of any evidence to support it.

In our opinion the evidence in the husband's possession as to his wife's conduct was not such as to afford reasonable grounds for believing that she had committed adultery. He was disposed to put the worst construction on anything she said or did, but the test of reasonableness is an objective one. We were invited by counsel for the husband to say that if the evidence did not disclose reasonable grounds for believing that the wife had committed adultery then nevertheless her conduct was in itself such a grave and weighty matter as to justify the husband in leaving her, and in support of this contention we were referred to *Haswell* v. *Haswell & Sanderson* (5) ((1859), 1 Sw. & Tr. 502). This was a petition by a husband by reason of his wife's adultery. The marriage had taken place without the knowledge of the parents of either party, and the wife continued to live with her mother, where the husband visited her from time to time. On one such visit he discovered his wife in a room upstairs with a man who had his arm round her and his hand on her breast. After consideration he decided to have nothing more to do with his wife and never again visited her mother's house.

Subsequently the wife cohabited with another man, and there was no doubt as to her adultery with him. The decision turned on the construction of s. 31 of the Matrimonial Causes Act, 1857*, which provided (omitting words which have no relevance to the case):

---

* See now the Matrimonial Causes Act, 1950, s. 4 (2): 29 HALSBURY'S STATUTES (2nd Edn.) 394.

A
> ". . . the court shall not be bound to pronounce such decree . . . if the petitioner shall, in the opinion of the court, have been guilty of . . . having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without any reasonable excuse."

The court held that the husband having found his wife submitting to indecent liberties had on that ground never returned to her mother's house where she B resided. The Judge Ordinary (SIR CRESSWELL CRESSWELL) continued (ibid., at p. 505):

> "It is not necessary for the court to say that this would have justified him in turning her out of his house; that it would have enabled him to resist an action of debt for necessaries supplied her; or would have been a sufficient C answer in a suit for restitution of conjugal rights. But the question is, whether we are in a position to exercise a discretionary power. The adultery has been fully proved, and we cannot say that the petitioner comes within the description of a person 'wilfully separating himself without reasonable excuse'. The discretionary power therefore does not exist. The petitioner is entitled to a decree."

D With regard to this decision it is to be noted that the Judge Ordinary expressly refrained from deciding whether the wife's conduct was such as to justify the husband in turning her out, or would have afforded an answer to a suit for restitution. Further, the circumstances differ considerably from those in the present case. In *Haswell* v. *Haswell* (5) the wife was found in the home indulging in an act of sexual familiarity.

E However that may be, we are not considering whether or not the facts in *Haswell* v. *Haswell* (5) would bring the case within the principle laid down in *Glenister* v. *Glenister* (2). We think that, because of the nature of the offence of adultery, the principle of that case should not be extended beyond its proper scope. For example, it would be going further than is warranted by the reasoning on which the decision in *Glenister* v. *Glenister* (2) is based to hold that a husband F would be justified in leaving his wife on the belief that she had been cruel to him; or that she had given him some other ground of complaint which he reasonably believed would afford him the right to leave her. It is sufficient to say that we do not think that it would be right in this case, despite the wide terms of the Matrimonial Causes Rules, 1957, r. 73 (7), to decide the case on an entirely new issue which was never adumbrated in the court below, and which G involves a finding of fact as to which no evidence was given. The husband's case from first to last was that he left his wife because he believed that she had committed adultery. In our opinion that was not a reasonable belief, and we do not think we ought now to enter into a consideration of the further question whether he would have been justified in leaving her, without his having drawn the unjustifiable inference to which he himself ascribes the separation. The H appeal is therefore allowed.

LORD MERRIMAN, P.: The result is that the appeal is allowed, the wife's complaint of desertion will be held to be proved, and the case remitted to the magistrates to assess the amount of maintenance, if any, as from Oct. 7, 1957.

Appeal allowed.

Solicitors: *Butt & Bowyer*, agents for *Rutter & Rutter*, Wincanton (for the wife); *Markham Thorp & Co.*, agents for *Farnfield & Nicholls*, Gillingham, Dorset (for the husband).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

HOLLAND *v.* ONG.

[COURT OF APPEAL (Hodson and Pearce, L.JJ., and Upjohn, J.), February 13, 14, 17, 1958.]

Rent Restriction—Decontrol—Rateable value—Flat and garage assessed for rates on Nov. 7, 1956, *as one hereditament—Division of assessment on tenant's proposal—Alteration having effect before Nov.* 7, 1956—*Whether alteration of rateable value effective for determining question of decontrol—Validity—Rent Act*, 1957 (5 *&* 6 *Eliz.* 2 *c.* 25), *Sch.* 5, *para.* 1 (*a*) (*b*), *para.* 2 (1).

A first floor flat and garage in London were assessed together in the valuation list for rating purposes at £100 gross value, £76 rateable value, on Nov. 7, 1956, which was the "date of ascertainment" for the purpose of s. 11 (1) of the Rent Act, 1957, and the decontrol of dwelling-houses having a rateable value exceeding (in London) £40 on that day. On Feb. 9, 1957 (i.e., within the time allowed for the proposal to be within para. 2 (1) of Sch. 5 to the Rent Act, 1957) the tenant of the flat made a proposal for the alteration of the list by dividing the assessment between the flat and the garage. On Sept. 24, 1957, the local valuation court directed that the assessment should be divided into two assessments, of which the first would comprise the flat at £55 gross value, £40 rateable value, and the second would comprise the garage at £60 gross value, £44 rateable value. The alteration had effect from a date before the date of ascertainment. The landlord subsequently applied to the county court under Sch. 5, para. 1 (b) of the Rent Act, 1957, for an apportionment of the original £76 rateable value between the flat and the garage in order to ascertain the rateable value of the flat for the purposes of decontrol. The tenant contended that the flat was a hereditament "shown in the valuation list" within para. 1 (a) of Sch. 5 on the date of ascertainment, and that, by virtue of para. 2 (1) of Sch. 5, the consequence of the division of assessment by the local valuation court was that the rateable value of the flat was £40 for the purposes of the decontrol of houses exceeding that value.

Held: there was no jurisdiction under para. 1 (b) of Sch. 5 to the Rent Act, 1957, to make the apportionment because (i) on the date of ascertainment the flat was "a hereditament for which a rateable value [was] then shown in the valuation list" within para. 1 (a) of Sch. 5, notwithstanding that it appeared as part of a larger hereditament including the garage, and (ii), the valuation list having been altered after the date of ascertainment "so as to vary the rateable value" of the flat within para. 2 (1) of Sch. 5, and with effect not later than that date, £40 was, by virtue of para. 1 (a) of Sch. 5, the rateable value of the flat for the purposes of decontrol under s. 11 (1) of the Act of 1957, and (iii) therefore para. 1 (b) of Sch. 5 was inapplicable.

Appeal dismissed.

[As to apportionment of the rateable value of premises including a dwelling-house for rent restriction purposes, see 20 HALSBURY'S LAWS (2nd Edn.) 317, para. 376, note (p); and for cases on rateable value and apportionment for the purposes of the Rent Restrictions Acts, see 31 DIGEST (Repl.) 657, 656, *7591-7593, 7586*.

For the Rent Act, 1957, Sch. 5, paras. 1 and 2, see HALSBURY'S STATUTES, Interim Service, p. 206.]

Case referred to:

(1) *Temple* v. *National Mutual Life Assocn. of Australasia, Ltd.*, [1955] 2 All E.R. 758; [1955] 2 Q.B. 461; 3rd Digest Supp.

Appeal.

The landlord appealed against an order of His Honour JUDGE HOWARD in the West London County Court, made on Nov. 25, 1957, dismissing his appeal

A against a decision of Mr. Registrar FREEMAN COUTTS, who had dismissed an application made by the landlord on Oct. 18, 1957, for the apportionment of the rateable value of a flat and garage, 19, Ennismore Mews, London, S.W.7, owned by the landlord of which the flat alone was let to the tenant. The application was made to determine whether the rateable value of the flat on Nov. 7, 1956, was more than £40 and so whether the flat was free from control under the Rent B Acts, by virtue of the Rent Act, 1957, s. 11 (1). The assessment of the flat and garage together had been £100 gross value, £76 rateable value, but, following a proposal for the alteration of the valuation list made by the tenant on Feb. 9, 1957, it had been divided by direction of a local valuation court into: flat £55 gross value, £40 rateable value; garage £60 gross value, £44 rateable value, with effect from a date before Nov. 7, 1956. The county court judge rejected the C application for apportionment on the ground that the rateable value of the flat so determined was its value for the purpose of s. 11 (1) of the Act of 1957 by virtue of Sch. 5, paras. 1 and 2.

R. E. Megarry, Q.C., David Kemp and *A. P. Graham-Dixon* for the landlord. *Roy Wilson, Q.C.*, and *M. Ahern* for the tenant.

D *Cur. adv. vult.*

Feb. 17. **HODSON, L.J.**: This is an appeal from a judgment of His Honour JUDGE HOWARD, given on Nov. 25, 1957, upholding the decision of Mr. Registrar FREEMAN COUTTS who had dismissed the appellant's application for an apportionment of the rateable value of 19, Ennismore Mews, of which he is the landlord. The property consists of a flat and garage E which were formerly rated as one hereditament at £76. The respondent is the tenant of the flat and resisted the apportionment on the ground that the valuation list had at the relevant date been altered so as to vary the rateable value of the property and divide the assessment between the first floor flat and the garage. The county court judge held that there was no jurisdiction to apportion the £76, since the effect of the alteration had been to assess the flat F at £40 and the garage at £44 with retrospective effect. The Rent Act, 1957, by s. 11 (1) released from control dwelling-houses in London of which, on Nov. 7, 1956, the rateable value exceeded £40. The tenant had obtained the alteration by making a proposal to that end pursuant to s. 40 (1) of the Local Government Act, 1948, and on Sept. 24, 1957, the local valuation court gave notice of its decision. This notice shows the facts on which the case was argued. It had G been agreed between the parties to the application in the court below that no evidence should be tendered and that the court should be asked to give its decision on the point of law which emerged from these facts which appeared on the face of the document, it being further agreed (as it had been pleaded) that the tenant had made his application in time for any alteration to have effect prior to the material date, Nov. 7, 1956. The decision of the local valuation H court described the property as formerly assessed at 19, Ennismore Mews as "first floor flat and garage (south)"; gross value of the hereditament, £100; rateable value £76; description and value proposed: "First floor flat, gross £55; net £40; garage (south)", shown separately, £60 gross and £44 net.

The question to be determined on this appeal depends on the terms of paras. 1 and 2 of Sch. 5 to the Rent Act, 1957, of which I shall have to read some I parts. Part 1 is headed: "Ascertainment of rateable value and adjustments for pending proposals". Paragraph 1:

> "In relation to any premises in England or Wales, any reference in this Act to the rateable value on a particular date (hereinafter referred to as the 'date of ascertainment') shall subject to the following provisions of this Part of this Schedule be construed—(a) if the premises are a hereditament for which a rateable value is then shown in the valuation list, as a reference to the rateable value of the hereditament, or where that value differs from the

> net annual value, the net annual value thereof, as shown in the valuation list on that date; (b) if the premises form part only of such a hereditament, as a reference to such proportion of the said rateable value or net annual value as may be agreed in writing between the landlord and tenant or determined by the county court."

Sub-paragraph (b) is the relevant part according to the landlord, and what he did was to apply for determination by the county court in accordance with the provisions of sub-para. (b), so as, if possible, to establish that the tenant's flat which is part of the constituent hereditament should be rated at a figure in excess of £40. He contended that the following para. 2, which I shall now read, had no application. Paragraph 2 (1):

> " The following provision shall have effect for the purposes of sub-s. (1) of s. 11 of this Act or an order made under sub-s. (3) thereof, that is to say, where after the date of ascertainment the valuation list is altered so as to vary the rateable value of a hereditament, and the alteration has effect from a date not later than the date of ascertainment and is made in pursuance of a proposal to which this paragraph applies, the rateable value on the date of ascertainment of any dwelling-house consisting of or wholly or partly comprised in that hereditament shall be ascertained as if the amount of the rateable, or as the case may be net annual, value of that hereditament shown in the valuation list on the date of ascertainment had been the amount of that value shown in the list as altered."

I need not read the succeeding part of para. 2, as that has been admittedly complied with in this case. If para. 2 (1) which I have read is applicable to this case, the tenant is right in his application that the rateable value of the flat is £40 and does not fall to be ascertained by apportionment of the £76. No doubt para. 2 (1) of Sch. 5 is primarily directed to a straightforward case of the variation of the value originally appearing in the valuation list attached to the description of a particular hereditament. In this case it would be primarily directed to a variation of the original figure of £76 to some other figure. The question to be determined is whether the language of the sub-paragraph is apt to embrace the splitting operation which has here occurred. The flat in question fulfils the definition of " hereditament " in s. 68 (1) of the Rating and Valuation Act, 1925, to which the Local Government Act, 1948, s. 144 (1) directs attention for definition purposes:

> " ' Hereditament ' means any lands, tenements, hereditaments or property which are or may become liable to any rate in respect of which the valuation list is by this Act made conclusive."

" Hereditament " is a very wide word, and there seems to be no difficulty, on the language of the definition section by itself, in applying that to this flat. I should refer back to s. 20 of the same Act because of the reference in the definition to the operation of the valuation list which is by this Act made conclusive. Section 20 (1) reads:

> " For the purpose of every rate as defined by this Act, and for the purpose of determining the annual value of premises under the Licensing (Consolidation) Act, 1910 . . . the valuation list as in force at the time when the rate is made or the value of the premises is to be determined, shall be conclusive evidence of the values of the several hereditaments included in the list."

To fulfil the definition is not enough, however, for, in order that the paragraph may operate, the flat must be a hereditament shown in the valuation list. What was shown in the valuation list before alteration was the flat plus garage, according to the description which I read from the notice of the decision, and it was not until after alteration that the flat was separately shown. The question is, can the flat be said to be shown in the valuation list when it is shown not as a separate entity but as part of a composite hereditament? It was part of a larger hereditament, and, although its rateable value was not actually shown and would therefore only be ascertained by apportionment, it can I think properly be said to be shown without unduly straining the language of the section. Some assistance I think is to be obtained from the decision of the Court of Appeal in *Temple* v. *National Mutual Life Assocn. of Australasia, Ltd.* (1) ([1955] 2 All E.R. 758). That was a decision on s. 7 (2) and (3) of the Rent and Mortgage Interest Restrictions Act, 1939. Sub-section (2) reads:

> " In relation to any dwelling-house of which the rateable value on the appropriate day [Apr. 6, 1939] was not on that day separately assessed, any reference in the preceding provisions of this Act to the rateable value on the appropriate day shall be construed as a reference to such proportion of the rateable value on that day of the property in which the dwelling-house is comprised as may be apportioned to the dwelling-house by the county court in accordance with the provisions of sub-s. (3) of s. 12 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920."

Sub-section (3) reads:

> " In relation to any dwelling-house first assessed after the appropriate day, any reference in the preceding provisions of this Act to the rateable value on the appropriate day shall be construed as a reference to the rateable value on the day on which the dwelling-house was first assessed."

In deciding when the dwelling-house was first assessed, the court came to the conclusion that it was so assessed when the assessment was made on the composite whole of which the particular item formed part, although no separate assessment was made on it until a later date. Counsel for the landlord pointed out that " shown " is not the same as " assessed ", and contended that, though it might be quite right to say that a part might be said to be assessed when the complex of which it formed part was assessed, yet you could not produce the result that this flat was ever shown on the valuation list before the list was altered. While recognising the force of this submission, I reject it. The flat was certainly shown in the list even though not separately included, and the whole of which it formed part was shown by description with a rateable value which covered both component parts. So that, so far as that part of the submission on behalf of the landlord is concerned, I agree with the registrar and with the county court judge that the landlord's submission fails.

There is a further submission on behalf of the landlord that, even if the flat is shown in the valuation list, the list had not been altered so as to vary its rateable value. It seems to me that he would have to argue, so as effectively to exclude the operation of the section, that it could not be altered so as to vary the rateable value; but it is unnecessary to determine that because it is sufficient for the purpose of this case to say that I agree with the court below that there can be said here to have been a variation from the original assessment of £76, and, although I concede that there is difficulty in regarding the known figure of £40 as an alteration from an unknown figure, part of the £76, notionally to be attributed to the flat, yet the alteration of the assessment of the premises as a whole from £76 to two separate assessments of £40 for the flat and £44 for the garage may in my opinion fairly be regarded as by itself an alteration varying the rateable value of the hereditament, i.e., of the flat. I would accordingly dismiss the appeal.

PEARCE, L.J.: I agree and for the reasons that my Lord has given.

UPJOHN, J.: I agree also.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Bircham & Co.* (for the landlord); *Ouvry & Co.* (for the tenant).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

GORFIN *v.* ODHAMS PRESS, LTD.

[COURT OF APPEAL (Parker and Sellers, L.JJ.), February 17, 1958.]

Counsel—Fees—Leading counsel's fee disallowed on party and party taxation—Action for damages for personal injuries—Liability admitted—Amount of damages in issue.

In an action for damages for personal injuries suffered by the plaintiff, the defendants admitted liability but put in issue the amount of damages recoverable and paid £350 into court. At the hearing of the action the plaintiff was represented by leading counsel as well as junior counsel. The defendants were represented only by junior counsel. The plaintiff was awarded £650 19s. 8d. damages, which included the special damages agreed at £250 19s. 8d., and costs. On taxation, the taxing master disallowed the fee for leading counsel.

Held: the disallowance of any fee for leading counsel on party and party taxation in a particular case did not necessarily raise a question of principle; in the present case the matter was one within the discretion of the taxing master, and the court could not interfere.

Per SELLERS, L.J.: if [the master] had said, as he did not say, that in every case where damages only were in dispute two counsel would not be justified, then this court might well have interfered (see p. 580, letter I, post).

Appeal dismissed.

[**Editorial Note.** Although in the particular circumstances of the present case the fee of leading counsel was disallowed on a party and party taxation, yet it remains the rule that in general it is proper for a party to employ two counsel at the hearing of an action in the High Court (see p. 580, letters B, C, post).

As to the allowance, on taxation, of fees of two counsel, see 3 HALSBURY'S LAWS (3rd Edn.) 81, para. 130.

For R.S.C., Ord. 65, r. 27 (41), (47), see the ANNUAL PRACTICE, 1958, pp. 1949, 1951.]

Cases referred to:

(1) *Payne* v. *Schmidt*, [1949] 2 All E.R. 741; 2nd Digest Supp.

(2) *Ginn* v. *Robey*, [1911] W.N. 28; Digest (Practice) 955, *4956*.

(3) *Re Potts, Ex p. Epstein* v. *Trustee & Bankrupt*, [1935] Ch. 334; 104 L.J.Ch. 49; 152 L.T. 456; Digest Supp.

Interlocutory Appeal.

This was an appeal by the plaintiff from a judgment of DONOVAN, J., sitting in chambers on Dec. 19, 1957, on a summons to review the taxation of the plaintiff's costs of the action, on the ground that the taxing master, Master HOOD, had erred in principle in disallowing the fee for leading counsel for the plaintiff at the hearing of the action. DONOVAN, J., held that the matter was prima facie for the discretion of the master and that it was not shown that the master had erred in principle.

The facts appear in the judgment of PARKER, L.J.

John Thompson, Q.C., and *J. G. K. Sheldon* for the plaintiff.

P. R. Pain for the defendants.

PARKER, L.J.: The plaintiff brought an action for damages for personal injuries against the defendants; he alleged breach of duty at common law and under the Factories Act, 1937. The defendants admitted the breach of duty and they put the damages in issue. The matter was tried before BYRNE, J., the plaintiff being represented by leading counsel as well as by junior counsel, the defendants being represented only by junior counsel. In the result damages were assessed at, and judgment was given for, some £650, the sum of £350 having

A been paid into court by the defendants. On taxation the master disallowed the fee of leading counsel. Objection was taken to that and the master, after further argument, gave an answer in these terms:

> "This is a party and party taxation based on a claim for personal injuries the liability for which was admitted in the defence, and a sum of £350 was paid into court shortly after which was not acceptable to the plaintiff. B Under the summons for directions medical evidence was limited to two witnesses on each side. The case lasted from 10.30 a.m. to 2.52 p.m., and there was judgment for the plaintiff for £650 19s. 8d. (including agreed special damages of £250 19s. 8d., i.e., £400 general damages). The defendants briefed one counsel only. Having heard long argument on this objection on the original taxation and on the hearing of this objection, I am of the C opinion that the circumstances of this case did not justify the briefing of two counsel. No question of principle is involved as to the allowance or disallowance of two counsel. It is a matter entirely in the master's discretion [the master then referred to *Payne* v. *Schmidt* (1) ([1949] 2 All E.R. 741)]. I therefore overrule this objection."

D On appeal, the plaintiff submitted before the learned judge, and he had submitted in this court, that the master had gone wrong in principle. It was at one time suggested that DONOVAN, J., took the view that the question whether there should be two counsel or one counsel was not a matter of principle at all, but only of quantum, and that, therefore, he had no jurisdiction to go into the matter. It is quite clear from what counsel for the defendants said, and also from the E note which was made by junior counsel for the plaintiff, that all that DONOVAN, J., said was something which judges often do say, namely: "If I had been judging this matter on my own, I might well have come to a different conclusion." The learned judge, however, held that this was a matter which was prima facie for the discretion of the master and he could not say that the master had erred in principle.

F I entirely agree with the learned judge. Counsel for the plaintiff, who has said everything possible for the plaintiff in this case, admits that he has to show that the master went wrong in principle. Although the terms of R.S.C., Ord. 65, r. 27 (41), are very wide, and, in effect, treat the matter before the judge in chambers as a re-hearing, I think that it is now clear in practice and on authority that the court will only interfere with the exercise of the master's discretion if it is G clear that the master has gone wrong in principle. It is for this reason that matters of quantum only, where no principle is involved, are rarely, if ever, interfered with. In other matters, as, indeed, the question whether two counsel or one counsel should be allowed, it is impossible to say that there is no principle involved; and, accordingly, if it can be shown that the master has erred in principle, then the court will exercise its own discretion in the matter.

H It is sufficient to refer to two cases on that. The first is *Ginn* v. *Robey* (2) ([1911] W.N. 28), a decision of this court. FLETCHER MOULTON and BUCKLEY, L.JJ., said (ibid.):

> "Although the court had jurisdiction to interfere with the discretion of the taxing master it was the rarest thing for the court to interfere except where the taxing master had gone wrong on a matter of principle. The I question whether the fees of two counsel should be allowed was not purely a question of quantum, but it was a question which the taxing master was much better qualified than a judge to decide, and prima facie the court would not interfere in such a case."

Then there is the decision of FARWELL, J., in *Re Potts, Ex p. Epstein* v. *Trustee & Bankrupt* (3) ([1935] Ch. 334), where the learned judge said (ibid., at p. 339):

> "A matter of this kind [the question of the fee of leading counsel] is prima facie one for the discretion of the taxing master, and this court is

> very slow indeed to interfere with the exercise of that discretion, and, indeed, in my judgment this court ought not to interfere, unless it has reason to think that the taxing master, in exercising his discretion, has acted upon some wrong principle or upon some misunderstanding of the true position."

Counsel for the plaintiff submits that, even if it has not become the rule, it is, at any rate, the prevailing practice now, that two counsel will be allowed on taxation except in very special circumstances, and he elevates it, if I may so put it, into a principle and says that the master must, therefore, have gone against principle in this case, there being no special circumstances involved. It is perfectly true, and I hope it may continue so, that it is, in general, proper that two counsel should be employed. There are a number of dicta in the cases to that effect, and in the ANNUAL PRACTICE, 1958, at p. 1951, a note to R.S.C., Ord. 65, r. 27 (47), is headed: "Two counsel usually allowed". But to say that, because leading counsel is disallowed in any case, the master must, therefore, have erred in principle, is a very different matter; and I cannot say in this case, any more than could the learned judge, that the master has erred in principle.

Finally, counsel for the plaintiff drew attention to the last paragraph of the master's answer, which is not very happily worded. That paragraph says: "No question of principle is involved as to the allowance or disallowance of two counsel". As a general proposition, I think that that is wrong, although it may well be that, as applied to the facts of this particular case, there was no principle involved. Then the master goes on: "It is a matter entirely in the master's discretion", quoting *Payne* v. *Schmidt* (1). That, again, is perhaps not very happily worded. It is a matter which is in the master's discretion, but, of course, it is not entirely in his discretion, because, if he errs in principle, then his discretion can be set aside. However, as I have said, I do not think that in this case the master erred in principle, and, accordingly, I agree with the learned judge that, whatever one might have decided oneself, hearing the case de novo, this court cannot interfere. Accordingly, I would dismiss the appeal.

SELLERS, L.J.: I agree with my Lord. The forceful argument of counsel for the plaintiff has indicated and perhaps established that this is a hard case, and it might be described as a border-line case. The sum of £650 was recovered in the action, and that is a sum which very often would justify the employment of leading counsel. The case was perhaps made more difficult for the plaintiff when it was realised that the sum of £350 had been paid into court in respect of the damages claimed. It is, however, clear from the master's answer to the objection taken by the plaintiff that the master had these matters present in his mind and the question for him was whether it was reasonable and prudent to have two counsel, leading counsel and a junior.

If one looks at the nature of the injuries in the claim, they were of the most modest type that one finds in pleadings in this type of action. When the medical terms are interpreted, the injuries consisted of no more than cuts and bruises. Apparently there must have been some more serious consequences; something else must have developed which would justify the amount of damages. Having regard to the issue which the master had to decide, I cannot take any different view from that of my Lord, namely, that it was within the master's discretion. If he had said, as he did not say, that in every case where damages only were in dispute two counsel would not be justified, then this court might well have interfered. That would, I think, have been erring in principle, but the master applied his mind to the problem which was for him to decide, namely: Should a second counsel be allowed in the circumstances of the particular case?

Appeal dismissed.

Solicitors: *Shaen, Roscoe & Co.* (for the plaintiff); *C. A. Rutland* (for the defendants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re A DEBTOR (No. 472 of 1950).

[Court of Appeal (Jenkins, Romer and Ormerod, L.JJ.), January 30, 31, February 3, 1958.]

Bankruptcy—Inquiry as to debtor's dealings and property—Summons to person capable of giving information to do so to the court—Former solicitor of and attorney to the debtor—Abortive previous proceedings to compel him as solicitor to deliver accounts in respect of same matter—No appeal by trustee—Whether res judicata—Delay—Whether bankruptcy summons an abuse of the process of the court—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5 *c.* 59), *s.* 25 (1)—*R.S.C., Ord.* 52, *r.* 25, *Ord.* 37, *r.* 20.

Res Judicata—Bankruptcy—Inquiry under bankruptcy jurisdiction as to dealings on behalf of debtor by solicitor and attorney for debtor—Abortive previous proceedings to compel solicitor to deliver accounts—Whether res judicata—R.S.C., Ord. 52, *r.* 25—*Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5 *c.* 59), *s.* 25 (1).

Practice — Cross-examination — Cross-examination on deponent's affidavit—Whether order necessary to summon witness for cross-examination—R.S.C., Ord. 37, *r.* 20.

On June 12, 1947, S., a solicitor, entered into two contracts for the purchase of land as attorney for a debtor. S. acted as attorney to and solicitor of the debtor between Mar. 12, 1947 and Nov. 29, 1947, after which the debtor revoked S.'s power of attorney and determined his retainer as solicitor. Later in 1947 the debtor issued a summons under R.S.C., Ord. 52, r. 25*, against S. as his former solicitor for an account, bills of costs, and delivery of documents, and on Dec. 13, 1948, the master made an order therefor. S. purported to comply with the order, but maintained that he had received no money on behalf of the debtor in respect of the two contracts, and that the debtor was not entitled to further information about them. On Sept. 18, 1950, a receiving order was made against the debtor; on Oct. 24, 1950, the debtor was adjudicated bankrupt, and in due course the official receiver became his trustee in bankruptcy. At that time there were no funds available in the bankruptcy sufficient to enable the trustee to proceed in the matter, but as soon as there were funds he obtained his substitution for the debtor in the proceedings against S. and gave notice of intention to proceed and to press for compliance with the order of Dec. 13, 1948. On Oct. 15, 1954, the trustee applied under R.S.C., Ord. 52, r. 25*, for a further order as to accounts, etc., and a twenty-one day order for an account to be verified by affidavit was made by the master on Oct. 22, 1954. On Oct. 29, 1954, the judge, on an appeal by S., extended the time for delivery of the account. After further extensions S. delivered an account which contained no details of the transactions about the land, and the judge then made no order, save as to costs, on S.'s appeal. On June 29, 1956, the trustee took out a summons for directions, on which he asked for leave to cross-examine S. and to surcharge and falsify the account if so advised, but the master, on Apr. 10, 1957, made no order, save as to costs, on the summons. The trustee then obtained a summons under s. 25 (1) of the Bankruptcy Act, 1914†, directed to S., as a person capable of giving information respecting the debtor's dealings or property, to appear before the court for examination. S. applied to set the summons aside, contending (a) that the matter was res judicata by the decisions under R.S.C., Ord. 52, r. 25; (b) that the summons was an abuse of the process of the court and was oppressive in that it covered the same ground as the proceedings under R.S.C., Ord. 52, r. 25; and (c) that the trustee had been guilty of inordinate delay, had been remiss in not appealing against the order of Apr. 10, 1957, and in not insisting on an order for the cross-examination of S. under R.S.C., Ord. 37, r. 20*, and so should not be allowed to use the inquisitorial machinery of s. 25 against S.

---

* R.S.C., Ord. 52, r. 25, is printed at p. 583, letter I, to p. 584, letter B, post.

† Section 25 (1) is printed at p. 583, letter D, post.

Held: the summons should not be set aside because—

(i) there was a wide difference between the proceedings under R.S.C., Ord. 52, r. 25, and those under s. 25 of the Bankruptcy Act, 1914; and, though a claim for information about the transactions of June 12, 1947, had been raised in the proceedings, under R.S.C., Ord. 52, r. 25, it had not been adjudicated, and therefore the matter was not res judicata (*Greenhalgh* v. *Mallard*, [1947] 2 All E.R. 255, distinguished).

(ii) there was no abuse of the process of the court and no oppression, for S., as former solicitor and attorney of the debtor, was under a duty to give the information sought, which was material to the debtor's affairs, but had consistently denied the right to the information (*Re North Australian Territory Co.* (1890), 45 Ch.D. 87, distinguished; *Ex p. Goldstein*, [1917] 1 K.B. 558, and *Re Maundy Gregory*, [1934] All E.R. Rep. 429, considered).

(iii) though the transactions in question took place more than ten years ago the lapse of time was no bar to the application as the respondent thereto, S., was responsible for the delay.

Per JENKINS, L.J.: an order for cross-examination of a witness on his affidavit must be obtained before his attendance can be secured by subpoena in accordance with R.S.C., Ord. 37, r. 20 (see p. 586, letter D, post).

Appeal dismissed.

[As to grounds for refusing an order for private examination by the bankruptcy court of a person believed to be capable of giving information, see 2 HALSBURY'S LAWS (3rd Edn.) 406, para. 816; and for cases on the subject, see 5 DIGEST 617, *5542-5544*.

As to estoppel and res judicata, see 15 HALSBURY'S LAWS (3rd Edn.) 181, para. 355; and as to res judicata where relief has been asked for but not mentioned in the judgment, see ibid., p. 207, para. 387, text and note (f); and for a case on the subject, see 21 DIGEST 174, *276*.

For the Bankruptcy Act, 1914, s. 25 (1), see 2 HALSBURY'S STATUTES (2nd Edn.) 352.]

Cases referred to:

(1) *Greenhalgh* v. *Mallard*, [1947] 2 All E.R. 255; 2nd Digest Supp.

(2) *Green* v. *Weatherill*, [1929] 2 Ch. 213; 98 L.J.Ch. 369; 142 L.T. 216; Digest Supp.

(3) *Henderson* v. *Henderson*, (1843), 3 Hare 100; 1 L.T.O.S. 410; 67 E.R. 313; 21 Digest 174, *276*.

(4) *Re North Australian Territory Co.*, (1890), 45 Ch.D. 87; 59 L.J.Ch. 654; 63 L.T. 77; 10 Digest (Repl.) 939, *6436*.

(5) *Re Metropolitan Bank, Heiron's Case*, (1880), 15 Ch.D. 139; 49 L.J.Ch. 651; 43 L.T. 299; 10 Digest (Repl.) 1055, *7321*.

(6) *Re A Debtor (No. 3 of 1909), Ex p. Goldstein*, [1917] 1 K.B. 558; 86 L.J.K.B. 705; 116 L.T. 379; 5 Digest 617, *5543*.

(7) *Re Gregory (Maundy), Ex p. Norton* v. *Trustee*, [1934] All E.R. Rep. 429; 152 L.T. 58; sub nom. *Re Gregory (Maundy), Ex p. Norton*, [1935] Ch. 65; sub nom. *Re Gregory (Maundy), Trustee* v. *Norton*, 104 L.J.Ch. 1; Digest Supp.

(8) *Re Great Kruger Gold Mining Co., Ex p. Barnard*, [1892] 3 Ch. 307; 62 L.J.Ch. 22; 67 L.T. 770 ; 10 Digest (Repl.) 911, *6204*.

Appeal.

This was an appeal by a solicitor, a former solicitor of and attorney to a debtor, against the order of Mr. Registrar BOWYER, dated July 31, 1957, refusing to set

---

* The relevant part of R.S.C., Ord. 37, r. 20, is set out at p. 586, letter C, post.

A aside a summons under the Bankruptcy Act, 1914, s. 25 (1), issued against the appellant on the application of the debtor's trustee in bankruptcy to give evidence and produce all documents in any manner relating to certain land at Denham, Buckinghamshire, comprised in two contracts both dated June 12, 1947, into which the solicitor had entered as solicitor and attorney to the debtor. The facts, which are summarised in the headnote, are fully set out in the judgment of B Jenkins, L.J.

N. N. McKinnon, Q.C., and *M. O'C. Stranders* for the appellant, the solicitor.
Muir Hunter for the trustee, the official receiver.

JENKINS, L.J.: This is an appeal from an order of Mr. Registrar Bowyer dated July 31, 1957, whereby he refused to set aside as oppressive, frivolous, vexa- C tious and an abuse of the process of the court a summons issued against the appellant, Mr. Swirsky, who is a solicitor, under s. 25 of the Bankruptcy Act, 1914, in the bankruptcy of one Norman.

It will be convenient next to refer to s. 25 of the Act. Section 25 (1) provides:

> "The court may, on the application of the official receiver or trustee, at D any time after a receiving order has been made against a debtor, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the court may deem capable of giving information respecting the debtor, his dealings or property, and the court may require any such person to produce any E documents in his custody or power relating to the debtor, his dealings or property."

There are various ancillary provisions to which I do not think it necessary to refer.

The particular matter to which the summons was directed was the purchase of

> F "certain land at Denham Bucks comprised in two contracts both dated June 12 [1947] and made between Willmot Pendleton and Horace James Hewlitt of the first part Suburban Park Estates Limited of the second part and the bankrupt William Thomas Norman of the third part."

The appellant's concern in those transactions was that, as will appear in a moment, he in fact entered into the two contracts as attorney for the debtor.

G The grounds on which the summons is said to have been vexatious, an abuse of the process of the court, oppressive and frivolous are derived from certain other proceedings, which were brought by the debtor against the appellant and after the debtor's bankruptcy were continued by the official receiver as trustee in the bankruptcy. It appears that the appellant during the period from Mar. 12, 1947, to Nov. 29, 1947, acted as attorney to and solicitor of the debtor, H who, unfortunately, had been sentenced to a term of imprisonment for some offence or offences under the Prevention of Fraud (Investments) Act, 1939. At the conclusion of his sentence the debtor revoked the power of attorney under which the appellant had been acting and he also determined his retainer of the appellant as his solicitor. Apparently the appellant while he was attorney and solicitor of the debtor carried out various transactions concerning land and in particular I entered into the two contracts to which I have referred. The appellant having thus ceased to act as solicitor and attorney to the debtor, the debtor conceived that he was entitled to an account against the appellant. The debtor accordingly towards the end of the year 1947 commenced proceedings against the appellant under R.S.C., Ord. 52, r. 25. That rule is headed "Account by Solicitor" and provides:

> "Where the relationship of solicitor and client exists, or has existed, a summons may be issued by the client or his representatives for the delivery

> of a cash account, or the payment of moneys, or the delivery of securities, and the court or a judge may from time to time order the respondent to deliver to the applicant a list of the moneys or securities which he has in his custody or control on behalf of the applicant, or to bring into court the whole, or any part of the same, within such time as the court or a judge may order. In the event of the respondent alleging that he has a claim for costs, the court or judge may make such provision for the taxation and the payment or security thereof or the protection of the respondent's lien (if any) as the court or judge may think fit."

On the application of the debtor under that provision, an order was made by Master Grundy on Dec. 13, 1948. It was thereby ordered

> "that the said solicitor do within twenty-eight days from the service of this order, deliver to William Thomas Norman the applicant the bills of costs in all causes and matters wherein he has been concerned for the said William Thomas Norman and at the same time deliver to the said applicant the cash account showing all moneys received by him for or on account of or paid on behalf of said applicant and do pay to the said applicant the amount due from him. And it is further ordered that the said solicitor do deliver up to the applicant all deeds books papers and writings in his possession custody or power belonging to the applicant";

and liberty to apply was reserved. On that order it appears that the appellant did deliver an account of a sort and certain bills of costs, and handed over certain documents. It is to be observed that as early as Oct. 20, 1949, the appellant was writing to the debtor's then solicitors in these terms:

> "With reference to our telephone conversation this morning in regard to the land at Denham Green, I would confirm that I did not receive any money in respect of this property on behalf of your client."

That indicates that from an early stage in the proceedings the debtor was claiming information as to the matter of the land at Denham Green, and the appellant was contesting his right to such information.

On Sept. 18, 1950, a receiving order was made against the debtor and he was adjudicated bankrupt on Oct. 24, 1950, and in due course the official receiver became his trustee in bankruptcy. On Dec. 15, 1953, the trustee applied to be substituted for the debtor as applicant in the proceedings under R.S.C., Ord. 52, r. 25, and the order for his substitution was made on Jan. 7, 1954. Following that, the trustee, on Jan. 8, 1954, gave notice to the appellant of his intention to proceed with the application under R.S.C., Ord. 52, r. 25, and to press for compliance with the order. On Oct. 15, 1954, the trustee applied for a further order as to accounts and so forth. That application came before Master Baker on Oct. 22, 1954, and the form of the order he made was:

> "It is ordered that the respondent George Swirsky having failed to comply with the order made against him herein on Dec. 13, 1948, he do deliver to the applicant the trustee of the property of William Thomas Norman a bankrupt within twenty-one days after service of this order a full account of all moneys received or paid by him on behalf of the said William Thomas Norman, such account to be verified by affidavit and to deal with all matters placed in the hands of the said George Swirsky by the said William Thomas Norman. And that the costs of this application together with the costs reserved by the order herein dated Jan. 7, 1954, be the applicant's in any event."

The appellant appealed from that order, and his appeal came before Slade, J., in the first instance on Oct. 29, 1954. The learned judge's order of that date recited the order under appeal and ordered that

> "the said order of Master Baker be varied by directing that the account therein referred to, be delivered within three calendar months of this order, such account to be verified by affidavit."

Then it was further ordered

> "that the said notice of appeal after delivery of the account be referred to the Honourable Mr. Justice Slade if so desired. And that the costs of this appeal and the hearing before the master be reserved until after the account has been delivered and that there be no order as to costs of the order dated Jan. 7, 1954. Liberty to restore."

An extension or extensions of time for delivery of the account was or were obtained by the appellant, and the matter again came before Slade, J., on June 22, 1956. On that occasion Slade, J., made an order in these terms:

> "No order is made upon the said appeal save that the said appellant, George Swirsky do pay to the respondent the trustee of William Thomas Norman, a bankrupt, the costs of this appeal and the costs of the application to Master Baker above-mentioned, such costs to be taxed";

and there was a certificate for counsel. It appears that on that occasion Slade, J., expressed his views as to the position with respect to the account which had been delivered. The learned judge apparently tested the accuracy of the account by looking at the supporting evidence in respect of various items, and it appeared to him, so far as it went, to be a compliance with the order for the delivery of an account; but he expressed himself on the position regarding the account at some length and in terms which made it quite plain that he did not consider the account as by any means final. He certainly, I think, envisaged further proceedings on the part of the trustee to verify the account and challenge any items which appeared to the trustee to be unjustified; but, the appeal having ended in no order being made, the matter was left in the air, and it was not clear to the trustee or his advisers what steps they should next take.

In fact on June 29, 1956, they took out a summons for directions. That summons came before Master Clayton. There were a number of hearings before him; I am not sure whether it was two or three; but the effective hearing took place on Apr. 10, 1957. On that occasion Master Clayton made no order except that costs were to be the appellant's in any event. That description of his order requires some explanation. It appears that the trustee or his advisers considered that the proper step next to be taken was to obtain an order giving leave to cross-examine the appellant on his account and to surcharge and falsify the account if so advised. It seems that there was a long argument about this on Apr. 10, 1957, and on the appellant's side it was urged that no such order should be made, because, for one reason, the matter had been disposed of by Slade, J., and for another reason (and I think that this must have been the dominant reason) that he had no jurisdiction on an application under R.S.C., Ord. 52, r. 25, to make the order sought.

Throughout the proceedings since the trustee became interested the trustee had quite clearly been pressing for information concerning the Denham transactions and the appellant had been consistently denying the trustee's right to such information. Accordingly, although the appellant knew full well what was the information which the trustee wanted, he consistently refused to give it, and in accordance with that attitude none of the accounts or purported accounts which he delivered contained any reference to the Denham property. His case was that he did not in respect of the Denham transaction receive any money of the debtor, and that, he said, concluded the matter. It was, of course, plain that, the appellant having delivered a series of accounts none of them from first to last containing any reference to the Denham property, the trustee could not pursue that matter further unless he was given leave to cross-examine. The master taking the view he did and refusing such leave, the trustee was baulked of the relief which he was hoping to obtain with respect to that matter. He was in no way remiss in raising the matter of the Denham property, for, as I have said, he had been raising it from time to time ever since he had become interested in the proceedings.

It is said on the part of the appellant that the trustee could have insisted on an order for cross-examination of the appellant, and it is said that he could have done that under R.S.C., Ord. 37, r. 20. That rule includes the following provision:

> " . . . any party or witness having made an affidavit to be used or which shall be used on any proceeding in the cause or matter shall be bound on being served with such subpoena to attend before such officer or person for cross-examination."

I think it is clear that it is not possible to secure the attendance of a witness for cross-examination and claim to cross-examine him as of right; an order for cross-examination must first be obtained and when it has been obtained the attendance of the person concerned can be secured by subpoena. So it does not seem to me that the trustee was remiss in pursuing his claim in that he did not seek, as it was, wrongly I think, suggested that he could have sought, the automatic attendance and cross-examination of the appellant under that rule.

Then it is suggested, as I understand it, that the trustee might have carried Master Clayton's decision to the judge on appeal. It does not seem to me that the trustee was necessarily or at all remiss in failing to do that. He may have thought that, Master Clayton having ruled, in effect, that the proceedings under R.S.C., Ord. 52, r. 25, were not appropriate proceedings in which to raise an extraneous matter such as the Denham land, he, the trustee, would accept that decision and pursue whatever other remedy might be open to him. He did in fact pursue the remedy open to him, or which he claimed to be open to him, under s. 25 of the Bankruptcy Act, 1914, and the learned registrar ordered that a summons in the terms which I have noticed should issue against the appellant. The appellant applied to set aside that summons, the learned registrar made the order of July 31, 1957, to which I have already referred, and the present appeal ensued from that order. I think that I have stated sufficient of the facts to enable me to deal with the issues which were argued before us.

It is said by counsel for the appellant that the issuing of the summons under s. 25 of the Bankruptcy Act, 1914, was wrong, in effect on four grounds. First, it is said that the outcome of the proceedings under R.S.C., Ord. 52, r. 25, was such as to make the matter sought to be pursued by the trustee under s. 25 res judicata which the trustee should not be allowed to reopen in proceedings in the bankruptcy. Then it was said that this was an abuse of the process of the court inasmuch as the trustee, having unsuccessfully pursued the appellant under R.S.C., Ord. 52, r. 25, in proceedings which dragged on over many years, was now seeking to reopen the matter and go over all the old ground again in the proceedings under s. 25. Then it was said that the trustee's recourse to s. 25 was oppressive, and finally it was pointed out that this litigation, if one treats it as relating to the Denham property, concerns a transaction now some eleven years old. It is said that there has been such inordinate delay that the trustee should not be allowed to put in motion against the appellant what has been called the inquisitorial machinery provided by s. 25 of the Bankrupcy Act.

To deal with these various points, first of all as to res judicata, the parties were, I think, agreed that the statement of principle from *Greenhalgh* v. *Mallard* (1)

([1947] 2 All E.R. 255), was a sufficient statement of res judicata for the purposes of this case; but, while accepting the principle as stated, counsel for the appellant says that it concludes the present case in his favour, whereas counsel for the trustee says that the circumstances in this case are such that the trustee is not precluded, under the principle stated, from pursuing his proceedings under s. 25 of the Bankruptcy Act, 1914. *Greenhalgh* v. *Mallard* (1) concerned a conspiracy and was an entirely different kind of case from the present one; but there is this convenient statement of principle in the judgment of SOMERVELL, L.J. ([1947] 2 All E.R. at p. 257). He says:

> " That, I think, would be enough to dispose of this case, but counsel for the defendants put his case in two ways, and I will deal with them. He relied, first, on res judicata, and then said that, if there was any doubt about that, he was entitled to succeed on the ground that it would be vexatious and an abuse of the process of the court to allow this transaction to be brought before the court again on the basis of the present statement of claim. I think that on the authorities to which I will refer it would be accurate to say that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. In *Green* v. *Weatherill* (2) ([1929] 2 Ch. 213 at p. 221) MAUGHAM, J., quoted some observations by WIGRAM, V.-C., in *Henderson* v. *Henderson* (3) ((1843), 3 Hare 100 at p. 114): ' I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time '."

As to the application of that principle to the present case, it is to be observed at the outset that there is a wide difference between the two forms of proceeding with which we are here concerned both as to their subject-matter and as to their effect. R.S.C., Ord. 52, r. 25, deals with cases where the relationship of solicitor and client exists or has existed and where the client seeks an account from his solicitor or former solicitor. The whole object and scope of it is directed to providing a summary means of causing solicitors to account for cash and securities in their hands and the like. Section 25 of the Bankruptcy Act, 1914, is by no means confined to persons who are accountable to the trustee through their relationship with the debtor. The section is couched in wide language and it covers cases in which it appears that the person proposed to be examined is in a position to give information which is material for the purpose of getting in the debtor's estate and winding it up. The two forms of proceeding are widely different, and it would be very difficult to hold that refusal of a claim against a solicitor for an account based on the relationship of solicitor and client which existed between a debtor and the solicitor concerned would necessarily and in all circumstances preclude the trustee from having recourse to the provisions of s. 25 of the Bankruptcy Act, 1914, with respect to the same individual if the court had solid ground for the opinion that that individual was in a position to provide material information in regard to the bankrupt's affairs.

Further, I find it very difficult to see what the res is which is said to be judicata. I have referred to the course of the proceedings under R.S.C., Ord. 52, r. 25, and it seems to me very difficult to say that anything at all was decided in those proceedings, save that Master Clayton was of opinion that an order could not properly be made for cross-examination and that Slade, J., was of opinion that the trustee was entitled to an account. Counsel for the appellant put the res, as I understood him, as being, in effect, the right to require information from the appellant regarding the Denham transaction. It is difficult to accept a right of that character as a res well capable of being judicata; but, accepting that definition of the res, I cannot find in the proceedings under R.S.C., Ord. 52, r. 25, anything remotely approaching a decision to the effect that the trustee had no right in any circumstances or in any proceedings to obtain information from the appellant with respect to the Denham transaction. There was nothing approaching a decision to that effect. The nearest approach to it was that Master Clayton took the view that the appellant could not properly be cross-examined in those proceedings and that, in the result, disabled the trustee from pursuing this particular matter in those proceedings; but that is the nearest one can get to the res judicata suggested by counsel for the appellant.

Then counsel for the appellant argued that he did not go so far as to put his case on the ground of strict res judicata or estoppel by record, because he admitted that the two kinds of proceeding, the s. 25 proceeding and the Ord. 52 proceeding, were wholly distinct in their character; but he said that the case did come within the extension of the doctrine indicated by Somervell, L.J., in *Greenhalgh* v. *Mallard* (1) ([1947] 2 All E.R. 255), where Somervell, L.J., said (ibid., at p. 257) that the doctrine of res judicata

> " covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."

Then I take this from the passage quoted (ibid., at p. 258) from *Henderson* v. *Henderson* (3) (3 Hare at p. 114) where it says:

> " The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

It is said that the trustee might have brought forward at the time his claim for information about the Denham transaction and that he has failed to do so, and that he ought not to be allowed to raise that matter again in other proceedings. There is no question but that the trustee did his very best to raise, in the proceedings under R.S.C., Ord. 52, r. 25, the matter of obtaining information about the Denham transaction. It is true that he failed to attain his object, but he failed not because he was remiss in bringing the matter forward but because the appellant consistently denied his right to bring it forward and consistently kept the matter of the Denham transaction out of such accounts as he delivered. The matter was raised and quite clearly raised, but it was never adjudicated. The trustee had to be content as regards the proceedings under R.S.C., Ord. 52, with such account as the appellant delivered, and that account included no information about the Denham property. He thus succeeded on part of his claim but failed to pursue the other part of his claim to a successful conclusion, not because it was decided against him but because the master did not think, in

A effect, that it was proper to raise it in those proceedings by cross-examination of the appellant.

For the reasons which I have endeavoured to state, I cannot see that the doctrine of res judicata, on the facts and in the circumstances of this case, prevents the trustee from availing himself of s. 25 of the Bankruptcy Act, 1914.

Next, as to the proceedings under s. 25 being an abuse of the process of the B court, in my view there is no substance at all in that contention. Recourse to s. 25 of the Bankruptcy Act, 1914, was necessitated by the appellant's consistent refusal to give any information about the Denham property in the proceedings under R.S.C., Ord. 52, r. 25. It seems to me that the trustee was, in effect, faced with the alternatives of abandoning his attempt to get information about the Denham property altogether or of applying under s. 25. If the appellant dislikes C the idea of facing proceedings under s. 25 he has only himself to thank: a quite short and simple explanation in an affidavit would have completely averted the necessity. The appellant alleges that, with respect to the land at Denham, the sale was in fact completed by conveyance to somebody else in such a way that no money became due to the debtor, and, as I understand it, no money of the debtor's was expended. He says that he furnished a completion statement to D the debtor's former solicitors showing that that was so. But, even if he did, that statement is not available to the trustee, who has not been able to get a sight of it, and I see no reason why the appellant should not simply have stated his account of that matter in an affidavit. That could have been quite shortly and simply done.

In connexion with the plea of abuse of process of the court, we were referred E to two cases in particular. *Re North Australian Territory Co.* (4) ((1890), 45 Ch.D. 87), was the first of them. That was a case under s. 115 of the Companies Act, 1862, which was broadly similar in its intention to s. 25 of the Bankruptcy Act, 1914. In that case a liquidator in a voluntary winding-up of a company brought an action with the leave of the court against another company and obtained an order for an affidavit of documents in the action, but the court F refused to order the production of documents or the examination of the company's secretary on interrogatories on the ground that in the present stage of the action, no defence having been put in, the discovery was premature. The liquidator then obtained an order under s. 115 of the Companies Act, 1862, for the examination of the secretary before an examiner. Then the matter came before the Court of Appeal through the secretary, in the course of his examination, refusing G to answer a question. It was held

> "that as the liquidator had shown no reason for seeking the discovery except to assist him in the action, and so to evade the order of the judge postponing discovery in the action, the witness was justified in refusing to answer the question."

H That appears to me to be a very different case from this one, for in that case the inquisitorial procedure of the right to invoke s. 115 of the Companies Act, 1862, was sought to be used for the ulterior purpose of obtaining in the action against the very person whose examination was sought an advantage in a matter of discovery which had been denied to the liquidator in the action, and I should have thought that that was a very good example of an abuse of the process of I the court, the process of one court being, as it were, played off against that of another and used to defeat the order of that other court.

Then there was *Re Metropolitan Bank, Heiron's Case* (5) ((1880), 15 Ch.D. 139). That was a similar case. The headnote is this:

> "A voluntary liquidator who applies to the court under s. 138 of the Companies Act, 1862, for an order under s. 115 to examine a person in respect of the affairs of the company is not entitled as of right to the order, but must satisfy the court that it will be just and beneficial for the purposes of

> the winding-up. Where a voluntary liquidator has brought an action on behalf of the company against an officer of the company, and has exhibited interrogatories which have been fully answered by the defendant, he will not be entitled to an order under s. 115 for the examination of the defendant unless he satisfy the court that, notwithstanding the interrogatories already exhibited, he has a strong case for a further examination."

We were referred to a number of other authorities, and in particular to *Re A Debtor* (*No. 3 of 1909*), *Ex p. Goldstein* (6) ([1917] 1 K.B. 558). That is a case which shows that an order under s. 25 of the Bankruptcy Act, 1914, should not be made unless there is reasonable ground for supposing that the person sought to be examined is in a position to give some material information. We were also referred to *Re Maundy Gregory, Ex p. Norton* v. *Trustee* (7) ([1934] All E.R. Rep. 429), which, so far as material to the present purpose, relates to the same point as *Ex p. Goldstein* (6), that is to say that it is not legitimate to put the inquisitorial power of s. 25 into operation merely on a speculative inquiry; there must be some ground for supposing that the person sought to be examined has information. Then there was *Re Great Kruger Gold Mining Co., Ex p. Barnard* (8) ([1892] 3 Ch. 307). That was cited to us for some cautionary observations by LINDLEY, L.J., as to the exceptional character of this inquisitorial jurisdiction and the care with which it should be exercised.

Accordingly, it does not seem to me in this case that abuse of the process of the court has been made out. The appellant brought these further proceedings on himself, and it appears to me that, inasmuch as he himself, in his capacity as attorney for the debtor, signed the two contracts relating to the land at Denham, there is a prima facie case that he is in a position to give material information with respect to the affairs of the debtor. I therefore reject the objection that the summons under s. 25 was an abuse of the process of the court.

Then there is the allegation of oppression. For similar reasons it seems to me that there is really no substance in that. The appellant from first to last knew what was expected of him, and, indeed, ought to have known that, as the former solicitor and attorney of the debtor, he was under a duty to give the information sought, and he chose not to give it, and so he now finds himself faced with the prospect of an examination under s. 25 which, if he had carried out his plain duty, would have been averted.

Finally, there is the matter of delay. I confess that when this case was first opened I was impressed by the great lapse of time which has occurred since the events now sought to be investigated; but counsel for the trustee took us through the history of the matter, and he has succeeded in satisfying me that over the whole period the delay was really caused more by the Fabian tactics of the appellant in his determination to avoid giving any information if he could help it than by any remissness on the part of the trustee. In the earlier part of the period the trustee was in the difficulty that he could not move in the matter without funds, and that accounts for a certain amount of initial delay ; but when once he was fully seized of the matter and possessed of funds it does not seem to me that he can really be saddled with any great part of the responsibility for the delay which, for my part, I think was mainly due to the appellant.

Accordingly, I reject the four objections which have been advanced by the appellant to the summons under s. 25 of the Bankruptcy Act, 1914.

The matter of granting or refusing summonses under s. 25 is eminently a matter for the discretion of the learned registrar. Having considered the facts of this case with some care, it appears to me that there is no reason whatever for holding that the learned registrar in this case did not exercise his discretion in a perfectly correct manner. In conclusion, I would say that I have no fault whatever to find with the careful judgment of the learned registrar, and, in my opinion, this appeal fails and should be dismissed.

ROMER, L.J.: I quite agree; and there is very little that I wish to add to the judgment of my Lord. One thing that is clear about this case above all others is that there are no merits whatever possessed by the appellant, and, indeed, counsel hardly contended on his behalf to the contrary. The position was that the appellant, Mr. Swirsky, had acted as solicitor to the bankrupt, and he does not deny that he has in his possession, as counsel for the trustee pointed out to us, vital information as to transactions which he effected as solicitor and attorney to the debtor, who was in prison at the time. The appellant has for many years past adopted the attitude that he is under no obligation to give the trustee in bankruptcy this information, or, indeed, to give it to the bankruptcy court, he saying that there was a time when he gave the information to the solicitors who were then acting for the debtor, though why that should constitute a reason for not giving it again now is past my comprehension.

The appellant's case is that he is entitled to relief from this summons which the trustee in bankruptcy has issued under s. 25 of the Bankruptcy Act on the principles enunciated and explained in *Greenhalgh* v. *Mallard* (1) ([1947] 2 All E.R. 255) to which my Lord has referred. It is not necessary to decide it, but it may be that, if in the Queen's Bench proceedings the official receiver [the trustee] could have got the relief which he is seeking by his summons and had failed to ask for it, then that principle, that is to say the principle of *Greenhalgh* v. *Mallard* (1), might have applied; but that is not at all what happened. What the trustee is trying to do by this summons, in effect, is to interrogate the appellant with regard to two particular contracts relating to some land at Denham. Both before SLADE, J., and before Master CLAYTON the trustee did try to get an order for the cross-examination of the appellant on those two contracts. My Lord has described the nature of the contracts, and I need not describe them again.

So far as the relevant proceeding before SLADE, J., is concerned, it is stated in the affidavit of Mr. King on behalf of the trustee sworn on July 19, 1957, that what was sought before SLADE, J., when the matter was before him on appeal was, in his words,

> " an order for cross-examination which was refused at that stage because the issue before the learned judge was an adjourned appeal relating to the form and completeness of the account rendered or to be rendered by the applicant pursuant to the orders of the court."

In the same affidavit it is said that the learned judge, while saying that the account which was before him could not be said to be a failure to comply with the order under which it was made in point of form, clearly made it plain that he thought that it might well happen that, on investigation of the account and investigation of the materials relied on in connexion with it, the matter might require to be probed further by the trustee in bankruptcy. So, having regard to those two elements in the hearing before SLADE J., it appears to me to be quite impossible to say that the principle of *Greenhalgh* v. *Mallard* (1) applies by reason of the trustee having failed to ask SLADE, J., for the relief for which he is asking by his present summons.

Then, as to the proceedings before Master CLAYTON, there appears this uncontradicted paragraph in the same affidavit of Mr. King:

> " It was with a view to obtaining directions and an order for ' surcharging and falsifying ' the applicant's account and to cross-examine him in support thereof that application was made to Master CLAYTON, who was eventually of the opinion that no such order or directions could be made or given under R.S.C., Ord. 52, r. 25."

I can only read that as a categorical statement of fact that the reason why Master CLAYTON refused to direct this cross-examination which he was asked to do was because he took the view that he could not make such an order under

the particular rule under which the application for an account had been made. A
Therefore, just as before SLADE, J., so also before Master CLAYTON an application was made for cross-examination and it was rejected in each case, by SLADE, J., on the ground that he could not deal with it on an adjourned appeal relating to the form or completeness of the account, and before Master CLAYTON because the order sought could not be made under R.S.C., Ord. 52, r. 25. It appears to me, accordingly, that it cannot be said that the position here is within any B
reasonably measurable distance of the principle of *Greenhalgh* v. *Mallard* (1).

That being so, it seems to me that that objection, which was the prime objection urged by counsel on the appellant's behalf, fails. I would only add to that that the burden of proving that this principle, which is an extended branch of the general principle of res judicata, should apply lies on the appellant, and, in my judgment, he has certainly failed to discharge it. C

The only other point about which I might say one word is the alleged delay on which the appellant relies. I think that has been quite satisfactorily explained, although, as my Lord has said, at first sight it did seem to call for some explanation. But it has to be remembered that the official receiver as trustee in bankruptcy is under no obligation to take any steps until he is in funds sufficient to enable him to do so, and we were told that no such funds became available D
for some considerable time after the receiving order and adjudication, and as soon as he was in funds the official receiver promptly took such steps as were open to him, and he was thwarted from taking proceedings in every possible way the appellant could think of. I am satisfied that no legitimate criticism can be advanced on that ground.

It is further to be observed that the appellant has from first to last never E
suggested that he is in any way embarrassed by the length of time that has gone by and that by reason of the passage of time he has now failed to remember what happened and is not in a position to give the information which the trustee is requiring. I have no doubt that if that had been so, he would have said so; but he has not said so, and, indeed, has maintained a marked silence on that part of the case, as he has on every other aspect of the case, in the affidavits F
which he has sworn and the letters which he has written.

For the rest, I entirely agree with all my Lord has said, and I think that this appeal should be dismissed.

ORMEROD, L.J.: I agree, and there is nothing I wish to add to the reasons which have already been fully expressed by JENKINS, L.J., and G
ROMER, L.J. The only thing that I wish to say is that I am in full agreement with the remarks that have fallen from them as to the merits of this appeal.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Bell & Ackroyd* (for the appellant, the solicitor); *Tarry, Sherlock & King* (for the trustee in bankruptcy, the official receiver).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* SOUTH GEORGIA CO., LTD.

[House of Lords (Viscount Simonds, Lord Reid, Lord Tucker, Lord Keith of Avonholm and Lord Somervell of Harrow), January 20, 21, February 27, 1958.]

Profits Tax—Distribution—Net relevant distributions—Trading loss—Gross relevant distributions made—Franked investment income less than amount of trading loss but exceeding gross relevant distributions—Whether there were net relevant distributions liable to distribution charge—Finance Act, 1947 (10 *&* 11 *Geo.* 6 *c.* 35), *s.* 34 (2)—*Finance Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 54), *Sch.* 4, *para.* 7 (1A), *substituted by Finance Act,* 1947 (10 *&* 11 *Geo.* 6 *c.* 35), *s.* 32 (1).

In its accounts for the chargeable accounting period ending on Oct. 31, 1953, a company showed a loss of £602,000, excluding franked investment income. The company's franked investment income (viz., the company's investment income received from sources where it had borne profits tax) for the period amounted to £272,000, and the company's gross relevant distributions (viz., for present purposes, the dividends paid) for that period amounted to £181,818. The company was assessed to the profits tax on the footing that the sum of £181,818 constituted net relevant distributions as determined by the proviso to s. 34 (2)* of the Finance Act, 1947, and thus rendered the company liable to a distribution charge at twenty per cent. on that amount under s. 30 (3) of that Act.

Held: the proviso to s. 34 (2) of the Finance Act, 1947, applied even though there was no profit after taking the franked investment income into account; the company's profits for the purposes of the proviso should (having regard to para. 7 (1A) of Sch. 4 to the Finance Act, 1937) be taken to be nil, the amount of the net relevant distributions being, therefore, the excess of the gross relevant distributions over nil, viz., £181,818, and the company was liable to a distribution charge on that amount.

Appeal allowed.

[As to net relevant distributions and distribution charge, see 20 Halsbury's Laws (3rd Edn.) 636, 638, paras. 1245, 1247.

For the Finance Act, 1947, s. 34 (2), see 12 Halsbury's Statutes (2nd Edn.) 778; and for the Finance Act, 1937, Sch. 4, para. 7, see ibid., 383.]

Appeal.

Appeal by the Crown from an interlocutor of the First Division of the Court of Session as the Court of Exchequer in Scotland (Lord Clyde (President), Lord Carmont, Lord Russell and Lord Sorn), dated Dec. 7, 1956, on a Case Stated by the Commissioners for the Special Purposes of the Income Tax Acts under the Finance Act, 1937, Sch. 5, Part 2, para. 4, and the Income Tax Act, 1952, s. 64, on an appeal by the respondent company, The South Georgia Co., Ltd., against an assessment to profits tax made on it for the chargeable accounting period Nov. 1, 1952, to Oct. 31, 1953, in the sum of £36,363 12s. The commissioners held that the assessment had been made on the basis of an erroneous construction of the Finance Act, 1947, s. 34 (2), and discharged the assessment. The First Division of the Court of Session affirmed this determination. The facts appear in the opinion of Viscount Simonds.

The Solicitor-General for Scotland (*William Grant, Q.C.*), *W. R. Grieve, Q.C.* (both of the Scottish Bar), and *A. S. Orr* for the Crown.

The Dean of Faculty (*C. J. D. Shaw, Q.C.*) and *Alastair M. Johnston* (both of the Scottish Bar) for the respondent company.

---

* This sub-section is printed at p. 595, letter F, post.

The House took time for consideration.

Feb. 27. The following opinions were read.

VISCOUNT SIMONDS: My Lords, in my opinion, the interlocutor against which the Commissioners of Inland Revenue have brought this appeal cannot be sustained. The relevant facts are few, and not in dispute, nor is the point at issue susceptible of long discussion.

The respondent company has for many years carried on business as whalers. Its accounts for the chargeable accounting period of one year to Oct. 31, 1953, as computed for profits tax and excluding " franked investment income " (an expression which I will presently explain) showed a loss of £602,000. The franked investment income for the same period amounted to £272,000 and the gross relevant distributions, an expression which, for the purpose of this case, may be regarded as equivalent to dividends, for the same period amounted to £181,818, which has been in the Case Stated at the round figure of £181,000. It was assessed to profits tax on the footing that this sum represented a net relevant distribution under the provisions of s. 30 (3) and (4) of the Finance Act, 1947. The question is whether it was rightly so assessed, and the answer to that question turns on the correct interpretation of the statutory provisions relating to profits tax, and particularly of the proviso to s. 34 (2) of the Act of 1947. The Commissioners for the Special Purposes of the Income Tax Acts determined that the assessment was wrongly made, and in that determination were upheld by the First Division of the Court of Session.

It is necessary to refer briefly to the legislative background to the sections which particularly require your Lordships' consideration. Profits tax was first imposed by the Finance Act, 1937, under the name of national defence contribution; its name was changed in 1946. It was levied at a flat rate percentage on profits arising in each chargeable accounting period from any trade or business to which the section applied. Such profits were to be computed on income tax principles as adapted in accordance with the provisions of Sch. 4 to that Act. I do not pause now to refer to these provisions and their subsequent amendment. Their importance in this case deserves detailed examination at a later stage. The Finance Act, 1947, made considerable changes. In the first place, the tax was no longer to be imposed on a class of persons hitherto subject to it. With that change we are not concerned. In the second place, the tax was no longer imposed at a flat rate on all profits, but a differential was established in order to discourage distribution and encourage retention by granting relief in respect of profits not distributed but retained. In the third place, it provided that a tax, called a distribution charge, should be imposed on profits which, having been retained and having, therefore, enjoyed non-distribution relief, were distributed in a later accounting period. The effect of this legislation as subsequently amended at the relevant date was that the tax in respect of distributed profits was 22½ per cent., and of undistributed profits was 2½ per cent. (a differential of twenty per cent.) and the distribution charge was twenty per cent.

I now turn to the sections which demand closer examination, and, first, to the statutory provision for the computation of profits. I have pointed out that they are to be computed on income tax principles as adapted in accordance with the provisions of Sch. 4 to the Act of 1937 as subsequently amended. I think it necessary to refer only to para. 7 of the schedule as amended by s. 32 of the Act of 1947. The relevant parts of it as thus amended are as follows:

> " 7.—(1) Income received from investments or other property shall be included in the profits except—(a) income received directly by way of dividend or distribution of profits from a body corporate carrying on a

> trade or business to which s. 19 of this Act applies; and (b) income so received from any other body corporate, being income received indirectly by way of dividend or distribution of profits from a body corporate carrying on such a trade or business as aforesaid . . .
>
> "(1A) Any reference in any enactment relating to the profits tax to franked investment income shall be construed as a reference to the income which would be included in the profits if paras. (a) and (b) of the preceding sub-paragraph had been omitted, and, in computing profits for the purposes of so much of any such enactment as refers to profits, including franked investment income, the said sub-paragraph shall have effect as if the said paras. (a) and (b) were omitted."

My Lords, the meaning of this provision appears to have caused some difficulty, but I think that it is reasonably clear and means (so far as is relevant to our present purpose) no more than this, that, when you find the expression "profits, including franked investment income", you disregard for the purpose of your computation para. (a) and para. (b) and include in it the income derived from all the investments and property of the company, regardless of the fact that, in a computation made in another connexion and for another purpose, you may have to exclude the income from some, but not all, of its investments. A single ordinary commercial computation of profits has to be made, of which the result may be to show some profit, no profit or a loss. I come then to s. 34 of the Act of 1947 and its all-important proviso.

That section provided, by sub-s. (1), that it and the three next succeeding sections should, subject as therein mentioned, determine what was to be taken, for the purposes of the provisions of the Act relating to reliefs for non-distribution and distribution charges, as the net relevant distributions for any chargeable accountable period and, by sub-s. (2), it provided as follows:

> "The net relevant distributions . . . for any chargeable accounting period . . . are so much of the gross relevant distributions . . . for that period . . . as bears to the whole of the said gross relevant distributions the same proportion that the profits for that period bear to the profits therefor computed without abatement and including franked investment income: Provided that where the said gross relevant distributions exceed the profits computed without abatement and including franked investment income, the net relevant distributions shall be the sum of—(a) the profits for the period computed with due regard to the provisions for abatement but not including franked investment income; and (b) the amount of the excess."

On this proviso, interpreted in the light of para. 7 of the schedule as amended, the Crown makes a very simple case. On the undisputed figures the gross relevant distributions were £181,000, the profits including franked investment income were nil (I may interpolate that the reference to abatement may throughout be disregarded), therefore the net relevant distribution must be the excess of £181,000 over nil, i.e., £181,000; nothing has to be brought in under para. (a) of the proviso, for there were no profits.

To the claim thus formulated the respondent company makes as simple a reply. It says that the proviso has no application to the present case because it only applies where (i) there is a profit after including franked investment income and (ii) the gross relevant distributions exceed such profit, and here there was no such profit. Therefore, it says, the proviso did not come into operation, and the assessment was wrongly made. I may observe here that it is common ground that, if the proviso is inapplicable, no charge can be imposed, for a calculation made in accordance with the formula contained in the body of sub-s. (2) would show no net relevant distribution. Everything, therefore, turns on the meaning of the proviso and whether it is, in effect, a condition precedent A to its application that there should be a profit when the franked investment income is included in the computation. As the learned Lord President (LORD CLYDE) said ((1957) S.L.T. at p. 119): " the proviso can only apply if there is a profit once the franked investment income is included ", and LORD SORN expressed a similar opinion.

My Lords, I have already indicated my view on what a computation of profits B in the terms of the proviso involves. I will repeat that it involves not two operations, first the ascertainment of trading profit or loss and then the addition of franked investment income, but a single operation which takes into one account the trading profit or loss and the investment income whether franked or not. I cannot, with all respect to the Lord President, accept the view that to interpret " including " as meaning " adding " fits more convincingly into the C scheme of s. 32 of the Act than does the Crown's contention. On the contrary, I think that the latter contention accords with the primary purpose of s. 34 of the Act (the relevant section in this connexion), which I understand to be to determine how much of an actual dividend paid for a particular period is to be regarded as having been paid out of (a) the chargeable profit of the period, D (b) the franked investment income of the same period, and (c) the undistributed profits of an earlier period or periods. This result is achieved if a single computation is made which shows that the profits for a period, including franked investment income, are nil or a minus figure (it matters not which for this purpose) and a dividend for that period is, nevertheless, paid. For, unless the contrary is shown, it can only be assumed that that dividend has been paid out of undistri- E buted profits of earlier periods, which is itself the reason for a distribution charge being made. The proviso to sub-s. (3) of s. 30 of the Act will safeguard the taxpayer from being charged with an amount of tax in excess of the relief previously granted.

The learned Dean of Faculty on behalf of the respondent company urged in support of the construction that he invited your Lordships to adopt that it was F really meaningless to speak of a nil profit or of adding something to it, and this plea found favour with the Lord President. As I understood it, this was only relevant if the view was accepted that there were two separate operations and not a single computation. In the view which I take, therefore, it does not arise, but I think it right to say that I see no impropriety of language in speaking of a G nil profit, where the question is whether any or what profit has been made; and the answer would be equally valid in the case of an exact balance or of a loss.

It was further urged, in an argument which I find it difficult to distinguish from that which I have already discussed, that, even if the proviso applies, on its proper application the respondent company has been wrongly assessed. I quote from its formal case: H

> " Even if the [Crown] were entitled to take the profits including franked investment income at a minus figure of £330,000 in order to make calculations set forth in the proviso, the result of the sum was that the excess of the gross relevant distribution (£181,000) over the profits including franked investment income (minus £602,000 plus £272,000=minus £330,000) was I £511,000 which when added to the profits of the period gave a figure of minus £91,000 for the net relevant distributions."

I think that this argument does no more than deny the validity of the answer " Profits nil " to the question " What profit is shown by a computation made in accordance with the terms of the proviso? " But, in my opinion, there is no need to go behind that simple answer and inquire whether the computation shows that, even with the inclusion of franked investment income, there is still a loss. The argument stated in this way does, however, illustrate that the respondent company's contention must have a result which defeats the essential purpose of the Act. For, year after year, a company could continue to pay dividends which could only come out of undistributed profits but would escape from any payment of distribution charge so long as even after including franked investment income it showed no profit. The Crown's contention on the other hand appears to me both to be in accord with the natural and primary meaning of the section and to harmonise with the plain purpose of the Act.

I would, therefore, allow the appeal and declare that the respondent company was correctly charged to profits tax by way of a distribution charge for the chargeable accounting period Nov. 1, 1952, to Oct. 31, 1953, in respect of the sum of £181,818. The respondent company must pay the Crown's costs in this House and in the Court of Session.

LORD REID: My Lords, the profits tax assessed in this case is a distribution charge. The general scheme of the Finance Act, 1947, is that, if a company does not distribute the whole of its profits for a particular period, it gets relief for non-distribution by paying a lower rate of profits tax in respect of that part of its profits which it has retained; but when such retained profits come to be distributed, the company pays by way of distribution charge what it had saved by way of relief for non-distribution while it retained the profits undistributed. The provisions of the Act are complicated, partly because profits tax may not be payable in respect of the whole of the company's profits. In particular, profits tax is not payable in respect of franked investment income which consists, broadly speaking, of dividends received from its investments in other trading companies; the reason being that those other companies will already have paid profits tax on their profits, so that to subject them to profits tax again when they are received by another company as dividends would involve double taxation. The Act also deals with abatements, but this matter does not arise in the present case. Allowance is made for these factors in calculating the amount of reliefs for non-distribution and distribution charges. These are calculated not by reference to the total dividends paid by the company (the "gross relevant distributions") but by reference to the appropriate proportion of them (the "net relevant distributions"). Section 34 of the Act of 1947 sets out alternative formulae by which net relevant distributions are to be calculated and this case depends on the proper interpretation of that section.

In this case, during the relevant period, the respondent company suffered a trading loss of £602,000 (in round figures), it received franked investment income amounting to £272,000, and it distributed dividends of £181,818. It had sufficient reserves which had enjoyed relief for non-distribution to enable it to pay this dividend. Admittedly the leading formula in s. 34 (2) cannot be applied. The question is whether the alternative formula set out in the proviso to s. 34 (2) can be applied. If it can, this appeal must succeed: if it cannot, then the respondent company succeeds and no distribution charge is payable. The proviso is in these terms:

> "Provided that where the said gross relevant distributions exceed the profits computed without abatement and including franked investment income, the net relevant distributions shall be the sum of—(a) the profits for the period computed with due regard to the provisions for abatement but not including franked investment income; and (b) the amount of the excess."

It was argued that, before the proviso can apply at all, there must be a profit and that here there was a loss; even if the franked investment income is taken into account there was a loss of £330,000. I agree that a loss of £330,000 cannot be regarded as a profit of minus £330,000, but, in my judgment, it can, in accordance with ordinary usage, be regarded as a profit of nil. There was no profit, and to say that there was no profit appears to me to be the same thing as to say that the profit was nil. Then it was said that a sum cannot properly be said to " exceed " nil; it can only " exceed " another sum. But, again, I think that, in ordinary usage, one can properly say that ten exceeds nil or nothing.

The difficult question in the case appears to me to be the meaning of the words " the profits computed without abatement and including franked investment income "; what is it that the gross relevant distribution must exceed in order to bring the proviso into operation? It is said for the respondent company that " profits " in the legislation dealing with profits tax means profits apart from franked investment income (which I shall call trading profits although that is not quite accurate); and that, therefore, what the proviso directs you to do is first to compute the trading profits and then to include, i.e., to add, the franked investment income. In this case, the trading profits are nil, the franked investment income is £272,000, and adding these two together gives £272,000. The gross relevant distributions, £181,818, do not exceed £272,000, and, therefore, the proviso does not apply. If s. 34 could be taken in isolation, I might be inclined to accept this argument, but it cannot be so taken.

Schedule 4 to the Finance Act, 1937, sets out modifications of the provisions of the Income Tax Acts which were to be applied in computing profits for the purposes of the national defence contribution. In 1946 the national defence contribution was renamed the profits tax, and in 1947 extensive alterations were made. In particular, s. 32 of the Act of 1947 substituted new provisions for those of Sch. 4, para. 7 (1), to the Act of 1937. The new para. 7 (1) appears to me to make it clear that whenever the word " profits " appears by itself in this legislation it means profits excluding franked investment income; but this is followed in s. 32 by a new para. 7 (1A), which is, I think, of vital importance in this case. The new provisions are in these terms:

> " 7.—(1) Income received from investments or other property shall be included in the profits except—(a) income received directly by way of dividend or distribution of profits from a body corporate carrying on a trade or business to which s. 19 of this Act applies; and (b) income so received from any other body corporate, being income received indirectly by way of dividend or distribution of profits from a body corporate carrying on such a trade or business as aforesaid; and (c) income to which the persons carrying on the trade or business are not beneficially entitled: Provided that the profits of a body corporate which, either alone or in conjunction with any statutory undertakers carrying on a trade or business to which sub-s. (5) of the said s. 19 applies, has a controlling interest in any other body corporate, being such statutory undertakers as aforesaid, shall not in any case include any income received from that other body corporate.
>
> " (1A) Any reference in any enactment relating to the profits tax to franked investment income shall be construed as a reference to the income which would be included in the profits if paras. (a) and (b) of the preceding sub-paragraph had been omitted, and, in computing profits for the purposes of so much of any such enactment as refers to profits, including franked investment income, the said sub-paragraph shall have effect as if the said paras. (a) and (b) were omitted."

Sub-paragraph (1) is not obscure. Leaving aside para. (c) and the proviso which throw no light on the present question, it includes in " profits " for the purposes of profits tax all income from investments except such income as is

A described in para. (a) and para. (b)—chiefly dividends from the company's investments in other trading companies. Put more simply, that means that such dividends are not to be included in "profits" for profits tax purposes. Subparagraph (1A) is more than a little obscure. The first part of it appears to be no more than a verbose way of attaching the name "franked investment income" to the kinds of income described in para. (a) and para. (b) of sub-para. (1). (I B follow the statute in referring to parts of a sub-paragraph as paragraphs.) And at first sight the second part might seem to be no more than an elaborate statement of an obvious consequence of so naming those kinds of income. But on closer examination, it appears to me that this second part has an operative effect which is really decisive of the present case.

In the legislation dealing with profits tax the word "profits" frequently C occurs. Sometimes it is qualified by the words "including franked investment income": often it is not so qualified. When it is not so qualified, sub-para. (1A) can have no application, and if, in these cases, it is necessary to compute the profits, then the computation must be made in the manner provided by sub-para. (1). But where the word "profits" is so qualified and the provision requires profits to be computed, then sub-para. (1A) applies and the computation D must be made in the manner provided by this sub-paragraph and not in the manner provided by sub-para. (1). Normally, when the same word is used repeatedly in the same section or group of sections, one presumes that it is intended to have the same meaning. But it appears to me that sub-para. (1A) treats the words "profits, including franked investment income" as a composite E phrase with a special meaning and effect; it directs that, where profits have to be computed for the purposes of a provision in which this phrase is used, the computation shall be made in the manner which would be provided by sub-para. (1) if para. (a) and para. (b) were deleted from that sub-paragraph. Deleting these paragraphs and again leaving aside para. (c) and the proviso, sub-para. (1) would provide: "Income received from investments or other property shall be F included in the profits". In other words, all dividends received by the company are to be taken into account in making the computation of profits, whether they are franked investment income or not.

There may have been good reason for adopting this cumbrous and unusual method of drafting—I do not know. I am very conscious of the fact that all the learned judges of the First Division attach another and a simpler meaning G to sub-para. (1A). The Lord President (LORD CLYDE) said ((1957), S.L.T. at p. 118):

> "Throughout these two sub-paragraphs, therefore, what I have called trading profits and franked investment income are treated as quite distinct and separate, and 'profits' per se exclude any part of the franked investment H income";

and later (ibid.):

> "If it could have been said that the statutes had contemplated that the profits could only be ascertained after franked investment income had I been taken into account, then there might have been plausibility in the [Crown's] argument. But this is not the situation."

LORD SORN said (ibid., at p. 120): "the scheme consistently shows that profits are to be calculated separately from franked investment income". But, giving the best consideration I can to the matter, I have been forced to a different conclusion. To my mind, the compelling words in sub-para. (1A) are "*in computing profits* . . . the said sub-paragraph shall have effect as if the said paras. (a) and (b) were omitted".

I must now turn back to the proviso to s. 34 (2), and, in particular, the words "the profits computed without abatement and including franked investment income". Here the words "computed without abatement and" are interposed between "profits" and "including franked investment income", but I do not think that that is material. It appears to me that this is an enactment which, in the words of sub-para. (1A), "refers to profits, including franked investment income". If the view which I have already expressed is right, then these profits must be computed as directed by sub-para. (1A), and franked investment income must be taken into account in making that computation. The trading loss being £602,000 and the franked investment income £272,000, the result of taking both into computation is that there were no "profits computed without abatement and including franked investment income". I have already given my opinion that that is equivalent to saying that such profits were nil. If that be so, it follows that the assessment in this case was properly made. A B C

In my judgment, this appeal should be allowed.

LORD TUCKER: My Lords, I also agree that this appeal should be allowed for the reasons which have been stated by my noble and learned friends.

LORD KEITH OF AVONHOLM: My Lords, the object of the profits tax legislation is reasonably clear, though the effect of the formulae by which it is sought to achieve that object may not be so immediately apparent. Indeed, the whole point of this appeal is whether one of the formulae is apt to achieve the object of the statute. In imposing a profits tax on the profits of a company, Parliament has allowed a certain relief in respect of profits that are retained by the company and not immediately distributed to the shareholders, called relief for non-distribution, and has imposed a compensating charge on these profits if they come to be subsequently distributed, called a distribution charge. That at least was Parliament's intention, though if the respondent company's contentions and the judgment of the court below, as well as the determination of the commissioners, are right, there is a gap in the legislation which prevents that intention, in present circumstances, from taking effect. D E F

It is important to observe that "profits" of a company are not confined under the relevant statutes to trading profits. While trading profits are to be computed for the chargeable accounting period on income tax principles, as they would be under Case I of Sch. D to the Income Tax Acts, there is to be included, with certain exceptions, in the profits assessable to profits tax, income from investments or other property. This was so in certain cases under s. 20 of and the original para. 7 of Sch. 4 to the Finance Act, 1937, and, though the original para. 7 has now been replaced by a new para. 7 in somewhat different terms, this conception is still retained. As matters now stand, there is to be included in the profits all income received from investments or other property except what is referred to as "franked investment income" and some other categories of income absent from this case. Franked investment income is income received from other bodies corporate on which profits tax has already been paid. G H

Section 19 of the Finance Act, 1937, is the provision under which the tax is charged. It was levied originally at the rate of five per cent., with no provision for relief in respect of non-distribution, or compensating charge in respect of distribution. Sub-section (2) of s. 30 of the Finance Act, 1947, introduced non-distribution relief where I

> ". . . the net relevant distributions to proprietors . . . for any chargeable accounting period are *less* than the profits . . . for that period chargeable to the profits tax . . ."

Sub-section (3) of the same section prescribed a distribution charge where

> ". . . the net relevant distributions to proprietors . . . for any chargeable accounting period are *greater* than the profits . . . for that period chargeable to the profits tax . . ."

"Net relevant distribution" is explained in s. 34 (2) of the Act of 1947. I quote the sub-section in full:

> "The net relevant distributions to proprietors for any chargeable accounting period of a body corporate, society or other body are so much of the gross relevant distributions to the proprietors for that period of that body corporate, society or other body (as defined by the next succeeding section) as bears to the whole of the said gross relevant distributions the same proportion that the profits for that period bear to the profits therefor computed without abatement and including franked investment income: Provided that where the said gross relevant distributions exceed the profits computed without abatement and including franked investment income, the net relevant distributions shall be the sum of—(a) the profits for the period computed with due regard to the provisions for abatement but not including franked investment income; and (b) the amount of the excess."

A few calculations will show that, where the amount distributed as dividend to the shareholders is less than the profits plus the franked investment income (if any) of a company for the relevant accounting period, the "net relevant distribution" calculated according to the first part of the sub-section will always be less than the profits. A balance is attained where profits and franked investment income exactly meet the amount distributed as dividend. There is then a net relevant distribution equal to the profits. No occasion arises for non-distribution relief nor for a distribution charge. The profits excluding franked investment income are taxed at the full rate of charge and that is all. But where the dividend to the shareholders is greater than the profits including the franked investment income, the formula so far applied breaks down. It takes no account of the sum drawn from reserves to make up the dividend, and so the figure brought out as the net relevant distribution will not be appropriate for the purpose of calculating the distribution charge under s. 30 (3) of the statute. A new formula, as prescribed by the proviso, is accordingly introduced to be applied where the dividend paid out in any year is greater than the profits including franked investment income. This achieves, at least where there is a profit, that the full profits tax is charged. Tax at 22½ per cent. is charged on the profit for the year, excluding the franked investment income, the franked investment income which has already borne the full tax and is now distributed to help to make up the dividend pays nothing further, and on the balance, which, ex hypothesi, has been drawn from past profits to meet the dividend and has already borne tax at the rate of 2½ per cent. in respect of non-distribution relief, the company pays the distribution charge of twenty per cent. So far the scheme of the statute seems plain. But it is said for the respondent company, and has been held by the Court of Session and the commissioners, to break down in the circumstances of this case, because there are no profits to which the proviso can apply. There was, in fact, a substantial loss, even including franked investment income. Further, it is said that, if there are no profits, franked investment income cannot be included in the profits. Franked investment income, accordingly, if it falls to be brought in at all, falls to be brought in by itself and as added to nothing it exceeds the amount of the dividend paid, the proviso does not apply.

My Lords, I have come to the opinion that the contentions of the respondent company and the reasoning of the learned judges in the court below are unsound. If the phrase found in the proviso "profits computed without abatement and including franked investment income" were taken by itself, without any aid from any other part of the statute, I should have thought that it meant that profits and franked investment income were to be computed together to arrive at a total profit. If there is no profit with the inclusion of the franked investment income, then total profit, as I see it, would be nil. It is to be remembered that profit for the purpose of profits tax includes investment income which is not franked, and that the exclusion of franked investment income from the profit is to prevent it being taxed a second time. This is, I think, clear from the provisions of sub-para. (1) of para. 7 of Sch. 4 to the Act of 1937, as amended by the Act of 1947. But what is conclusive, in my opinion, is sub-para. (1A) of the same paragraph which, in effect, enacts that " in computing profits for the purposes of so much of any such enactment as refers to profits, including franked investment income " franked investment income shall be computed in the profits. In the opening words of the proviso, franked investment income cannot, therefore, be treated as something standing outside or apart from profits or losses. It must be included in striking a balance of profit or loss.

That leaves the question whether, if there is a loss after bringing in franked investment income, the proviso applies. In my view, the profits must then be regarded as nil and the calculation under the proviso must be made from this level. There is nothing in the proviso which excludes such an interpretation, and such a reading is consistent with the whole object of the statute. As already indicated, the formula of the proviso is designed to secure that any draft from past undistributed income to make up a distribution of dividend should bear its proper share of the distribution charge. This object would be entirely defeated if a company which operated in any year at a loss and paid a dividend out of past profits were to pay no distribution charge. An application of the formula in the proviso to such a case, by taking profits as nil, involves, I think, no straining of the statutory language.

I would allow the appeal.

LORD SOMERVELL OF HARROW: My Lords, I agree with the opinion delivered by my noble and learned friend on the Woolsack and have nothing to add to it.

Appeal allowed.

Solicitors: *Solicitor for England of the Board of Inland Revenue*, agent for *Solicitor for Scotland of the Board of Inland Revenue* (for the Crown); *Thomas Cooper & Co.*, agents for *Beveridge & Co.*, Edinburgh (for the respondent company).

[*Reported by* G. A. Kidner, Esq., *Barrister-at-Law.*]

PTEROTI COMPANIA NAVIERA S.A. *v.* NATIONAL COAL BOARD.

[QUEEN'S BENCH DIVISION (Diplock, J.), February 19, 1958.]

Shipping—Charterparty—Lay days—Unloading—Commencement of lay days—Unloading begun before notice of readiness given.

By a charterparty in the form of the Americanized Welsh Coal Charter it was provided that lay time for discharging the vessel chartered was to commence " twenty-four hours, Sundays and holidays excepted, after vessel is ready to unload and written notice given . . ." Under the charterparty the lay time amounted to three days, twenty-one hours and ten minutes. The vessel having berthed at the port nominated by the charterers for discharging cargo at 2 a.m. on Wednesday, July 18, 1956, and being at that time in free pratique and in every respect ready to discharge her cargo, the charterers' agents began to discharge her at 2.30 a.m. that day; the servants of the owners of the vessel assisted in the discharge in accordance with the charterparty by providing, e.g., winches and winchmen, and they raised no objection to its commencement at that hour. At 9 a.m. on Wednesday, July 18, which was at the earliest time possible under the terms of the charterparty, the owners' agents gave written notice of readiness to discharge to the charterers' agents, the notice stating that time was to count as provided in the charterparty. Discharge of the vessel was completed at 11.45 p.m. on Friday, July 20, 1956. On the question when lay time had begun for the purpose of calculating the amount of dispatch money payable to the charterers,

Held: (i) on the true construction of the charterparty lay time commenced twenty-four hours after the last of two events, viz., when the vessel was ready to unload and when written notice of readiness to discharge was given to the charterers; it commenced, therefore, at 9 a.m. on Thursday, July 19, and not when the discharging operations were in fact begun.

(ii) on the facts the charterers had not waived the provisions of the charterparty as to the commencement of lay time by starting to unload before time had begun to run thereunder, nor could there be implied an agreement that lay time was to commence from the time at which the unloading was in fact begun.

[As to time for discharging cargo and as to giving written notice of readiness, see 30 HALSBURY'S LAWS (2nd Edn.) 338-341, paras. 520-522; 348, 349, paras. 528, 529; and for cases on the commencement of lay days, see 41 DIGEST 568-572, *3921-3957*.]

Case referred to:

(1) *Nelson (James) & Sons, Ltd.* v. *Nelson Line (Liverpool), Ltd.*, [1908] A.C. 108; 77 L.J.K.B. 456; 98 L.T. 322; *revsg.* sub nom. *Nelson & Sons, Ltd.* v. *Nelson Line (Liverpool), Ltd., Re Same*, [1907] 2 K.B. 705; 41 Digest 580, *4044*.

Action.

In this action Pteroti Compania Naviera S.A., the plaintiffs (referred to hereinafter as " the shipowners "), claimed the sum of £190 12s. 6d. as freight, against the National Coal Board, the defendants (referred to hereinafter as " the charterers "), being the difference between £340 2s. 1d. which the charterers had deducted as dispatch money from the freight payable by them to the shipowners, and £149 9s. 7d. which was the amount of dispatch money that the shipowners claimed the charterers were entitled to deduct from the freight payable to them.

The facts, as set out in an agreed statement of facts, were as follows. By a charterparty, dated Sept. 29, 1955, in the form of the Americanized Welsh Coal Charter, the shipowners agreed to charter to the charterers the vessel s.s. Khios Breeze (referred to hereinafter as " the vessel "). Clause 8 of the charterparty provided:

> " The cargo to be taken from alongside by consignee at port of discharge, free of expense and risk to the vessel, at the average rate of 2,500 . . . [if Rotterdam] . . . tons per day, weather permitting, Sundays and holidays and afternoon on Saturdays excepted, provided vessel can deliver it at this rate. If longer detained, consignee to pay vessel demurrage at the rate of £300 British sterling per running day (or pro rata for part thereof). If sooner dispatched, vessel to pay charterer or his agents £150 British sterling per day (or pro rata for part thereof) dispatch money for working time saved. Time to commence twenty-four hours, Sundays and holidays excepted, after vessel is ready to unload and written notice given, whether in berth or not, and the time allowable for discharging to be calculated on the basis of the bill of lading quantity. In case of strikes, lockouts, civil commotions, or any other causes or accidents beyond the control of the consignee which prevent or delay the discharging, such time is not to count unless the vessel is already on demurrage. Consignee to effect the discharge of the cargo, vessel providing only steam, steam winches, winchmen, gins and falls."

In pursuance of the charterparty the vessel loaded 9,705 tons, 1,000 lb. at Hampton Roads so that under the provisions of cl. 8, the lay time for discharging the vessel was three days, twenty-one hours and ten minutes. Before the vessel arrived off Land's End, the master, in accordance with the charterparty, applied to the charterers for orders as to the port of discharging, and he was ordered to discharge the vessel at Rotterdam. The master then informed the charterers of the estimated time of arrival of the vessel at Rotterdam where she in fact berthed at 2 a.m. on Wednesday, July 18, 1956. At the time that she berthed at Rotterdam, the vessel was in free pratique and, in every respect, was ready to discharge, and at 2.30 a.m. on July 18, the charterers' agents began to discharge her, the shipowners' servants on board the vessel assisting in the discharge in the usual manner and raising no objection to the commencement of the discharge at that time. At 9 a.m. on Wednesday, July 18, at the earliest time possible under the charterparty*, the shipowners' agents tendered to the charterers' agents notice of readiness to discharge which the charterers' agents accepted. The notice read:

> " S.s. Khios Breeze. On behalf of the master we herewith declare that the above named vessel arrived at her discharging berth at 01.30 hrs. today, July 18, 1956, being in free pratique and in every respect ready for discharging operations as from 01.30 hrs. Time to count as per terms, conditions and exceptions of the charterparty covering this voyage."

Under cl. 8 of the charterparty the notice of readiness expired at 9 a.m. on Thursday, July 19, 1956. The discharge of the vessel proceeded continuously from 2.30 a.m. on July 18 until 11.45 p.m. on Friday, July 20, 1956, when it was completed.

The shipowners contended that the lay time for discharging the vessel commenced at 2.30 a.m. on Wednesday, July 18, viz., the time when discharging in fact commenced, and that therefore the charterers were entitled to dispatch money in respect of twenty-three hours, fifty-five minutes, which amounted to £149 9s. 7d. at the rate provided in cl. 8 of the charterparty; the charterers

---

* Clause 15 of the charterparty provided: " All notices under this charter at port of discharge . . . to be given in writing in consignee's agents' office on working days between the hours of 9 a.m. and 5 p.m. . . ."

A contended that the laytime commenced at 9 a.m. on Thursday, July 19, viz., when the notice of readiness expired, and therefore, that they were entitled to dispatch money in respect of two days, six hours and twenty-five minutes, which amounted to £340 2s. 1d. under cl. 8.

Eustace Roskill, Q.C., and *M. R. E. Kerr* for the plaintiffs, the shipowners.
B *A. A. Mocatta, Q.C.*, and *S. O. Olson* for the defendants, the charterers.

DIPLOCK, J., having read cl. 8 of the charterparty, and having stated the facts to which the clause had to be applied, continued: I am told that this is the first time the question has arisen when time is to commence for the purpose of demurrage or dispatch money where the charterers in fact start unloading before a notice of readiness has expired; and it does appear from the cases which have C been cited to me that there is none which is completely on all fours with this. On the other hand, it does seem to me that the point is a short and simple one. It depends, as points of this kind must depend, on the true construction of the relevant contract and, in particular, cl. 8* of that contract. I will read now the most relevant sentence of cl. 8:

D
> " Time to commence twenty-four hours, Sundays and holidays excepted, after vessel is ready to unload and written notice given, whether in berth or not, and the time allowable for discharging to be calculated on the basis of the bill of lading quantity."

That sentence means that in order to find out when time starts one looks for E two things: first, when was the vessel ready to unload (and time must start at least twenty-four hours after that); and secondly, when was written notice given (and time must start at least twenty-four hours after that).

Therefore, applying this sentence and clause to the facts of this case, on the face of it, it would appear that the charterers' contention† is right. On what seems to me to be plainly the prima facie meaning of cl. 8, why should it not F apply to this case? Counsel for the shipowners, I think, puts the matter in two ways. He says that the clause providing for notice, cl. 8, which includes also the provision about " Time to commence twenty-four hours . . . after vessel is ready to unload ", is put in for the charterers' benefit alone: it is therefore one that can be waived by the charterers, and that when charterers start to unload before the time has commenced to run under that clause they G waive their right to delay the starting of lay days until twenty-four hours from when notice of readiness to unload has been given. Alternatively, counsel for the shipowners says that if it is not a case of waiver then there is an agreement to be implied between the charterers and the shipowners that lay time is to start from the time at which unloading in fact commences. The only evidence that there is either of agreement or of waiver is that in fact the charterers did H start to unload at the time that I have stated and that the vessel's servants assisted in the operation in accordance with the provisions of cl. 8 by providing steam, steam-winches, winchmen, gins and falls. I think that quite plainly no agreement can be construed out of those facts. I draw attention to the decision of the House of Lords in *James Nelson & Sons, Ltd.* v. *Nelson Line* (*Liverpool*), *Ltd.* (1) ([1908] A.C. 108) and to a dissenting judgment‡ of FLETCHER MOULTON, I L.J., in the Court of Appeal ([1907] 2 K.B. 705 at pp. 715, 716), in the same case. That case is not wholly similar but the judgment to which I have referred points out the principles on which the court should be prepared to infer agreements of that kind between the parties, and contains a warning against an easy inference of such agreements. I can see no ground whatever on which I could infer an agreement here that because the charterers started to unload, and the shipowners' servants assisted in doing so, at two-thirty in the morning there was an agreement between the parties that lay time should start then instead of at the time provided for (in my view) on the plain construction of cl. 8. Equally I can see no ground on which I should be entitled to hold that cl. 8 had been waived by the charterers. It does not seem to me that either the provision relating to time commencing or that relating to notice is one which is put in solely for the benefit of the charterers; and I do not think that cl. 8 is a clause to which waiver would apply in any event.

---

* For the full terms of cl. 8 of the charterparty, see p. 604, letter B, ante.

† Viz., that lay time for discharging the vessel commenced when the notice of readiness expired, i.e., twenty-four hours after 9 a.m. on Wednesday, July 18, when the notice was given.

‡ The decision of the Court of Appeal was reversed in the House of Lords. LORD LOREBURN, L.C., and LORD HALSBURY, with whom the other law lords concurred, both rejected the inference of an agreement (see [1908] A.C. at pp. 113, 115).

Counsel for the shipowners has sought to impress on me that the only advantage of starting to unload early accrues to the charterer because he gets his cargo quicker and he gets dispatch money or pays less demurrage. It seems to me that there is also an advantage to the shipowner in getting his vessel discharged as early as possible because he gets the use of his vessel. Whether one advantage outweighs the other in any particular case I do not know, and I do not think that it matters. There are advantages to both sides; and in those circumstances I am not prepared to infer any agreement for the waiver of what I think are the plain terms of the clause itself.

I have had cited to me, by the industry of counsel, a number of cases on the fringe of the matter; and if I do not mention them in detail I hope it will not be thought that I have not derived benefit from reading them*. I am engaged here, however, in determining a question of construction. I do not think that there is any particular magic about its being a charterparty in this case (except that one would seek to know the technical terms involved); and it does not seem to me that the construction which other courts have put on different clauses in other charterparties really could or should constrain me to apply to this charterparty a construction which in my view would be contrary to its plain meaning.

This action accordingly fails.

Action dismissed.

Solicitors: *Stokes & Mitcalfe* (for the plaintiffs, the shipowners); *Donald H. Haslam* (for the defendants, the charterers).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

---

* The following cases were referred to in argument: *Kawasaki Kisen Kabushiki Kaisha* v. *Bantham Steamship Co., Ltd.*, [1938] 1 All E.R. 571; *Franco-British Steamship Co., Ltd.* v. *Watson & Youell* (1921), 9 Lloyd's Rep. 282; *The Katy*, [1895] P. 56; *Burnett Steamship Co., Ltd.* v. *Oliver & Co., Ltd.* (1934), 48 Lloyd's Rep. 238; *Horsley Line, Ltd.* v. *Roechling Bros.*, 1908 S.C. 866; *Verren* v. *Anglo-Dutch Brick Co. (1927), Ltd.* (1929), 34 Lloyd's Rep. 210; *Rederi Akt. Transatlantic* v. *Board of Trade* (1925), 30 Com. Cas. 117.

BETTY'S CAFÉS, LTD. *v.* PHILLIPS FURNISHING STORES, LTD.

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Keith of Avonholm, Lord Somervell of Harrow and Lord Denning), January 27, 28, 29, February 27, 1958.]

Landlord and Tenant—New tenancy—Business premises—Opposition by landlord—Intention to reconstruct premises on termination of current tenancy—Date at which fixed and genuine intention to reconstruct must exist—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2 *c.* 56), *s.* 30 (1) (*f*).

Since 1925, the appellants, who carried on the business of café proprietors and retail confectioners, had been the tenants of premises under a series of leases, the last of which was for a term of eight years expiring on Dec. 31, 1953. In August, 1953, the respondents (hereinafter called " the landlord company ") acquired the long leasehold reversion of the premises, the purchase being completed on Mar. 1, 1954. On Sept. 23, 1953, a new tenancy of the premises was granted by the county court under the Leasehold Property (Temporary Provisions) Act, 1951, for a term of twelve months from Jan. 1, 1954, and this tenancy was continued from Jan. 1, 1955, by virtue of the Landlord and Tenant Act, 1954, s. 24 (1)*. On June 28, 1955, the tenants served notice on the landlord company requesting a new tenancy for fourteen years. On Aug. 15, 1955, the landlord company gave notice of opposition, relying on s. 30 (1) (f)† of the Act (i.e., on an intention to carry out substantial work of construction which they could not reasonably do without obtaining possession). On Oct. 27, 1955, the tenants commenced proceedings for the grant of a new tenancy by the court. On Apr. 23, 1956, after the application to the court had been heard for four days, the board of the landlord company passed a resolution‡ that, in the event of the company obtaining possession of the premises, work specified in an architect's estimate previously obtained should be carried out forthwith and expenditure of £20,000 should be approved. It was proved before the High Court that, on Apr. 23, 1956, the landlord company intended, on the termination of the current tenancy, to carry out substantial work of construction on the premises and could not reasonably do so without obtaining possession of them, but it was not proved that the landlord company so intended at any earlier date.

Held: (i) (LORD KEITH OF AVONHOLM dissenting) the relevant time at which a landlord's intention as described by s. 30 (1) (f) of the Landlord and Tenant Act, 1954, must be shown to exist for the purposes of that paragraph was the time of the hearing of the application for a new tenancy, and, the landlord company in the present case having established such an intention on their part at that time, a new tenancy could not be granted.

(ii) the fact that the sole object of the landlord company was to adapt the premises for occupation for their own business did not render s. 30 (1) (f) unavailable to them, their ground of opposition under s. 30 (1) (f) being independent of the ground established by s. 30 (1) (g), viz., an intention on the part of a landlord to occupy premises for his own business, which ground was unavailable to them by reason of s. 30 (2) of the Act of 1954.

---

* Section 24 (1) provides: " A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act; and, subject to the provisions of s. 29 of this Act, the tenant under such a tenancy may apply to the court for a new tenancy—(a) if the landlord has given notice under the next following section to terminate the tenancy, or (b) if the tenant has made a request for a new tenancy in accordance with s. 26 of this Act."

† The terms of para. (f) are printed at p. 616, letter C, post.

‡ The terms of the resolution are printed at p. 610, letter I, to p. 611, letter A, post.

Dictum of Parker, L.J., in *Fisher* v. *Taylors Furnishing Stores, Ltd.* ([1956] A 2 All E.R. at p. 84) approved.

Per Lord Morton of Henryton: I prefer the view of the Court of Appeal that, if the tenants had been entitled to a new tenancy, the term should have been five years not fourteen years (see p. 619, letter H, post).

Decision of the Court of Appeal ([1957] 1 All E.R. 1) affirmed.

[**Editorial Note.** The opinions of Viscount Simonds and Lord Morton B of Henryton show that under paras. (a)-(c) of s. 30 (1) of the Landlord and Tenant Act, 1954, the requisite state of affairs on which to ground opposition must be shown to exist both at the time of the notice of opposition and at the hearing. Under para. (d) the willingness must exist at the hearing. On these points Lord Keith of Avonholm's opinion is to the same effect (see p. 613, letter F, to p. 614, letter A, p. 617, letter H, to p. 618, letter A, and C p. 620, letters F and G, post).

For the Landlord and Tenant Act, 1954, s. 30, s. 33, see 34 Halsbury's Statutes (2nd Edn.) 414, 417.]

Cases referred to:

(1) *Cunliffe* v. *Goodman*, [1950] 1 All E.R. 720; [1950] 2 K.B. 237; 31 D Digest (Repl.) 378, *5070*.
(2) *Porter* v. *McKenna*, [1956] A.C. 688.
(3) *Atkinson* v. *Bettison*, [1955] 3 All E.R. 340; 3rd Digest Supp.
(4) *Fisher* v. *Taylors Furnishing Stores, Ltd.*, [1956] 2 All E.R. 78; [1956] 2 Q.B. 78; 3rd Digest Supp.
(5) *Lazarus Estates, Ltd.* v. *Beasley*, [1956] 1 All E.R. 341; [1956] 1 Q.B. 702; 3rd Digest Supp. E
(6) *Kimpson* v. *Markham*, [1921] 2 K.B. 157; 90 L.J.K.B. 393; 124 L.T. 790; 31 Digest (Repl.) 718, *8023*.
(7) *Benninga (Mitcham), Ltd.* v. *Bijstra*, [1945] 2 All E.R. 433; [1946] K.B. 58; 115 L.J.K.B. 28; 173 L.T. 298; 31 Digest (Repl.) 704, *7929*.
(8) *Fuggle (R. F.), Ltd.* v. *Gadsden*, [1948] 2 All E.R. 160; [1948] 2 K.B. 236; [1948] L.J.R. 1664; 31 Digest (Repl.) 704, *7930*. F
(9) *Bolton (H. L.) Engineering Co., Ltd.* v. *Graham (T. J.) & Sons, Ltd.*, [1956] 3 All E.R. 624; [1957] 1 Q.B. 159; 3rd Digest Supp.
(10) *Ancona* v. *Marks*, (1862), 7 H. & N. 686; 31 L.J.Ex. 163; 5 L.T. 753; 158 E.R. 645; 6 Digest 47, *341*.

Appeal. G

Appeal by the tenants, Betty's Cafés, Ltd., from an order of the Court of Appeal (Birkett and Romer, L.JJ., Lord Evershed, M.R., dissenting), dated Nov. 28, 1956, and reported [1957] 1 All E.R. 1, reversing an order of Danckwerts, J., dated May 7, 1956, and reported [1956] 2 All E.R. 497, on an application by the tenants for a new tenancy, under the Landlord and Tenant Act, 1954, of business premises known as 42 and 44, Darley Street, Bradford, H for a term of fourteen years commencing on June 24, 1956. The application was opposed by the landlords, Phillips Furnishing Stores, Ltd. (hereinafter called "the landlord company"), on the ground specified in s. 30 (1) (f) of the Act of 1954, namely, that, on the termination of the current tenancy, the landlord company intended to reconstruct the premises comprised in the holding, or a substantial part of those premises, or to carry out substantial work of construction on the holding or part thereof, and that they could not reasonably do so I without obtaining possession of the holding. Danckwerts, J., held that the landlord company had not shown the requisite intention at the material time, which was the date of the service of the notice of opposition, and, accordingly, he granted the tenants' application. The Court of Appeal, reversing this decision on the law, held that the relevant time at which the landlord company must have held the intention described in s. 30 (1) (f) of the Act of 1954, if the ground of opposition provided by that paragraph were to be established, was the time of the court's decision at the hearing and not the date when the notice of opposition was given. The Court of Appeal, therefore, remitted the matter to Danckwerts, J., to determine whether the landlord company had established at the hearing such an intention as satisfied s. 30 (1) (f), having regard to a resolution of the landlord company's board passed on Apr. 23, 1956, after the application to the court had been heard for four days. On Apr. 4, 1957, Danckwerts, J., held ([1957] 2 All E.R. 223) that the passing of the resolution on Apr. 23, 1956, by the landlord company's board was effective and dismissed the tenants' application for a new tenancy.

The facts appear in the opinion of Viscount Simonds.

Charles Russell, Q.C., L. A. Blundell and *C. B. Priday* for the appellants, the tenants.

Milner Holland, Q.C., and *J. P. Widgery* for the respondents, the landlord company.

The House took time for consideration.

Feb. 27. The following opinions were read.

VISCOUNT SIMONDS: My Lords, this appeal raises a short question of construction of certain sections of Part 2 of the Landlord and Tenant Act, 1954, to which I will refer as "the Act of 1954". Concretely, it is whether Danckwerts, J., was right, when the matter first came before him, in ordering the respondents (hereinafter called "the landlord company") to grant to the appellants (hereinafter called "the tenants") a new tenancy of certain business premises known as 42-44, Darley Street in the city of Bradford for the term of fourteen years from June 14, 1956, at a rent of £3,000 per annum and otherwise on the terms of a lease dated Apr. 29, 1946, to which I will refer later. The Court of Appeal have by a majority (Birkett and Romer, L.JJ., dissentiente Lord Evershed, M.R.), held that he was wrong in doing so.

It is necessary to state briefly the relevant facts on which this question arises. The tenants and their predecessors in title have since 1925 carried on the business of café proprietors and retail confectioners on the greater part, and, since June 24, 1955, on the whole, of the premises in question under a series of leases the last of which was dated Apr. 29, 1946, and was for a term of eight years from Jan. 1, 1946, at a rent of £1,400 per annum. On Sept. 23, 1953, the Bradford County Court made an order under the Leasehold Property (Temporary Provisions) Act, 1951, for the grant of a new tenancy of the premises to the tenants' predecessor in title for a term of twelve months from Jan. 1, 1954, at a rent of £2,000 per annum and otherwise on the terms of the said lease. This tenancy was, from Jan. 1, 1955, continued by s. 24 (1) of the Act of 1954 and has, since Feb. 17, 1955, been vested in the tenants. In the meantime, the landlord company had acquired the long leasehold reversion of the premises at a price of £38,750, the contract for purchase having been made on Aug. 25, 1953, and the purchase completed on Mar. 1, 1954. It was, in the view of the learned judge, which I see no reason to doubt, fairly clear that they hoped to occupy this property for the purposes of their furnishing business. It is also, I think, clear that this idea was never formally given up by the board of directors of the landlord company, though the inconsistent idea of selling the premises to the tenants was favoured by certain of the directors and was by them carried so far that the tenants felt a legitimate grievance at its abandonment. All this, however, has become of no importance, for your Lordships have to determine this appeal on two findings of fact: (i) that it was proved that, on Apr. 23, 1956, the landlord company intended, on the termination of the current tenancy, to carry out a substantial work of construction on the premises and could not reasonably do so without obtaining possession thereof; and (ii) that it was not proved that they so intended at any earlier date. The relevance of these dates must now be explained.

Part 2 of the Act of 1954 was designed (inter alia) to give a greater degree of protection to the tenants of business premises than they formerly had. To effect this purpose, it provided in the first place that a tenancy to which it applied should continue automatically under s. 24 until one or other of several events should happen, of which the relevant event for the purpose of this case is that the tenant should, pursuant to s. 26, make a request for a new tenancy. That section provided that a tenant's request for a new tenancy might be made in the circumstances therein described (which admittedly covered the present case) and should be for a tenancy beginning with such date not more than twelve nor less than six months after the making of the request as might be specified therein, with a proviso which I need not state. It further provided that a tenant's request for a new tenancy should not have effect unless it was made by notice in the prescribed form given to the landlord and set out the tenant's proposals as to the property to be comprised in the new tenancy, as to the rent to be payable thereunder and as to the other terms thereof. And, by sub-s. (6), it provided as follows:

> " Within two months of the making of a tenant's request for a new tenancy the landlord may give notice to the tenant that he will oppose an application to the court for the grant of a new tenancy, and any such notice shall state on which of the grounds mentioned in s. 30 of this Act the landlord will oppose the application."

Taking advantage of this section, the tenants by notice in the prescribed form to the landlord company dated June 28, 1955, requested the grant of a new tenancy of the premises commencing on June 24, 1956, at a rent of £2,500 per annum for a term of fourteen years, the other terms being, except as therein mentioned, those of the existing tenancy. On Aug. 15 the landlord company replied that they were not willing to grant a new tenancy and, following precisely the language of s. 26 (6) and of s. 30 (1) (f), said that the grounds

> " on which we shall oppose any application which you may make to the court for the grant of a new tenancy of the said property are that on the termination of the current tenancy we intend to reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that we could not reasonably do so without obtaining possession of the holding."

On Oct. 27, 1955, the tenants accordingly issued an originating summons in the Chancery Division of the High Court asking that the landlord company might be ordered to grant them a new tenancy in the terms of their notice. This summons, having come before the master on certain affidavit evidence, was adjourned to be heard in effect as a witness action by the judge. It was heard with oral evidence before DANCKWERTS, J., on Apr. 16, 1956, and five further days, and on May 7 he gave judgment in favour of the tenants and ordered the landlord company to grant them a new lease of the premises for fourteen years from June 24, 1956, at a rent of £3,000 per annum. It is necessary now to remind your Lordships of what proved to be the decisive event of Apr. 23, 1956. On that day, at a board meeting of the landlord company, the hearing of the case before the learned judge being nearly but not quite concluded, it was resolved

> " (i) That in the event of the company obtaining possession of these premises from [the tenants] on the termination of the [tenants'] current tenancy thereof the works detailed in Mr. Ovenden's specification dated January, 1955, and plan numbered 45/2 be forthwith carried out and that expenditure of up to £20,000 upon such works be approved. (ii) That counsel appearing for the company in the application by [the tenants] now proceeding in the Chancery Division be authorised to give an undertaking either to the

> court or to [the tenants] that the above-mentioned works will be carried out as soon as is practicable in the event of possession being so obtained."

I have said that the passing of this resolution was a decisive event. But it was not yet to be decisive. For DANCKWERTS, J., while holding that the works in question were a substantial work of construction within the meaning of s. 30 (1) of the Act and that the landlord company could not reasonably carry them out without obtaining possession of the premises, held that, on the true construction of the Act, the landlord company must prove that already at the date when they gave their notice of opposition, namely, on Aug. 15, 1955, they had a firm and settled intention to carry out these works at the end of the current tenancy. He held (and it has not since been disputed) that they had not proved such an intention at that date; he, therefore, regarded the resolution of Apr. 23, 1956, as irrelevant.

Here, then, my Lords, was the issue on which the Court of Appeal, though divided among themselves, overruled the learned judge. Was it necessary to prove that the requisite intention was held at the date of the notice of opposition or was it sufficient to prove that it was held at the date of the hearing? Taking the latter view, the Court of Appeal, not having had the advantage of the learned judge's opinion whether the resolution of Apr. 23 had the requisite quality of a fixed and settled intention, remitted the case to him for his determination of that question. He decided it in favour of the landlord company, and accordingly dismissed the tenants' application for a new lease. In effect, therefore, this appeal raises the single question whether the Court of Appeal were right in holding that the landlord company proved the intention required by s. 30 (1) of the Act if they proved its existence at the date of the hearing. If your Lordships thought they were not right, then the further question would arise whether the term of the new lease should, if granted, be, as DANCKWERTS, J., determined, fourteen years or, as the Court of Appeal unanimously thought, five years only. But this question does not arise.

For the determination of this short question of construction, I must refer to certain other sections of the Act. I have already pointed out that, under s. 26 (6)

> "the landlord may give notice to the tenant that he will oppose an application to the court for the grant of a new tenancy, and any such notice shall state on which of the grounds mentioned in s. 30 of this Act the landlord will oppose the application."

I have also, with sufficient precision, referred to the ground, namely that contained in s. 30 (1) (f), on which the landlord company gave notice that they would oppose, and, in fact, opposed, the tenants' application in this case. But, in deference to the argument addressed to us, I set out the grounds mentioned in s. 30 (1) (a), (b), (c), (d) and (g), ignoring para. (e) which neither side found helpful or wholly intelligible. I shall also refer to s. 30 (2) and to s. 31 (1), as throwing a mild light on the construction. Section 30 (1) is as follows:

> "The grounds on which a landlord may oppose an application under sub-s. (1) of s. 24 of this Act are such of the following grounds as may be stated in the landlord's notice . . . under sub-s. (6) of s. 26 thereof, that is to say:—
>
> "(a) where under the current tenancy the tenant has any obligations as respects the repair and maintenance of the holding, that the tenant ought not to be granted a new tenancy in view of the state of repair of the holding, being a state resulting from the tenant's failure to comply with the said obligations;
>
> "(b) that the tenant ought not to be granted a new tenancy in view of his persistent delay in paying rent which has become due;
>
> "(c) that the tenant ought not to be granted a new tenancy in view of other substantial breaches by him of his obligations under the current

> tenancy, or for any other reason connected with the tenant's use or management of the holding; A
>
> "(d) that the landlord has offered and is willing to provide or secure the provision of alternative accommodation for the tenant, that the terms on which the alternative accommodation is available are reasonable having regard to the terms of the current tenancy and to all other relevant circumstances, and that the accommodation and the time at which it will be B available are suitable for the tenant's requirements (including the requirement to preserve goodwill) having regard to the nature and class of his business and to the situation and extent of, and facilities afforded by, the holding; . . .
>
> "(g) subject as hereinafter provided, that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, C or partly for the purposes, of a business to be carried on by him therein, or as his residence."

Sub-section (2) of s. 30 precluded the landlord company from taking advantage of para. (g), for it made that ground available only to a landlord who had acquired the reversion at least five years before the termination of the current tenancy. Section 31 (1) provided that, if a landlord opposes an application under sub-s. (1) D of s. 24 on grounds on which he is entitled to oppose it under s. 30 and establishes any of those grounds to the satisfaction of the court, the court shall not make an order for the grant of a new tenancy.

My Lords, as a preliminary to determining the date when the requisite intention must be proved to have been formed, there was much discussion on the meaning of the word "intends" in s. 30 (1) (f). It might be regarded as somewhat E academic in this case; for it is conceded that, whatever the meaning of the word, an intention had not been formed at the date of notice of opposition but had been formed on Apr. 23, 1956. But the question has this degree of relevance, that the greater the fixity of intention and the less the mental reservation, the greater the difficulty in supposing that the landlord is to form that intention within two months of receiving the tenant's request or for ever hold his peace. F In this context, your Lordships have the advantage of a judgment delivered by ASQUITH, L.J., than whom there have been few greater masters of the English language in judicial interpretation or exposition, in *Cunliffe* v. *Goodman* (1) ([1950] 1 All E.R. 720). I will content myself with a single short passage, though much more might be usefully cited. The learned lord justice said (ibid., at p. 724): G

> "An 'intention', to my mind, connotes a state of affairs which the party 'intending'—I will call him X.—does more than merely contemplate. It connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about by his own act of volition."

H

I do not think that anything is to be gained by trying to elaborate these words, but I must fairly add that I do not at all dissent from the explanation of them which the learned Master of the Rolls (LORD EVERSHED) has given in this case ([1957] 1 All E.R. at p. 17). It is a question of fact what intention a man has at a given time, difficult, it may be, to ascertain, but still a question of fact, and I think that a jury directed in such words as these could come to a fair conclusion. I

Having said so much, I doubt whether I have got much help on my way to a solution of the question of construction. But perhaps it may be said that it would, in many cases, place an unfair burden on the landlord if, within a short space of two months, he had to attain the fixity of intention which I have indicated. Content, perhaps, to await the time when he can resume possession under para. (g), he is suddenly faced with an application compelling him to form an intention, which can only be formed after a consideration of a number of factors not easily ponderable. If I felt any real difficulty in construction, I

A should, I think, find in this consideration an impulse to regard the date of hearing as the relevant and only relevant date for the ascertainment of intention. Equally, from the point of view of the tenant, it seems essential that the court should find the intention subsisting at the date of the hearing. As I listened to the argument for the tenants and studied their formal Case, it appeared to me that they regarded the date of notice of opposition as the only relevant date. But I B have not been able to understand what advantage the tenants could gain from the fact of the landlord company's intention at that date or from the proof of it, if at a later stage it had been abandoned. On this part of the case I respectfully adopt the reasoning of ROMER, L.J.*, on which I cannot hope to improve.

I return, then, to the short question of construction. Under s. 26 (6), a landlord giving notice that he will oppose an application must state in his notice on C which of the grounds mentioned in s. 30 he will oppose the application. This is the language of futurity. The landlord " will " oppose the application, and he " will " oppose it on such and such a ground. If the matter rested there, I should not find it possible to regard the ground of opposition as referring to anything but a state of affairs existing at the date of the hearing when its validity could be tested. It might, no doubt, be relevant for the purpose of testing its D validity to know something of the precedent state of affairs; that would depend on the nature of the ground of opposition. But in regard to para. (f), which we are immediately considering, nothing more is required of the landlord than that he should state that he will oppose the application on the ground that, on the termination of the current tenancy, he intends to do certain work and so on. All is still in the future and, except for the purpose of challenging his bona fides, E which is not here in question, nothing that has happened in the past has any relevance. At the hearing he will oppose and prove his avowed intention. This seems to me, with all deference to those who take a different view, to be the plain English of s. 26 (6) and s. 30 (1) (f). I have already pointed out that it appears to accord also with the general purpose of the Act. It harmonises also with the language of s. 31 (1), which contemplates the landlord satisfying the court on F any of the grounds on which he is entitled to oppose the application.

But it has been urged (and for that reason I have set out paras. (a) to (d) and para. (g)) that, whatever might be said if para. (f) stood alone, a different construction is imposed by a consideration of the other grounds of opposition. From this argument I entirely dissent. In the first place, I see no reason why different grounds of opposition should not relate to different periods of time. G But in any case, the argument, if bona fides is assumed, is an unreal one. It is not to be supposed that a landlord will base his opposition under para. (a), i.e., the state of repair of the holding resulting from the tenant's failure to comply with his obligations, if, in fact, the state of repair at that date gives him nothing to complain of. He will state that he will rely on para. (a) if, and only if, at the date of notice it gives him solid support. At the hearing, the judge, whose H power to grant a new tenancy is discretionary where this ground of opposition is pleaded, will necessarily take into consideration the state of repair or disrepair, not only at the date of notice but also at the date of hearing. This appears to me to throw no light on the meaning of s. 30 (1) (f). I would make the same observations mutatis mutandis on paras. (b) and (c). Perhaps a brighter light is thrown by para. (d), which opens with the words " that the landlord has I offered and is willing ", etc. Here the perfect and the present tense are used. Leave out the perfect and look only at the present tense: " The landlord is willing ". It would be a hardship and worse on the tenant, if the relevant date were any other than that of the hearing; it is to his advantage that the opportunity of accepting an offer of alternative accommodation should be open to the last moment, and it is inconceivable that the landlord should, at the hearing, be permitted to say that, though no longer willing, he had been willing at an earlier date, and, therefore, could validly oppose the application. Nor would it be reasonable to reduce the time within which the landlord should have the opportunity of finding and offering alternative accommodation. If the tenant complains that he has had too little time to consider its suitability, his grievance can be met by an appropriate adjournment. In para. (d), therefore, I find support, if it be needed, for the view that the word " intends " in para. (f) means intends at the date of the hearing.

---

* See [1957] 1 All E.R. at p. 14.

Learned counsel for the tenants argued in the alternative that the relevant intention must be proved to exist at the moment when the landlord states in the proceedings that he opposes the tenant's application on para. (f), that is, presumably, when the proceedings are commenced by way of originating summons in the High Court, in the affidavit filed by him or on his behalf in opposition. But it did not appear to me that there was any reason to select this moment of time rather than any other in the course of the hearing before judgment except that, fortuitously, it would in the present case, defeat the landlord company. They also relied on the analogous provisions of Part 1 of the Act; so also did counsel for the landlord company. I intend no disrespect to their careful arguments if I say that they cannot affect the conclusion that I reach on a consideration of the relevant sections of Part 2.

My Lords, in the courts below, it was proper to consider at length the cases in which the quality of the requisite intention had been considered and also those cases in which there had been obiter dicta as to the relevant date. As to the former, I hope I have said enough in accepting the decision of ASQUITH, L.J., in *Cunliffe* v. *Goodman* (1), and not dissenting from the elaboration or explanation of it by the present Master of the Rolls. As to the latter, the point having been fully argued in the present case but not in those containing the dicta to which I have referred, your Lordships will not, I believe, think I should be justified in occupying time in discussing them.

It remains to consider an alternative argument on behalf of the tenants which was not, I think, dealt with by the Court of Appeal. It was to the effect that, on the true construction of s. 30, a reconstruction or other work such as is specified in para. (f) is not intended within the meaning of, and does not fall within, the said paragraph, if the landlord's intention to carry out the work is conditional on his obtaining possession of the premises for his own occupation and the sole object of the work is to adapt the premises for the purposes of the business which he desires to carry on therein. It is clear that no such limitation of the scope of para. (f) is to be found in the paragraph itself; but it is said to be implicit in it when read with para. (g). There is, I think, no force in this argument. Paragraph (g) is available to the landlord whether or not he intends to carry out a work of demolition or reconstruction. There is no reason to deny to him the use of para. (f) if he can satisfy its conditions. I do not ignore that reliance was placed on a decision of the Privy Council in *Porter* v. *McKenna* (2) ([1956] A.C. 688), but I am unable to get any help from a construction placed on another statute unless it establishes some principle, or that statute is so closely connected with the statute under consideration that the legislature must be deemed to have legislated with a knowledge of that construction. The decision in *Porter* v. *McKenna* (2) satisfied neither condition.

In the result, the appeal must be dismissed with costs. That means that the application of the tenants for the grant of a new lease fails and must be dismissed. I think it right to mention this because the case has taken a curious course. The order of the Court of Appeal did not directly order that the application should be dismissed but, in effect, made the dismissal conditional on the learned judge finding on further consideration that the intention of the landlord company on Apr. 23, 1956, possessed the necessary qualities of fixity and genuineness. The learned judge did so find and, accordingly, himself dismissed the application; but no further order was made by the Court of Appeal.

A **LORD MORTON OF HENRYTON:** My Lords, the appellants are tenants of Nos. 42-44, Darley Street, Bradford. They and their predecessors in title (an associated company) have held the premises since 1925 under a series of four leases for terms of eight, eight, five and eight years. The last of these leases expired on Dec. 31, 1953. The tenancy was continued until Dec. 31, 1954, by an order made under the Leasehold Property (Temporary Provisions) Act, B 1951, and from Jan. 1, 1955, the tenancy has been continued by s. 24 (1) of the Landlord and Tenant Act, 1954.

The respondents (hereinafter called "the landlord company") completed a purchase of the leasehold reversion in the premises, expectant on the determination of the tenants' tenancy, on Mar. 1, 1954. On June 28, 1955, the tenants served on the landlord company a request for a new tenancy under s. 24 (1) C (b) and s. 26 of the Act of 1954. In reply thereto, the tenants received a notice in writing dated Aug. 15, 1955, signed by Mr. Jones, the secretary and a director of the landlord company, purporting to be a notice given pursuant to s. 26 (6) of that Act. The notice stated that the landlord company would oppose an application to the court for a grant of a new tenancy on the ground

> D "that on the termination of the current tenancy we intend to reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that we could not reasonably do so without obtaining possession of the holding."

The words quoted are taken from s. 30 (1) (f) of the Act of 1954. The subsequent E history of the matter has been fully stated by my noble and learned friend on the Woolsack. As he has stated, it was proved that, on Apr. 23, 1956 (the fifth day of the hearing of this case by DANCKWERTS, J.), the landlord company intended to carry out the works mentioned in the notice, but it was not proved that the company so intended at any earlier date.

The question for decision on this appeal is whether this intention was formed F too late to enable the landlord company to oppose the application of the tenants for a new tenancy. DANCKWERTS, J., held that this intention must be in existence when the notice of opposition is served, and granted to the tenants a new tenancy for fourteen years at a rent of £3,000; but the Court of Appeal, by a majority (LORD EVERSHED, M.R., dissenting), held that the intention need not be formed until the opposition by the landlord is being heard by the court. The G result was that the tenants' application for a new lease was dismissed.

My Lords, I have not found it easy to answer the question just stated. The answer to it depends on the true construction of the relevant provisions of the Landlord and Tenant Act, 1954, and in particular the following provisions:

> "26 (6). Within two months of the making of a tenant's request for a H new tenancy the landlord may give notice to the tenant that he will oppose an application to the court for the grant of a new tenancy, and any such notice shall state on which of the grounds mentioned in s. 30 of this Act the landlord will oppose the application.
>
> "30 (1). The grounds on which a landlord may oppose an application under sub-s. (1) of s. 24 of this Act are such of the following grounds as may I be stated in the landlord's notice . . . under sub-s. (6) of s. 26 thereof, that is to say:—
>
> "(a) where under the current tenancy the tenant has any obligations as respects the repair and maintenance of the holding, that the tenant ought not to be granted a new tenancy in view of the state of repair of the holding, being a state resulting from the tenant's failure to comply with the said obligations;
>
> "(b) that the tenant ought not to be granted a new tenancy in view of his persistent delay in paying rent which has become due;

> " (c) that the tenant ought not to be granted a new tenancy in view of other substantial breaches by him of his obligations under the current tenancy, or for any other reason connected with the tenant's use or management of the holding;
>
> " (d) that the landlord has offered and is willing to provide or secure the provision of alternative accommodation for the tenant, that the terms on which the alternative accommodation is available are reasonable having regard to the terms of the current tenancy and to all other relevant circumstances, and that the accommodation and the time at which it will be available are suitable for the tenant's requirements (including the requirement to preserve goodwill) having regard to the nature and class of his business and to the situation and extent of, and facilities afforded by, the holding; . . .
>
> " (f) that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding;
>
> " (g) subject as hereinafter provided, that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence.
>
> " (2) The landlord shall not be entitled to oppose an application on the ground specified in para. (g) of the last foregoing sub-section if the interest of the landlord . . . was purchased or created after the beginning of the period of five years which ends with the termination of the current tenancy . . ."

I omit para. (e) because neither party relied on it in this House.

> " 31 (1). If the landlord opposes an application under sub-s. (1) of s. 24 of this Act on grounds on which he is entitled to oppose it in accordance with the last foregoing section and establishes any of those grounds to the satisfaction of the court, the court shall not make an order for the grant of a new tenancy."

Counsel for the tenants point out that a landlord can only oppose the tenant's application for a new lease if he brings himself within the terms of s. 30 (1), and their argument continues on the following lines. Taking para. (f) as an example, two requirements are imposed on the landlord by s. 30 (1). First, he must assert the facts set out in para. (f) and, secondly, this assertion must be made in his notice of opposition. Having asserted these facts, the landlord must establish, at the hearing of the application, that the assertion was true, i.e., that, when he delivered the notice of opposition, the landlord intended to carry out the works mentioned in para. (f) on the termination of the current tenancy. It is now common ground that, in the present case, the landlord company failed to establish that they had such an intention when they delivered the notice of opposition. Therefore, the opposition of the landlord company failed, and the Court of Appeal wrongly dismissed the tenants' application for a new tenancy. In support of the argument just stated, counsel for the tenants point to the terms of para. (a), para. (b), para. (c) and para. (d) of s. 30 (1). They submit that the " state of repair " mentioned in para. (a), the " persistent delay " mentioned in para. (b), and the " substantial breaches " mentioned in para. (c) all refer to facts existing at the date of the notice. They further submit that, in para. (d), the words " has offered " must refer to an offer made before the notice has been delivered, and in the same paragraph the words in the present tense " is willing ", " is available " and " are suitable " must refer to the state of affairs at the date of the notice. This being so, they say, the words " the landlord intends ", in

A para. (f), must also refer to the state of affairs at the date of the notice, since it would be strange, indeed, if, in para. (f), the legislature intended to refer to any point of time other than the point of time so clearly indicated in the earlier paragraphs.

My Lords, the line of argument which I have tried to summarise undoubtedly has its attractions, but I have reached the conclusion that it cannot prevail, if B one considers s. 30 in the light of s. 26 (6) and s. 31 (1) already quoted. Section 26 (6) provides that the landlord's notice of opposition " shall state on which of the grounds mentioned in s. 30 of this Act the landlord *will oppose* the application ". The words " will oppose " must surely refer to some date *after* the delivery of the notice in which the landlord states the ground on which he " will oppose " the tenant's application. And, in my view, that date can only be the C date when the opposition of the landlord is heard by the High Court or the county court, as the case may be.

I now turn to s. 30 (1), and I shall first consider a case where the landlord selects para. (f) as the ground on which he will oppose the tenant's application. That is the present case, and I shall, for the moment, disregard the other paragraphs in s. 30 (1). Looking only at para. (f), and bearing in mind what the landlord D is to state under s. 26 (6), it would seem that, when the landlord delivers his notice, he is not saying: " I give you notice that I intend to reconstruct the premises ". He is saying: " I give you notice that I will oppose your application on the ground that I intend to reconstruct the premises ", which is a very different statement. The former is a statement that an intention to reconstruct exists at the time when the notice is given. The latter is a statement that, at a future E date, the landlord will allege, and endeavour to prove, that an intention to reconstruct is then in existence. Later, when the hearing takes place, the landlord says to the court: " I now oppose the application of the tenant on the ground that I intend to reconstruct the premises and that I could not reasonably do so without obtaining possession of the holding ". If the landlord establishes that his intention exists at that date, and that the work could not reasonably F be carried out without obtaining possession of the holding, s. 31 (1) forbids the court to make an order for the grant of a new tenancy. There was much discussion in the course of the argument as to the nature of the " intention " which must exist at the relevant date, but ultimately counsel on both sides agreed that the landlord must prove that he has definitely decided to carry out the work, and that this decision has a reasonable prospect of being carried into effect. I G would accept this definition, which is entirely in accordance with the words of ASQUITH, L.J. ([1950] 1 All E.R. at p. 724), already quoted by my noble and learned friend on the Woolsack.

The observations which I have just made on para. (f) apply equally to the use of the word " intends " in para. (g), and, if these paragraphs had stood alone in s. 30 (1), I should have had no doubt that the appeal must fail. But H s. 30 (1) must be read as a whole, and I now turn to paras. (a) to (d) inclusive. I shall first read para. (a) in the light of s. 26 (6). So read, the effect of para. (a) is as follows:

> " I give you notice that I will oppose your application on the ground that you ought not to be granted a new tenancy in view of the state of repair of I the holding, being a state resulting from your failure to comply with your obligations."

I cannot imagine a landlord relying on this ground unless the premises were in disrepair at the date of the notice, and I think that, at the hearing, in deciding whether the tenant ought or ought not to be granted a new tenancy, the court would have regard both to the state of repair at the date of the notice and to the state of repair at the date of the hearing. A similar situation arises in cases under para. (b) and para. (c) of s. 30 (1). The court would consider, at the hearing, whether there has been persistent delay in paying rent, or other substantial breaches of obligation by the tenant, at the date of the notice, and would also consider the state of affairs at the date of the hearing. Again, in a case under para. (d), the court would consider the state of affairs at each of the dates already mentioned. Thus in each of these four paragraphs I find words which are clearly referable to the date of the notice of opposition.

I feel, my Lords, that this fact lends considerable support to the views expressed by the Master of the Rolls (LORD EVERSHED) and DANCKWERTS, J., and I think that the presence of paras. (a) to (d) inclusive in s. 30 (1) throws some doubt on the meaning of the word " intends " in para. (f). In the end, however, I have come to the conclusion that the decision of the majority of the Court of Appeal is correct. In para. (f) and para. (g) there are no words which are plainly referable to the date of the notice of opposition and, for the reasons already given, I think that the more natural interpretation of the word " intends " in para. (f) is that it is referable only to the time when the opposition of the landlord is heard by the court. If a doubt exists on the point, it is right to have regard to the practical considerations mentioned by ROMER, L.J., in the passages in his judgment which I shall now quote ([1957] 1 All E.R. at p. 12):

> " Section 31 (1) shows, in my opinion, beyond question that the intention must exist at the hearing; for it would be nihil ad rem for a landlord to establish to the satisfaction of the court that he had intended some weeks or months previously to demolish or reconstruct on the termination of the tenancy if, in fact, he had abandoned that intention in the interval. The additional requirement that an earlier intention, in the strict sense of the word, must also be established cannot, however, be clearly derived, in my judgment, from the statutory language used which, if it imposes the requirement at all, does so in an equivocal and ambiguous manner. Accordingly, it is permissible to inquire whether the requirement would, on the one hand, be of advantage to the tenant and, on the other hand, would or might result in hardship or inconvenience to the landlord; for if it would be a disadvantage to the landlord without securing any corresponding benefit to the tenant, it is surely a legitimate inference that the legislature did not intend to impose it."

The learned lord justice then embarked on the inquiry just mentioned and concluded, for reasons which I accept, that a requirement that the " intention " must exist at the date of the notice of opposition was unnecessary for the protection of a tenant and would, or might, impose hardship on a landlord. As to the reason for the requirement, in s. 26 (6), that the landlord must state, in his notice of opposition, on which of the grounds mentioned in s. 30 he intends to rely, ROMER, L.J., said (ibid., at p. 14):

> " The matter will ultimately come before the court, and it is obviously right that the tenant should know in advance what is the case that he will have to meet at the hearing. It is, in my judgment, the object of the counter-notice that the tenant should be given this information, but, in my opinion, the counter-notice has no further or other object. It is, I think, intended to be in the nature of a pleading and its function, as in the case of all pleadings, is to prevent the other party to the issue from being taken by surprise when the matter comes before the judge. Why the interests of justice should further require that the landlord's intention must be shown to have been a definite and settled intention at the time when the counter-notice is served, or why the tenant should be entitled to a new tenancy unless such an intention can be established, I find, for my part, difficult to comprehend."

My Lords, I would gratefully adopt these observations, and they confirm me in my view that the word " intends " in para. (f) should be construed as referable only to the date when the opposition of the landlord is heard, notwithstanding the doubts which are created by the language of paras. (a) to (d) inclusive.

In the course of the argument reference was made to the provisions of Part 1 of the Act of 1954, but I have been unable to derive any assistance from these provisions. Other dates were suggested as being possible dates on which intention to reconstruct must be formed, but I can find no warrant in the Act for selecting any of these alternative dates. I think that, if the intention need not exist at the date when the notice of opposition is served, it need not exist at any other time before the hearing of the opposition by the landlords.

A further argument submitted on behalf of the tenants was stated by counsel somewhat as follows:—Even if the requirements of the Act are satisfied by an " intention " formed just before judgment is given, these requirements are not satisfied if the landlord's *only* intention is to carry out works necessary to enable him to occupy the premises. Counsel referred to certain cases bearing on this matter, in particular, *Atkinson* v. *Bettison* (3) ([1955] 3 All E.R. 340), and *Fisher* v. *Taylors Furnishing Stores, Ltd.* (4) ([1956] 2 All E.R. 78). I need only say that I can find no ground for this submission in the Act of 1954, and I would adopt the language of PARKER, L.J., in the latter case (ibid., at p. 84). After referring to the relevant sections of the Act of 1954, PARKER, L.J., continued as follows:

> " From the scheme of the Act as there laid down I should have thought that it was clear, apart from authority, that, if any of those grounds of objection is established, the tenant's application for a new lease must fail. Each ground is entirely separate and independent, and each, if proved, entitles the landlord to succeed. Thus, if the ground specified in para. (f) is proved to the satisfaction of the court, it matters not to what use the landlord ultimately intends to put the holding. He may intend to let it when the work is done to a third party; he may intend ultimately to occupy it himself for his own business; or he may not have made up his mind at all. To suggest that, if his intention is ultimately to occupy it himself and he cannot by reason of s. 30 (2) rely on para. (g), he is thereby debarred from relying on para. (f), is to apply a proviso to the operation of para. (f) which is not there and for which there is no warrant. Of course, if he finds himself debarred from relying on para. (g) and is forced to rely on para. (f), his task will not be an easy one; it will at once be suspected that his alleged intention is not genuine and that it is merely put forward to circumvent his inability to rely on para. (g). But, assuming that he satisfies the court that the intention is genuine, I can see no reason why he should be debarred from relying on para. (f)."

The result is that, in my view, the tenants are not entitled to the grant of a new tenancy and the question of the length of the term which should be granted does not arise; but, as the members of the Court of Appeal were unanimous in thinking that the term should be five years, in place of the term of fourteen years granted by DANCKWERTS, J., I desire to say that I prefer the view of the Court of Appeal. It is true that, under s. 33, in default of agreement between the parties, the new tenancy is to be

> " . . . such a tenancy as may be determined by the court to be reasonable in all the circumstances, being . . . a tenancy for a term not exceeding fourteen years . . ."

Thus the learned judge had a discretion; but I cannot help feeling that, in granting a term of the maximum length, he may have overlooked one consideration which seems to me of great importance. In all cases, except a case coming within sub-s. (2) of s. 30 (already quoted), if a landlord proves at the hearing the ground of objection set out in s. 30 (1) (g), namely, that he intends to occupy the holding for the purposes of a business to be carried on by him therein, the court must refuse to grant a new tenancy. In the present case, I think it is clear that the landlord company could have proved this fact. The only reason why they could not rely on para. (g) was because they came within sub-s. (2) of s. 30, and it is to be observed that the Act, in these circumstances, imposes a bar for a period which cannot exceed five years. In the present case, the bar would only have lasted till Mar. 1, 1959. I do not suggest that these facts compel the court to any particular conclusion as to the length of the term to be granted; but I think that s. 30 (2) gives an indication of the policy of the Act in cases coming within para. (g) of s. 30 (1).

I agree that this appeal should be dismissed.

LORD KEITH OF AVONHOLM: My Lords, in this difficult case, which, before coming to this House, has given rise to an even conflict of judicial opinion, I find myself in general agreement with the judgment of the learned Master of the Rolls (Lord Evershed). He has expressed his reasons so fully and so clearly that I find it unnecessary to embark on a detailed examination of the Landlord and Tenant Act, 1954, and will confine myself to a few general observations.

I should have thought that, when Parliament provided for the notices to be given by the landlord under s. 25 and s. 26 of the Act, it contemplated that the grounds on which the landlord has to state that he would, or will, oppose an application to the court for a new tenancy would be in existence at the time of the notice. This, I should have thought, was clear where the notice was given under s. 25, for I cannot understand a landlord, who wishes to terminate a tenancy, being thought to state a ground of opposition to a possible application for a new tenancy that did not exist at the time of his notice. The prescribed form of notice under the Landlord and Tenant (Notices) Regulations, 1957 (S.I. 1957 No. 1157), carries, I think, the same inference. I am not sure that sufficient attention has been paid to this aspect of the case. When I turn to the grounds themselves, set out in s. 30 (1), I find that paras. (a) to (d) are grounds which have their origin in the past. These must, I think, be assumed to be live grounds at the date of the notice. Without examining various situations that might arise under these heads, because no case under them is now before us, it may be, though it is not necessary to express any opinion on the point, that the court might take account of the fact that the tenant had purged past breaches of his contract of tenancy under paras. (a) to (c) by the time the case came into court. Paragraph (d) raises a somewhat different point, for it speaks both in the past and in the present. Here I would be prepared to read " is willing " as involving an element of continuing willingness. It must mean, I think, is willing at the time of the notice, and at the time his opposition commences. What is to happen if the alternative accommodation offered thereafter disappears is a problem that may some day have to be considered, for a tenant may well think that he has good reason for resisting the offer on the ground that the accommodation offered is not reasonably suitable.

Paragraph (f), as also para. (g), speaks wholly in the present, " the landlord intends ". As under para. (d), I think this means that he intends at the time of the notice, and that he will intend at the commencement of his opposition. But, as this is an intention with regard to something which is to happen in the future, namely, on the termination of the current tenancy, I think he must continue to intend throughout the hearing. If he abandoned his intention while the court was seised of the case, it would be a clear negation of what the statute meant, that he should be given possession because he had an intention when he gave the notice and when proceedings commenced. In effect, he must, I think, be taken to say: " I have intended, I do intend and I will continue to intend " and the court must believe him. It may be said that, if continuing intention is required, last-minute intention achieves the same result. Even if it did, that is not, I think, what the statute says. The landlord is entitled to oppose under s. 30 (1) only if the factual ground stated in the notice given under s. 26 (6) was then true. The tenant is entitled to know betimes the alleged reason for the landlord's opposition, to enable him to judge of its truth and make his arrangements accordingly. A termination of his tenancy because of a last-minute intention of the landlord accepted by the court as genuine may put him to no end of inconvenience and disturbance of his business. On the other hand, if the court thinks the intention, though belated, should receive consideration, it could grant a short tenancy which the landlord could give notice to terminate, because of his intention, without any grave hardship to the landlord.

Reference has been made to the hardship that might arise to a landlord if he had to make up his mind within two months of a tenant's request for a new tenancy in a matter of demolition or substantial reconstruction of his premises. But I find it somewhat unreal to imagine a landlord, spurred by the request of a tenant for a new tenancy, suddenly to bethink himself of a scheme of reconstructing or substantially altering his premises, and, if he has been contemplating such a project, and is unable to make up his mind, for one reason or another, within the statutory period, the statute contemplates, I think, that the tenant should not be faced with this ground of opposition. As I have said, if the landlord has perfected his plans and intentions before a new lease has been granted but too late to give due notice, he may adduce that as a ground for curtailing the length of the new tenancy. Further, the point has no validity where the landlord gives notice to terminate the tenancy and intimates reliance on an intention under para. (f) in the event of the tenant applying for a new tenancy.

The learned Master of the Rolls, while he considers the date of the landlord company's notice as the relevant date, says that, alternatively, the relevant date is the date when parties first join issue—here the lodging of the landlord company's affidavit. I would not dissent from this as an alternative ground of judgment, though I prefer the view that the intention must exist at both dates.

I would allow the appeal.

LORD SOMERVELL OF HARROW: My Lords, I agree with the opinion delivered by my noble and learned friend on the Woolsack, and desire to add only a few observations. The sections dealing with applications by the tenant and opposition by the landlord have already been cited. The notice under s. 26 (6) of the Landlord and Tenant Act, 1954, in all cases, I think, is for the purpose of telling the tenant the case which he will have to meet if the matter comes to court. It is, as ROMER, L.J., said ([1957] 1 All E.R. at p. 14), analogous to a pleading. The landlord may fail. That would not mean that the notice had been invalid as a document entitling him to appear.

In all the cases under s. 30, the court must, in my opinion, consider the points raised as at the conclusion of the cases on each side. Although, for example, a notice based on s. 30 (1) (b) would not be given unless there had been past delay in paying rent, events between the notice and the hearing would be relevant to the decision whether the court ought to grant the tenancy. The tenant may, after the notice has been given, have improved or aggravated his position as a payer. The court would have to consider as at the time of the hearing whether he had " persistently delayed in paying his rent ". When one comes to para. (f) and para. (g), the intention must be established to the satisfaction of the court when the order falls to be made. The previous history may be relevant in considering whether there is an intention within the statute. If the appellant tenants are right, a landlord is precluded from giving a notice if, at the time of the notice, demolition or reconstruction is a possibility or probability but not an intention. A landlord may have instructed an architect or surveyor who has not, by the end of the two months, completed his plans and obtained an estimate.

I can find no words in the Act or any principle which would exclude a landlord on that state of facts from giving a valid notice. The estimate may be satisfactory and the court fully satisfied of his intention. If the estimate is higher than he likes, he can withdraw his opposition.

I also agree with ROMER, L.J. ([1957] 1 All E.R. at p. 12), that, if the statutory language imposes the requirement for which the tenants contend, it does so in " an equivocal and ambiguous " manner. The provisions under consideration are cutting down the contractual rights of the landlord, and an equivocal and ambiguous manner is not sufficient on this and it may well be on other grounds.

An argument was based on the different wording of Part 1 of the Act, dealing with residential tenants. An Act must, no doubt, be construed as a whole, but it would be unfortunate if landlords of business premises could only discover their rights and obligations by drawing inferences from complicated provisions dealing with a different subject-matter. The argument was in part based on the use of the word " proposals " in s. 4 (3) (b), the suggestion being that " proposals " were less formal than " intentions ". I doubt this. In the matrimonial field and in others, a proposal is not made until an " intender " has reached the head of the " valley of decision ". The word " intends " is to be found in s. 30 (1) (f). I doubt whether one assists the tribunal of fact by expanding into a paragraph what Parliament has stated in a word which falls, of course, to be applied in its context. If one starts laying down other words, they may well cause difficulty in the varied circumstances which may arise.

On the second point, I agree with what PARKER, L.J., said in *Fisher* v. *Taylors Furnishing Stores, Ltd.* (4) ([1956] 2 All E.R. 78 at p. 84), and would not wish to add to it.

I would dismiss the appeal.

LORD DENNING: My Lords, on Aug. 15, 1955, the landlords, Phillips Furnishing Stores, Ltd. (hereinafter called " the landlord company ") gave a notice to the tenants opposing the grant of a new tenancy. The notice was in accordance with the Landlord and Tenant Act, 1954, and said this:

> " The grounds on which we shall oppose any application which you may make to the court for the grant of a new tenancy of the said property are that on the termination of the current tenancy *we intend to reconstruct the premises* . . ."

It was signed " A. Jones for and on behalf of Phillips Furnishing Stores, Ltd." Mr. Jones was the secretary of the company and a director of it. I regard that notice as a clear statement that at that time—the time of giving the notice—the landlord company had formed the intention to reconstruct the premises. It meant: " We intend to reconstruct the premises at the end of your tenancy ". It did not mean: " If you make an application to the court, then, by the time it is heard, we *will* intend to reconstruct ". It is a misuse of the English language for a man to say: " I *will* intend to do " so and so. He says: " I intend to do it ". Intention is a present state of mind denoting what it is his purpose to do in the future. That is the way in which the Master of the Rolls (LORD EVERSHED) interpreted this notice and I entirely agree with him about it. This interpretation is borne out by a reference to the other grounds which, under the statute, may be stated in a notice of opposition. If a landlord opposes on the ground that: " I have offered you alternative accommodation and am willing to provide it ", he clearly means that, *in the past*, at some time before the notice, he *has offered* alternative accommodation, and that, *in the present*, at the time of giving the notice, he *is willing* to provide it. If he opposes the new lease on the ground of " your persistent delay in paying rent ", he means the tenant's delay in the *past*, before the giving of the notice, and not some hypothetical delay in the future.

Such being the true interpretation of these notices, I am of opinion that they must be given honestly and truthfully. They are not to be regarded merely as pleadings preparatory to a trial—in which parties, I regret to say, sometimes deny the truth, or refuse to admit it, if it suits their plan of campaign. These notices are intended to be acted on before there is a trial at all. On the receipt of such a notice, the tenant has to decide his course of action—for instance, whether to accept the alternative accommodation that is offered, or whether to accept the landlord's word that he intends to occupy the premises himself, or as the case may be. In every case he has to decide whether to apply for a new lease or not. It would be deplorable if a landlord could be allowed to get an advantage by misrepresenting his state of mind or any other fact. Suppose he said in his notice: "I intend to reconstruct the premises" or "I intend to occupy for the purposes of my own business", when he, in fact, had no such intention at all. On the faith of such a statement, the tenant might be induced to abstain from applying to the court for a new tenancy, because he would think it no use to do so. He would know that he would have to pay the costs if he lost. Just imagine the tenant's consternation if, at the end of the tenancy, after he had left, the landlord did not reconstruct the premises or occupy them himself, but straightway let in someone else. Would the tenant have no redress? I should have thought it clear that the notice would be bad—voidable—liable to be set aside for fraudulent misrepresentation: see *Lazarus Estates, Ltd.* v. *Beasley* (5) ([1956] 1 All E.R. 341). If it was avoided, the original tenancy would continue. The landlord would get no advantage from his misrepresentation—which is as it ought to be. If it was too late to avoid the notice, the landlord would be liable at common law in damages for fraud; just as he would be under s. 55 if the misrepresentation was made to the court.

Provided, however, that the notice is a good and honest notice when it is given, then it is clear, to my mind, that the ground stated therein must be established to exist at the time of the hearing. Suppose a landlord had been willing, on the giving of the notice, to provide alternative accommodation, but he was not willing at the time of the hearing; or suppose he had the intention, at the giving of the notice, to reconstruct the premises, but had changed his mind by the time of the hearing. He clearly could not resist a new lease. To succeed, he must satisfy the trial judge that, at the time when the court comes to make its order, he is *then* willing to provide alternative accommodation, or *then* intends to reconstruct, or as the case may be. An interesting parallel can be found under the Rent Acts: see *Kimpson* v. *Markham* (6) ([1921] 2 K.B. 157), *Benninga (Mitcham), Ltd.* v. *Bijstra* (7) ([1945] 2 All E.R. 433), *R. F. Fuggle, Ltd.* v. *Gadsden* (8) ([1948] 2 All E.R. 160 at p. 163). In short, it comes to this: the landlord must *honestly and truthfully* state his ground in his notice, and he must establish it as *existing* at the time of the hearing.

Apply this to the present case: the landlord company did establish to the satisfaction of the judge, before he made his order, that, at the time of the hearing, they intended to reconstruct the premises at the end of the tenancy. But the tenants assert—and it was the main burden of their complaint before your Lordships—that the landlord company had not that intention at the time when they gave their notice. What is the result of this? If the notice had been a dishonest notice in which the landlord company had fraudulently misrepresented their intention—or, I would add, if there had been a material misrepresentation in it—I should have thought it would be a bad notice. But no such suggestion was made at any stage of the proceedings, and I think that I can see why. Much of the trial was occupied with the question whether the proposed work was "substantial", and whether there was a firm "intention" to do it. In the course of this inquiry, the judge held that ([1956] 2 All E.R. at p. 508)

> ". . . the intention of the [landlord company] can be discovered only

> from the acts of the board of directors as recorded in the minutes of the company ", A

and, as no resolution was passed until Apr. 23, 1956, he held that the landlord company had not established their intention before that date. This finding was not challenged before your Lordships, but I may, perhaps, remark that it has since been held that a company can form an intention without necessarily calling a board meeting: see *H. L. Bolton (Engineering) Co., Ltd.* v. *T. J. Graham & Sons, Ltd.* (9) ([1956] 3 All E.R. 624). B It is the absence of a board meeting that has led to an apparent paradox. The landlord company did not have the intention they professed at the date of the notice, but nevertheless their statement of it in the notice was not dishonest or untrue. The explanation is this: Mr. Jones, the secretary and a director, gave the notice in good faith. At the time the notice was given, there was no resolution of the board of directors C giving Mr. Jones authority to sign the notice, and he disclaimed any right to bind the landlord company without a directors' meeting. But he no doubt assumed—quite rightly as it turned out—that the landlord company would ratify his action. Many an agent has done as much before to protect his principal's interests, and no one has ever suggested that there is anything wrong in it. The landlord company ratified Mr. Jones' action when they, by their solicitors, D filed in the court an affidavit in answer to the tenants' application. In this affidavit, the acting secretary swore on oath that he was authorised by the landlord company to make it on their behalf and stated that the landlord company opposed a new tenancy on the ground stated in their notice of opposition. No one can, in these proceedings, dispute the authority of the landlord company's solicitors to file this answer on the company's behalf. E It was a clear ratification of Mr. Jones' action at a time long before the tenants had any idea that it had not been authorised. The notice thereupon became just as good as if it had been previously authorised: see *Ancona* v. *Marks* (10) ((1862), 7 H. & N. 686).

It will be seen that I have gone a long way with the Master of the Rolls. His mind recoiled at the thought that a landlord, by making an untrue statement about his intentions, could successfully resist a new lease. F The Master of the Rolls would not allow the landlord to get any advantage by an untrue notice. Nor would I. But, in this particular case, I do not regard the landlord company's notice as untrue. Once it was ratified by the landlord company, it became true from the beginning.

On the second point, I agree that it is covered by *Fisher* v. *Taylors Furnishing Stores, Ltd.* (4) ([1956] 2 All E.R. 78), G which will now have the support of this House. In that case the Court of Appeal virtually overruled one of the grounds of the decision in *Atkinson* v. *Bettison* (3) ([1955] 3 All E.R. 340)*, leaving that decision to rest on its other ground—a course which I think it was right to take, on being completely satisfied that the first ground was wrong.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Ward, Bowie & Co.*, agents for *Booth & Co.*, Leeds (for the appellants, the tenants); *Clifford-Turner & Co.* (for the respondents, the landlord company).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

---

* Compare *Craddock* v. *Hampshire County Council* (p. 449, ante).

PYX GRANITE CO., LTD. *v.* MINISTRY OF HOUSING AND LOCAL GOVERNMENT AND ANOTHER.

[COURT OF APPEAL (Lord Denning, Hodson and Morris, L.JJ.), December 9, 10, 11, 12, 1957, February 7, 1958.]

Town and Country Planning—Development—Permission—Necessity for permission—Agreement between quarry-owners and local authority as to quarrying areas scheduled to Act of Parliament—Whether agreed quarrying was development "authorised" by any local or private Act—Town and Country Planning General Development Order, 1950 (*S.I.* 1950 *No.* 728), *art.* 3 (1), *Sch.* 1, *class* xii—*Malvern Hills Act*, 1924 (14 *&* 15 *Geo.* 5 *c.* xxxvi), *s.* 54, *Sch.* 4.

Town and Country Planning—Development—Permission granted subject to conditions—Conditions as to land not included in application for permission—Validity—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6 *c.* 51), *s.* 14 (2), *s.* 17 (1).

Declaration—Jurisdiction—Exclusion of jurisdiction by statute—Necessity for clear exclusion—Discretionary statutory power to impose conditions on grant of permission—Whether jurisdiction excluded by provision of distinct statutory procedure or by discretionary nature of statutory power—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6 *c.* 51), *s.* 14 (2), *s.* 17 (1).

Statute—Contract—Agreement confirmed by statute—Whether agreement binding by statutory force or binding in contract—Malvern Hills Act, 1924 (14 *&* 15 *Geo.* 5 *c.* xxxvi), *s.* 54, *Sch.* 4.

In 1924 a quarrying company owned freehold land, and had quarrying rights on other land, in the Malvern Hills. While the Malvern Hills Act, 1924, a local Act for the preservation of the beauties of the Malvern Hills, was passing through Parliament, negotiations took place between the company and the promoters of the bill, the Malvern Conservators and the Malvern Urban District Council. The negotiations resulted in an agreement between the parties that the company should continue to quarry on its freehold land, should abandon its quarrying rights in certain other land, should retain its quarrying rights in the N. area and should have transferred to it additional rights in certain other parts of that area. The terms were embodied in heads of agreements which contemplated a deed being executed subsequently and which were set out in a schedule to the Act. Section 54 of the Act of 1924 provided, for the protection of the company, that "the heads of agreement . . . are hereby confirmed and made binding on the company and the conservators and the . . . council, and the provisions of this Act shall only apply to or affect the undertaking property or rights of the company subject to the provisions of the said heads of agreement." By deed dated Dec. 14, 1925, duly executed by the company, the conservators and the council, the areas in which the company should and should not quarry were defined. On Nov. 17, 1947, the company applied for planning permission to develop two of the areas of land agreed for quarrying One of these areas, the T. area, was freehold property of the company, and the other was the N. area. The company intended to crush and screen the stone to be quarried from the T. area on some of their other land, which was very near, using plant and machinery which had been installed on this other land and had been in use before 1947, so that no development permission was required for its use. The company subsequently invited dismissal of their application on the ground that development permission was not needed, but dismissal on this ground was rejected. On Sept. 30, 1953, the Minister refused permission to work parts of the T. area, granted permission to work the remainder of the T. area, on conditions and only A until June 30, 1966, and refused permission for any work in the N. area except the minimum required to secure safety from a threatened fall of rock. The conditions imposed by the Minister limited the times when the crushing and screening plant and machinery on the land near to the T. area could be used and required its ultimate removal from that land. By art. 3 (1) of and class xii of Sch. 1 to the Town and Country Planning General Develop- B ment Order, 1950, permission was given for "development authorised by any local or private Act of Parliament . . .". In December, 1953, the company brought an action for declarations (a) that it was entitled to carry out the proposed development without obtaining any special development permission, and (b) that the conditions imposed as to crushing and screening were invalid. C

Held: (i) (MORRIS, L.J., dissenting) quarrying by the company in, e.g., the N. area, was not "authorised" by the Malvern Hills Act, 1924, the effect of which was merely to make the terms of the heads of agreement (subsequently embodied in the deed of Dec. 14, 1925) binding in contract; therefore the company was not entitled by virtue of art. 3 of, and class xii D of Sch. 1 to, the Town and Country Planning General Development Order, 1950, to carry out the development, viz., the quarrying (see p. 631, letters D to G, p. 636, letter D, and p. 637, letter C, post).

R. v. *Midland Ry. Co.* ((1887), 19 Q.B.D. 540) applied.

(ii) the conditions imposed by the Minister were valid notwithstanding that they related to plant on land in respect of which development permission E was not required, because they were imposed bona fide and for no ulterior motive and required the "carrying out of works" on land under the company's control so near to the site of the quarrying for which permission was required as to make the works "expedient . . . in connexion with" that development within s. 14 (2)* of the Town and Country Planning Act, 1947 (see p. 633, letter G, p. 637, letter E, and p. 645, letter C, post). F

(iii) (HODSON, L.J., dissenting) the court had jurisdiction to make a declaration whether development permission was required notwithstanding that s. 17 of the Town and Country Planning Act, 1947, provided another procedure for the determination of that question, since the Act did not, by express words or by necessary implication, oust the jurisdiction of the G court (see p. 629, letter G, to p. 630, letter A, and p. 645, letter B, post).

Barraclough v. *Brown* ([1897] A.C. 615) distinguished.

Francis v. *Yiewsley & West Drayton U.D.C.* ([1957] 3 All E.R. 529) applied.

(iv) (HODSON, L.J., dissenting) the court also had jurisdiction to make a declaration whether conditions imposed on the granting of development H permission were valid notwithstanding that the power to impose them was discretionary, since the remedy by declaration was not confined to cases where there was no jurisdiction as distinct from a wrong exercise of jurisdiction (see p. 632 letter B, and p. 645, letter C, post).

---

* Section 14 (2) of the Town and Country Planning Act, 1947, provides: ". . . conditions may be imposed on the grant of permission to develop land thereunder— I

"(a) for regulating the development or use of any land under the control of the applicant (whether or not it is land in respect of which the application was made) or requiring the carrying out of works on any such land, so far as appears to the local planning authority to be expedient for the purposes of or in connexion with the development authorised by the permission;

"(b) for requiring the removal of any buildings or works authorised by the permission, or the discontinuance of any use of land so authorised, at the expiration of a specified period, and the carrying out of any works required for the reinstatement of land at the expiration of that period;"

Per Hodson, L.J.: if, where development permission is given subject to conditions, any of the conditions are bad as being imposed without jurisdiction, the whole planning permission will fall with it, for it would not be open to the court to leave the permission standing shorn of any of its conditions (see p. 637, letter G, post).

Appeal allowed.

[**Editorial Note.** The validity of the conditions depended much on the fact that the plant was near to land in respect of which development permission was required; had the plant been a mile or so away the conditions regarding its use and removal might have been invalid (see p. 633, letter I, to p. 634, letter A, post).

As to the jurisdiction to make declaratory judgments where other remedies are available, see 22 Halsbury's Laws (3rd Edn.) 749, para. 1610; and for cases on the subject, see 30 Digest (Repl.) 175-177, *242-254*; as to the effect of agreements scheduled to a statute, see 31 Halsbury's Laws (2nd Edn.) 546, para. 726, and 8 Halsbury's Laws (3rd Edn.) 146, para. 252; and for cases on the subject, see 12 Digest (Repl.) 668, 669, *5171-5177*.

For the Town and Country Planning Act, 1947, s. 14 (1), (2), s. 17, see 25 Halsbury's Statutes (2nd Edn.) 511, 515.

For the Town and Country Planning General Development Order, 1950, art. 3 (1), Sch. 1, class xii, see 21 Halsbury's Statutory Instruments 146, 161.]

Cases referred to:

(1) *Barraclough* v. *Brown*, [1897] A.C. 615; 66 L.J.Q.B. 672; 76 L.T. 797; 62 J.P. 275; 30 Digest (Repl.) 175, *243*.

(2) *Francis* v. *Yiewsley & West Drayton Urban District Council*, [1957] 1 All E.R. 825; *affd.* C.A., [1957] 3 All E.R. 529.

(3) *R.* v. *Midland Ry. Co.*, (1887), 19 Q.B.D. 540; 56 L.J.Q.B. 585; 57 L.T. 619; 30 Digest (Repl.) 668, *5173*.

(4) *Caledonian Ry. Co.* v. *Greenock & Wemyss Bay Ry. Co.*, (1874), L.R. 2 Sc. & Div. 347; 30 Digest (Repl.) 668, *5172*.

(5) *Barnard* v. *National Dock Labour Board*, [1953] 1 All E.R. 1113; [1953] 2 Q.B. 18; 3rd Digest Supp.

(6) *Vine* v. *National Dock Labour Board*, [1956] 3 All E.R. 939; 3rd Digest Supp.

(7) *R.* v. *Hendon Rural District Council, Ex p. Chorley*, [1933] 2 K.B. 696; 102 L.J.K.B. 658; 149 L.T. 535; 97 J.P. 210; Digest Supp.

(8) *Nakkuda Ali* v. *Jayaratne* (*M.F. De S.*), [1951] A.C. 66; 2nd Digest Supp.

(9) *R.* v. *Metropolitan Police Comr., Ex p. Parker*, [1953] 2 All E.R. 717; 117 J.P. 440; 3rd Digest Supp.

(10) *R.* v. *London County Council, Education Committee, Staff Sub-Committee, Ex p. Schonfeld*, [1956] 1 All E.R. 753; 3rd Digest Supp.

(11) *Associated Provincial Picture Houses, Ltd.* v. *Wednesbury Corpn.*, [1947] 2 All E.R. 680; [1948] 1 K.B. 223; [1948] L.J.R. 190; 177 L.T. 641; 112 J.P. 55; 2nd Digest Supp.

(12) *Sydney Municipal Council* v. *Campbell*, [1925] A.C. 338; 94 L.J.P.C. 65; 133 L.T. 63; 11 Digest (Repl.) 119, *120*.

(13) *Roberts* v. *Hopwood*, [1925] A.C. 578; 94 L.J.K.B. 542; 133 L.T. 289; 89 J.P. 105; 33 Digest 20, *83*.

(14) *Smith* v. *East Elloe Rural District Council*, [1956] 1 All E.R. 855; [1956] A.C. 736; 120 J.P. 263; 3rd Digest Supp.

(15) *Simpson* v. *A.-G.*, [1904] A.C. 476; 74 L.J.Ch. 1; 91 L.T. 610; 69 J.P. 85; 11 Digest (Repl.) 661, *855*.

(16) *Evans* v. *Hulton* (*E.*) *& Co., Ltd.*, (1924), 131 L.T. 534; Digest Supp.

Appeal.

This was an appeal by the defendant planning authorities, the Ministry of Housing and Local Government and the Worcestershire County Council, against the decision of LLOYD-JACOB, J., dated Apr. 16, 1957, declaring (1) that the carrying on of quarrying operations for the winning and making of stone at and in the plaintiff Pyx Granite Co., Ltd.'s lands and quarries known as Tank Quarry, Scar Rock Quarry and North Quarry situate in the urban district of Malvern in the county of Worcester is development within the meaning of the Town and Country Planning Act, 1947, which was included in class xii of Part 1 of Sch. 1 to the Town and Country Planning (General Development) Order, 1948, and permitted unconditionally by art. 3 thereof and thereafter was and is included in class xii of Part 1 of Sch. 1 to the Town and Country Planning General Development Order, 1950, and which is accordingly permitted unconditionally by art. 3 thereof; and (2) that the decisions of the Minister dated Sept. 5, 1949, and Sept. 30, 1953, were of no effect in so far as they purported to refuse permission to carry out such quarrying operations, and were of no effect in so far as they purported to grant permission subject to conditions; and that these decisions in no way limited or took away the company's rights to carry on quarrying operations under and by virtue of the unconditional permission given by art. 3 of the Orders of 1948 and 1950. The facts are summarised in the headnote.

G. D. Squibb, Q.C., *Rodger Winn* and *A. P. Leggatt* for the Ministry of Housing and Local Government and the Worcestershire County Council, the appellant planning authorities.

J. R. Willis, Q.C., and *W. Scrivens* for the company, the respondent quarry-owners.

Cur. adv. vult.

Feb. 7. The following judgments were read.

LORD DENNING: The Malvern Hills are of great natural beauty. They are also an important source of granite for roads. The Pyx Granite Company have the right to quarry in two areas of the hills. The questions in this case are two: First, whether the company have to obtain the permission of the planning authority before breaking fresh surface; secondly, if permission is necessary, what conditions can the planning authority lawfully impose? The Minister of Housing and Local Government says that the company are not entitled to win and work granite from the Hills except with the special permission of the local planning authority, that is, the Worcestershire County Council, or of the Minister. The Minister is ready to grant permission to the company to quarry to a limited extent, but no more.

There are two quarryable areas concerned. One is the Tank Quarry area. It is the freehold property of the company. It is the most important of the Malvern quarries, and is eleven acres in extent. There are five acres of it not yet touched which contain sufficient stone to last a hundred years. The Minister, by a letter dated Sept. 30, 1953, refused permission to work a tract of this land because he wished to preserve the skyline; and he also refused permission to work a spur of the land because it screened the workings. He has granted permission to work the remainder, but only until June 30, 1966. The other area is the North Quarry area. It is owned by the Malvern council, but they have granted to the company licences to work it until June 24, 1960. It is twenty-three acres in extent, but is in a dangerous state. There is a fault which has threatened to cause a large fall of rock. The Minister, by a letter dated Sept. 5, 1949, has granted to the company permission to win and work the minimum amount of granite required to secure safety, but by the letter of Sept. 30, 1953, he has refused permission for any other working.

The company contend that the Minister's letter refusing permission is of no validity at all. They say that they do not require special permission to work these areas because they were authorised to work them by a local or private Act of Parliament, namely, by the Malvern Hills Act, 1924. They say that development so authorised comes within the General Development Order which makes special permission unnecessary. The Minister has rejected this contention, and the company now bring this action asking the court to declare that they are in the right about it.

Counsel for the Minister takes a preliminary objection. He says that the court has no jurisdiction to entertain this claim for a declaration, and he relies on *Barraclough* v. *Brown* (1) ([1897] A.C. 615) for the purpose. The only procedure open to the company is, he says, by application under s. 17 (1) of the Town and Country Planning Act, 1947, which says that:

> "If any person who proposes to carry out any operations on land . . . wishes to have it determined . . . whether an application for permission in respect thereof is required under this Part of this Act having regard to the provisions of the development order, he may . . . apply to the local planning authority to determine that question."

It is as well to see what the procedure of s. 17 entails. Take a company which wants to know whether permission is required for its proposed development. The company can apply to the county council to know whether permission is required or not. If the county council decides that permission is required, the company can appeal to the Minister, or the Minister can "call in" the application to be determined by himself in the first instance. If the Minister decides (either on appeal or at first instance) that permission is required, there is no appeal to the courts from his decision at that stage, but his decision is not final. The company can test the correctness of it in a roundabout way. They can ignore his decision, and carry out their operations without permission; and then, when the county council serve an enforcement notice, the company can appeal to a court of summary jurisdiction and ask for the notice to be quashed on the ground that no permission was required—see s. 23 (4) (a)—and thence, by applying for a case to be stated, the company can obtain the ruling of the High Court. See what this means. The company would have to do the work at much expense without having any decision of the courts as to their rights, and at the risk of being ordered to pull it down if they were wrong.

So much for the remedy under s. 17. Is it the only remedy ? That depends on the true interpretation of the Act. I take it to be settled law that the jurisdiction of the High Court to grant a declaration is not to be taken away except by clear words. In *Barraclough* v. *Brown* (1), the words were sufficiently clear. In that case Parliament had

> " . . . by plain implication, enacted that no other court has any authority to entertain or decide these matters ";

see per Lord Watson ([1897] A.C. at p. 622). That is shown by *Francis* v. *Yiewsley & West Drayton Urban District Council* (2) ([1957] 3 All E.R. 529) where a man was aggrieved by an enforcement notice served under the Act of 1947. He said that it was invalid. The Act gave him a remedy by way of appeal to a court of summary jurisdiction. Section 23 (4) said "he may" appeal. The planning authority argued that that was the only remedy. But McNair, J., ([1957] 1 All E.R. 825), and this court held that the existence of the statutory remedy did not bar him from seeking a remedy by declaration. McNair, J., said ([1957] 2 Q.B. at p. 148):

> "It is a fundamental rule that if a subject is to be deprived of a right of coming to these courts, it must be in clear words."

I entirely agree. Applying this principle, I find nothing in the statute to bar recourse to a declaration. Section 17 is no doubt a convenient remedy. It enables a ruling to be obtained from the Minister in a way which is simple and inexpensive; but it is not the only remedy. Section 17 says that " he may " apply to the local planning authority, not that he *must* do so. The proposed work may be of such importance that the developer may desire the ruling of the High Court before starting on it. The only means of getting such a ruling is by an action for a declaration, and I see nothing in the Act to bar it. In my opinion, the preliminary objection fails.

I turn, therefore, to the substantial dispute. The company says that the working of these areas is covered by the Town and Country Planning General Development Order, 1950, and does not need the permission of the local planning authority or of the Minister. The General Development Order permits any development to be carried out if it is

> " Development authorised by any local or private Act of Parliament . . . being an Act . . . which designates specifically both the nature of the development thereby authorised and the land upon which it may be carried out "

(see art. 3, and class xii of Sch. 1). The company say that the development of these areas is authorised by the Malvern Hills Act, 1924, but the Minister disputes it.

The dispute depends on the true effect of the Act of 1924. It appears from the recitals that the amenities of the Malvern Hills were threatened by quarrying operations. Parliament desired to save the beauty of the Hills; but the quarry owners had vested rights of quarrying which they claimed should not be taken away without compensation. There seems to have been much negotiation in the course of the Bill through Parliament. In the result, Parliament, by s. 26 and s. 27 of the Act, empowered the Minister, on the application of the Malvern conservators, to make orders prohibiting quarrying on any particular part of the Hills; but the conservators had to pay compensation to the owners affected. This obligation to pay compensation would have a restrictive effect on attempts to preserve the Hills. The conservators might not be able to afford to buy out some quarry owners such as the company. Negotiations therefore took place between the company, the Malvern conservators and the Malvern council, as a result of which " Heads of Agreement " were drawn up, under which the company were to give up their right to quarry many acres of land over which they held a licence, and were to limit their rights of quarrying to twenty-three acres of licensed land. (This was outside their freehold property which was not affected by the Act.) The heads of agreement were confirmed and made binding by s. 54 of the Act which said that:

> " For the protection of the Pyx Granite Company Limited the following provisions shall, unless otherwise agreed in writing between the company and the conservators and the Malvern council, have effect (that is to say): The heads of agreement as set forth in Sch. 4 to this Act are hereby confirmed and made binding on the company and the conservators and the Malvern council, and the provisions of this Act shall only apply to or affect the undertaking property or rights of the company subject to the provisions of the said heads of agreement."

The heads of agreement contemplated that a formal agreement should be executed; and after some differences (which were only resolved after a decision of the Court of Appeal on June 24, 1925) a deed was executed on Dec. 14, 1925, by the Malvern council, the Malvern conservators and the company. By

A this deed the company agreed not to quarry in any part of the Malvern Hills except their freehold property, and the quarryable areas there defined; and it was agreed that the company's rights to quarry stone on their freehold property were not to be prejudiced or affected by the deed. The upshot of it all was that by agreement the company gave up their right to quarry on a considerable area of land in return for a promise by the Malvern conservators and the Malvern B council that the rights of the company to quarry stone on their freehold property and on some twenty-three acres of licensed land should be left undisturbed. This amounted, I think, to an implied agreement by the Malvern conservators and the Malvern council authorising the company to quarry stone within those limits. But was this authorised *by the Act*? The company say that it was authorised by virtue of s. 54. The Minister disputes it.

C This is a difficult question, and I can well understand the approach of the judge to it. Seeing that the heads of agreement were " confirmed and made binding " by the Act, it looks as if the provisions thereof (express or implied) were authorised by the Act; but we were referred to a case, which was not cited to the judge, and which throws a different light on the problem. It is *R.* v. *Midland Ry. Co.* (3) ((1887), 19 Q.B.D. 540), and the speech of LORD CAIRNS in *Cale-* D *donian Ry. Co.* v. *Greenock & Wemyss Bay Ry. Co.* (4) ((1874), L.R. 2 Sc. & Div. 347) which was quoted in it. That case shows that there are two ways in which Parliament can give validity to the provisions of an agreement not yet formally completed. It can make the provisions *as binding as a contract*, simply dispensing with the execution by the parties; or it can make the provisions *as binding as a statute*, giving them the same force as if enacted in the statute itself. E What has Parliament done here? It seems to me that s. 54 does no more than make the heads of agreement as binding as a contract.

At that time the heads of agreement had not been executed by the parties, but they were nevertheless " confirmed and made binding " on the parties, who could " otherwise agree " in writing. That is typical of a contractual bond. The section goes on to say that the provisions of the Act are only to F apply to the company's undertaking " subject to the provisions of the said heads of agreement ". That is no more than saying that the provisions are to be regarded as a " contracting out " of the Act with the sanction of Parliament. The last paragraph of the heads of agreement contemplated that a formal agreement should be prepared and executed by the parties. This was done on Dec. 14, 1925, by a deed which thenceforward replaced the heads of agreement. G In these circumstances, I think that the provisions of the heads of agreement cannot be regarded as equal to a statute, or as carrying the authority of Parliament, but only as of contractual force. The development of these quarryable areas was authorised by the agreement, but not by the Act of Parliament. It does not come, therefore, within the General Development Order, but needs the special permission of the local planning authority, or the Minister.

H This is not the end of the case because the company long ago took steps to safeguard their position. On Nov. 17, 1947 (whilst the earlier Planning Acts were in force), they applied to the Malvern council for permission to develop the land for quarrying purposes. On Jan. 14, 1948, the Minister " called in " the company's application for decision by himself in so far as it concerned the winning and working of minerals by surface working. When the Act of 1947 I came into operation, the company's application was, by the statute, to be treated as if it was made under that Act. A local inquiry was held. By the letters of Sept. 5, 1949, and Sept. 30, 1953 (to which I have already referred) the Minister granted permission in respect of part of the land, but imposed conditions to which the company object. The conditions required that the company should take away their plant and machinery when they had finished, and so forth. The company say that the conditions are invalid in whole or in part, and seek a declaration to that effect.

Counsel for the Minister on this part of the case takes another preliminary objection. There is nothing here corresponding to s. 17 on which he previously relied. But he relies on the wide discretion given by s. 14 to the planning authority to impose conditions, and says that this discretion is not open to proceedings for a declaration. He read us passages from *Barnard* v. *National Dock Labour Board* (5) ([1953] 1 All E.R. 1113) and sought to deduce therefrom that the remedy by declaration only lies where there is no jurisdiction, not where it is wrongly exercised. I do not think that there is any such limit to the remedy by declaration. The wide scope of it can be seen from the speech of VISCOUNT KILMUIR, L.C., in *Vine* v. *National Dock Labour Board* (6) ([1956] 3 All E.R. 939 at pp. 943, 944) from which it appears that if a substantial question exists which one person has a real interest to raise, and the other to oppose, then the court has a discretion to resolve it by a declaration, which it will exercise if there is good reason for so doing.

Counsel for the Minister also said that if the conditions are invalid, the only remedy is by certiorari, and not by declaration, thus implicitly admitting that there ought to be a remedy, but that the company had pursued the wrong form of it. He assumes that certiorari would lie to quash, but I am by no means sure about this. Certiorari is confined to judicial acts; and it can be argued that the Minister, when granting planning permission, is not acting judicially, but administratively, and that his decision is, therefore, not subject to certiorari. Counsel said that it is sufficiently near a judicial decision to be the subject of certiorari, and referred us to *R.* v. *Hendon Rural District Council, Ex p. Chorley* (7) ([1933] 2 K.B. 696). But since that case there have been the decisions of the Privy Council in *Nakkuda Ali* v. *Jayaratne* (*M.F. De S.*) (8) ([1951] A.C. 66 at p. 78) and of the Divisional Court in *R.* v. *Metropolitan Police Comr., Ex p. Parker* (9) ([1953] 2 All E.R. 717) which have restricted the scope of this remedy. It is one of the defects of certiorari that it so often involves an inquiry into the distinction between judicial acts and administrative acts which no one has been able satisfactorily to define. No such difficulty arises with the remedy by declaration, which is wide enough to meet this deficiency, as this court had occasion to point out in *R.* v. *London County Council, Education Committee, Staff Sub-Committee, Ex p. Schonfeld* (10) (reported [1956] 1 All E.R. 753, but not on this point). It applies to administrative acts as well as judicial acts whenever their validity is challenged because of a denial of justice, or for other good reason. It is clearly available to enable the court to declare whether conditions imposed by a licensing authority are valid, no matter whether that authority is acting judicially or administratively; see *Associated Provincial Picture Houses, Ltd.* v. *Wednesbury Corpn.* (11) ([1947] 2 All E.R. 680). There are very good reasons here for entertaining a claim for a declaration. If these conditions are valid, they operate as a land charge, and must be entered in the register of land charges. It may be very important for the owner, or any proposed purchaser, to know whether they are valid or not before he commits himself to the proposed development. No statutory remedy is available for the purpose, and the best, if not the only, remedy is by way of a declaration. In my opinion, therefore, this preliminary objection also fails.

This brings me to the question whether the conditions imposed in this case are valid or not. The particular conditions to which the company object are those concerned with the plant and machinery which has been used in the quarries for years—not for actually winning the stone and getting it out of the ground, but for crushing it and putting it into a marketable state. The company say that they do not need permission to use this plant and machinery because they are using it in the same way as it was used before 1947. Yet the Minister has imposed conditions such as these: (1) He requires that crushing and screening shall only be operated between such hours as may be agreed, and that steps

A shall be taken to control the emission of dust therefrom. (2) He requires that all plant, machinery and foundations shall be removed when they are no longer required, and the site left in a tidy condition. The Minister claims to impose these conditions under the general power contained in s. 14 (1), or alternatively under the special power contained in s. 14 (2) (a)*. The company say that if the Minister wishes to impose such conditions, he can only do it under the
B powers contained in s. 26 which give a right to compensation under s. 27.

The principles to be applied are not, I think, in doubt. Although the planning authorities are given very wide powers to impose " such conditions as they think fit ", nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable
C that object may seem to them to be in the public interest. If they mistake or misuse their powers, however bona fide, the court can interfere by declaration and injunction. See *Sydney Municipal Council* v. *Campbell* (12) ([1925] A.C. 338 at p. 343); *Roberts* v. *Hopwood* (13) ([1925] A.C. 578 at p. 613) and *Smith* v. *East Elloe Rural District Council* (14) ([1956] 1 All E.R. 855 at p. 867). This principle was applied in a planning case where the London County Council gave
D permission for some manufacturers to erect a new factory on a new site, but sought to impose a condition that their existing works on the old site should close down as soon as the new factory was brought into use. This condition was desirable in the interests of the over-all planning of the area. But the Minister was advised (rightly, I think) that the condition could not properly be
E imposed as it was, in part, an attempt to suppress existing development by depriving the manufacturers of the right to use their existing factory; and that suppression of an existing use of this kind could only be achieved by an order under s. 26; see the Bulletin of Selected Appeal Decisions (VII/12). The company say that the conditions to which they object here are invalid for a similar reason, namely, as an attempt to impose conditions on the continuance
F of an existing use which can only be achieved by an order under s. 26.

The judge thought that the company were right on this point, and it is only after much hesitation that I differ from him. I cannot shut my eyes to the fact that this plant and machinery is ancillary to the getting of stone from the quarries. The company win the stone from the working face, and for that operation they certainly have to get permission. Then they crush the stone and
G screen it, not actually at the place where they are excavating, but very near to it. If the question depended on the general words of s. 14 (1) there might be a doubt whether the conditions were valid; but the special words of s. 14 (2) were inserted so as to clear up any doubts about s. 14 (1), and they seem to me to cover this case. These conditions require " the carrying out of works " on land under
H the control of the company—although it is not the land in respect of which the application for permission relates—and they can properly be regarded as expedient " in connexion with " the permitted development.

I see no reason to attribute to the Minister any ulterior object. He evidently takes the view that if the company wish to win and work stone from these quarries for some years to come, they should take steps to ensure that there is as
I little nuisance as possible either from the blasting operations or from the ancillary operations of crushing and screening the stone; and that they should clear up the place when they have finished. There is nothing unfair or unreasonable about that. After all, if the company do not wish to accept the permission on those conditions, their remedy is not to work the quarry; but if they do continue to work the quarry, they can fairly be expected to comply with these conditions. It would be very different if the Minister sought to impose like conditions about

---

* Section 14 (2) (a) is printed as a footnote to p. 626, ante.

plant or machinery a mile or so away. It might well be that that could only be A done by an order under s. 26. But here the plant and machinery is on the spot, and the conditions are so closely "in connexion with" the permitted development as to be valid.

In my opinion, therefore, although there is no technical barrier to the granting of declarations, the company have not succeeded in establishing a case for them. I would allow the appeal accordingly. B

HODSON, L.J.: The first question is whether or not the court can grant the declaration first made* by the learned judge. Section 17 (1) of the Town and Country Planning Act, 1947, provides statutory proceedings for the determination of any question whether the carrying out of certain operations on land would constitute or involve development within the meaning of the Act for C which, having regard to the provisions of any development order, permission is required to be obtained by application. A person who proposes to carry out operations *may*, in the words of the section,

> ". . . either as part of an application for such permission, or without any such application, apply to the local planning authority to determine that question." D

The effect of s. 17 (2) read with its prior provisions s. 15 (1), (2), and (3) is that any decision of the Minister given on an application made under s. 17 (1) to determine the above question is final save and except that provision is made for appeal against an order made for the enforcement of planning control.

In these circumstances, the principles laid down in *Barraclough* v. *Brown* (1) E ([1897] A.C. 615) are, in my judgment, applicable. The headnote of this case reads as follows:

> "Where a statute gives a right to recover expenses in a court of summary jurisdiction from a person who is not otherwise liable, there is no right to come to the High Court for a declaration that the applicant has a right to F recover the expenses in a court of summary jurisdiction; he can only take proceedings in the latter court."

LORD HERSCHELL said (ibid., at p. 620):

> ". . . it would be very mischievous to hold that when a party is compelled by statute to resort to an inferior court he can come first to the High Court G to have his right . . . determined."

LORD WATSON said (ibid., at p. 622):

> "It cannot be the duty of any court to pronounce an order when it plainly appears that, in so doing, the court would be using a jurisdiction which the legislature has forbidden it to exercise." H

The learned judge disposed of this objection by reference to the date of the original application to the Minister, which was prior to the date of the coming into force of the Act of 1947, videlicet 1948, but the material matter to be considered is this action for a declaration which was commenced by writ in December, 1954, and the jurisdiction of the court to grant a declaration must be considered independently of whether any application has or has not been made to the local I planning authority under s. 17. The position of the court is the same whether or not the local planning authority or the Minister has made a determination. Planning is itself the creature of statute, and Parliament has provided its own method for the determination of the question here involved, videlicet whether planning permission is required. No significance is to be attached to the use of the word "may", which is the only word apt for the purpose. Indeed, it would not be sensible to make it compulsory for persons to seek a determination if they did not consider it in their interest to do so. The same permissive word "may" is contained in the statute under consideration in *Barraclough* v. *Brown* (1). Although the section now in question is directed to a different purpose from that involved in that case, there is to my mind no distinction in principle. The declaration sought must look to the future just as the determination to be sought under s. 17, and I can see no good ground for distinguishing this case on the ground that the declaration speaks in the present tense. It is said further by the company that it is inconvenient as between vendor and purchaser not to know whether there was an enforcement notice, and that therefore it is in practice highly desirable to be able to obtain a declaration of this nature; but I do not find that this argument carries the matter any further. The risk of planning interference by the Minister cannot be avoided, and a safeguard is provided by s. 17 itself. In my opinion, the legislature has by s. 17 given exclusive jurisdiction to the local authority, and the Minister and this court cannot be asked to make the declaration sought.

---

* See p. 628, letters A and B, ante.

If I am wrong as to this, the question is whether the Minister and the local planning authority are entitled to succeed on the ground that the company were not authorised by the Malvern Hills Act, 1924, to develop their land for the purpose of winning and working of minerals by surface working in their quarries. The company rely on the words of class xii of Sch. 1 to the Town and Country Planning (General Development) Order, 1948 (S.I. 1948 No. 958) made pursuant to the Act of 1947, revoked and replaced by the Town and Country Planning General Development Order, 1950 (S.I. 1950 No. 728) which contains, so far as material, an identical schedule of permitted development. Class xii contains this:

> "Development authorised by any local or private Act of Parliament or by any order approved by both Houses of Parliament, being an Act or Order which designates specifically both the nature of the development thereby authorised and the land upon which it may be carried out."

The sole question is whether there has been such an authorisation.

It is to be observed, first, that the company required no statutory authority to work their undertaking. Secondly, the Malvern Hills Act, 1924, as its preamble shows, was an Act framed to preserve the amenities of the Malvern Hills, and to deal with the interference with those amenities by quarrying operations, and by the erection of buildings, sheds, machinery and plant. By ss. 25, 26 and 27 of the Act, the conservators might make and enforce bye-laws to regulate quarrying in on or under the Malvern Hills, and regulate the erection of buildings, etc., and the Minister of Agriculture and Fisheries might make orders for the prohibition of quarrying. Sections 28, 29 and 30 deal with procedure and enforcement of orders of the Minister. Section 54 of the Act is as follows:

> "For the protection of the Pyx Granite Company Limited (in this section referred to as 'the company') the following provisions shall unless otherwise agreed in writing between the company and the conservators and the Malvern council have effect (that is to say):—The heads of agreement as set forth in Sch. 4 to this Act are hereby confirmed and made binding on the company and the conservators and the Malvern council and the provisions of this Act shall only apply to or affect the undertaking property or rights of the company subject to the provisions of the said heads of agreement."

The heads of agreement are set out in Sch. 4 and contain the following paragraph:

> "A clause to be inserted in the Bill excluding the undertaking property and rights of the company from its operation except that bye-laws may be

> made with the approval of the Home Secretary (after notice to the company) in regard only to blasting operations in the company's quarries for the protection of the public."

No such clause was ever inserted, and in 1925 it was held by the Court of Appeal* that, the legislature not having seen fit to insert this clause in the Act when it became law, the court could not, by a process of construction, produce the same result so that the undertaking of the company remained subject to the powers conferred on the conservators of making bye-laws for the regulation of quarrying in the area subject to their jurisdiction. Thus the Act of 1924 did not exclude the company's land from its operation.

There is nothing in the Act which specifically authorises the company to carry on their quarrying or any other activities, but it is argued that by countenancing these activities there has been an authorisation within the meaning of class xii of Sch. 1 to the development orders to which I have referred. The provisions of the Act are restrictive, and there is nothing in the agreement which is part of the Act except a variation of the rights of the parties to the agreement not amounting in any sense to the giving of any new authority to the company to work. Statutory confirmation of the agreement does not put the parties in a different position from that which they would have occupied if they had made an agreement which had not been so confirmed. Rights conferred by agreement are none the less conferred thereby when the agreement is confirmed by Act of Parliament. Authorisation involves the need for sanction, as is illustrated by s. 22 of the Act of 1924 and the second and third schedules thereto, where the conservators are specifically authorised to purchase quarries, etc., notwithstanding anything contained in certain earlier Acts.

This construction of the Act of 1924 as not in itself authorising the company to do anything is, in my opinion, supported by the judgment of the Court of Crown Cases Reserved in *R.* v. *Midland Ry. Co.* (3) ((1887), 19 Q.B.D. 540), which was not referred to in the court below. The question there was whether, under s. 8 of the Regulation of Railways Act, 1873, a difference between railway companies was, under the provisions of any general or special Act, required or authorised to be referred to arbitration. Two railway companies had agreed that all questions of difference arising out of their agreement should be determined by arbitration in manner provided by the Railway Companies Arbitration Act, 1859, and a private Act was subsequently passed to which the agreement was scheduled, and by which it was provided that the scheduled agreement should be confirmed and made binding. It was held that the right to refer to arbitration was derived from the agreement, and that the difference was not

> " required or authorised to be referred to arbitration under the provisions of any general or special Act "

within the meaning of s. 8. In other words, the recognition of the agreement was not an authorisation to refer to arbitration.

The same situation exists here. The company were not authorised by the Act of 1924 to do anything, and the fact that their agreement with other parties has been embodied in an Act of Parliament does not amount to authorisation. There is nothing here to correspond with the words in *Caledonian Ry. Co.* v. *Greenock & Wemyss Bay Ry. Co.* (4) ((1874), L.R. 2 Sc. & Div. 347), referred to in the judgment of STEPHEN, J. (19 Q.B.D. at p. 546) where the clause to be construed, after saying that the agreement was valid and obligatory, went on to say that

> " the companies are hereby required to implement and fulfil all the provisions and stipulations thereof."

---

* In *Pyx Granite Co., Ltd.* v. *Malvern Hill Conservators and the Malvern U.D.C.*, May 11, 1925.

The judgment of WILLS, J., in *R.* v. *Midland Ry. Co.* (3) begins as follows (19 Q.B.D. at p. 549):

> "Broadly stated, and apart from technicality, the question is whether in a case where an agreement between two companies to which the Act of 1873 refers, containing a reference clause, has been embodied in an Act of Parliament, the necessity or the privilege, as the case may be, of having their disputes referred to arbitration has been created by the express command of the legislature, or is the off-spring of agreement between the parties, the action of Parliament having been confined to the removal of obstacles, actual or apprehended, to their power so to contract."

WILLS, J., answered the question by saying that the reference clause was the off-spring of the agreement between the parties. The view of the court was clearly that the requisition or authority then in question was a requisition to do that which the companies were not called on to do otherwise, and an authority to do that which they were not authorised to do without the Act. In my judgment, the Minister and the planning authority are right in their submission that the company were not authorised within the meaning of the General Development Order.

It is also to be noticed that the Tank Quarry, part of the company's undertaking, was not, so far as the schedule to the Act of 1924 and the plan annexed thereto shows, part of the Malvern Hills area, unless it can be said that the conservators have acquired an interest in it within the meaning of s. 5 of the Act. There is, so far as I know, no evidence of this, but it is not necessary to pursue this matter in view of the fact that the North Quarry is within the Malvern Hills area, and included in the schedules to the Act.

The only remaining question is as to the conditions imposed by the Minister. I have nothing to add on this subject to the views expressed by my Lord as to the validity of the conditions generally. In any event it would, I think, be impossible to mutilate the Minister's decision by removing one or more of the conditions. The permission given has been given subject to those conditions, and non constat but that no permission would have been given at all if the conditions had not been attached. The consequence would be that if any of the conditions imposed were held to be bad as imposed without jurisdiction, the whole planning permission would fall with it, and the company would be left without any planning permission at all, for it would not be open to the court to leave the planning permission standing shorn of its conditions, or any of them.

Moreover it is doubtful whether at this time the Minister's decision could properly be impeached by declaration. That could have been done by certiorari (see *R.* v. *Hendon Rural District Council, Ex p. Chorley* (7), [1933] 2 K.B. 696); but the time for this has long since passed. Such proceedings, if successful, could only, in my opinion, have led to the result I have indicated, namely, the quashing of the whole permission, and not the leaving of the permission standing shorn of all or some of its conditions. I would allow the appeal.

MORRIS, L.J.: When the company made application on Nov. 17, 1947, for permission to develop their land with quarrying undertakings thereon, the Town and Country Planning Act, 1947, had been passed, but most of its provisions had not come into force. The provisions of the Town and Country Planning Interim Development Order, 1946 (S.R. & O. 1946 No. 1621) were then in operation. That order was made under the Town and Country Planning Acts, 1932 to 1944. It was provided by s. 10 of the Town and Country Planning Act, 1932, that the Minister should make a general order with respect to the interim development of land within the areas to which resolutions to prepare or adopt a scheme applied.

In reference to the area now in question there had, on July 25, 1934, been a resolution to prepare a scheme. That resolution had been approved by the Minister on Sept. 28, 1934. Interim development for the purposes of s. 10 meant development between the date on which a resolution took effect, and the date of coming into operation of a scheme. Under para. 4 (1) of the Order of 1946 certain development could be undertaken without the permission of the interim development authority. One such class of development* included (with certain exceptions) development authorised by any Act of Parliament which specifically designated the land on which the development could be carried out. Another class (see class v) included the carrying out by mining undertakers (subject to certain exceptions) on land comprised in their undertaking of any development required for the purposes of their undertaking.

The Minister in fact called in the company's application of Nov. 17, 1947. When he dealt with it, he did so under the provisions of the Town and Country Planning Act, 1947, which came into operation on July 1, 1948. That Act provides (see s. 12) that permission is required under Part 3 of the Act in respect of any development of land which is carried out after the appointed day when the Act came into force. Under the Act, development is defined to mean (subject to certain exceptions) the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land. Section 13 of the Act required the Minister to provide by order for the grant of permission for the development of land under Part 3 of the Act, which permission, in the case of any development specified in the order, might be granted by the order itself, or in other cases might be granted by the local planning authority or in certain cases by the Minister. On May 5, 1948, the Minister made the Town and Country Planning (General Development) Order, 1948 (S.I. 1948 No. 958). On May 8, 1950, the Minister made the Town and Country Planning General Development Order, 1950 (S.I. 1950 No. 728). Paragraph 3 (1) of that order provides as follows:

> " Subject to the subsequent provisions of this order, development of any class specified in Sch. 1 to this order is permitted by this order and may be undertaken upon land to which this order applies, without the permission of the local planning authority or the Minister: Provided that the permission granted by this order in respect of any such class of development shall be subject to any condition or limitation imposed in the said Sch. 1 in relation to that class."

Class xii of Sch. 1 refers to:

> " Development authorised by any local or private Act of Parliament . . . which designates specifically both the nature of the development thereby authorised and the land upon which it may be carried out."

If the development referred to by the company in their letter of Nov. 17, 1947, comes within the words which I have just cited, then the company had permission for such development, and no further permission of the local planning authority or of the Minister was needed. When, at a much later date, that is in July, 1952, an inquiry was being held, the company put forward their submission that they need not have applied for planning permission. They invited a dismissal of their application by the Minister on the ground that no further permission was required. It may seem unfortunate that steps could not then have been taken to obtain the ruling of the court so that the uncertainty could then be resolved, and further unnecessary labour and inquiry avoided. Recourse to the courts was not, however, then sought, and the main question now to be determined is whether the company were permitted to do what they proposed without obtaining any special permission. Whether the provisions of the Order No. 1621 of 1946, or of S.I. 1948 No. 958, or of S.I. 1950 No. 728 are regarded, the principal issue is whether the development proposed by the company is development that was authorised by the Malvern Hills Act, 1924. It seems to me that the Malvern Hills Act, 1924, designated both the nature of the development to be carried out by the company, and the land on which the development was to be carried out. The question is, therefore, whether that Act authorised the quarrying activities of the company.

---

* Class 1.

The recitals in the preamble of the Malvern Hills Act, 1924, show that there was great concern to preserve the beauties of the Malvern Hills, and to limit the interference with the amenities of the area which must result from quarrying operations and the erection of buildings, sheds, machinery and plant. The company was an existing company engaged in the business of quarrying stone. The company was clearly interested, and the company opposed the Bill when it was introduced. There were certain manifest conflicts. On the one hand there was a desire to maintain natural beauty; on the other hand there was a necessity to obtain a certain output of stone. Those owning lands which contained valuable stone had an interest to develop their property commercially. Such interest might, if uncontrolled, run counter to the public interest of preserving the amenities of the Malvern Hills

> "for purposes of health recreation and enjoyment and the prosperity and development of the district."*

After negotiation, agreement was reached between the company and the promoters of the Bill. The settlement that was reached involved that the company should continue to quarry on their freehold land, should abandon their rights in regard to a certain area, and, while retaining existing rights on a part of the North Quarry area, should have transferred to them additional rights relating to other parts in the North Quarry area. The arrangements recorded in Sch. 4 to the Act of 1924 were most detailed. There was a plan which was signed by the chairman of the committee of the House of Lords to whom the Bill was referred. The first paragraph of the heads of agreement set out in Sch. 4 recorded:

> "The company's rights of quarrying to be limited (outside their freehold property) to the quarryable area at North Malvern defined on a plan to be signed by the Right Honourable the Lord Islington the Chairman of the Committee of the House of Lords to whom the Bill is referred a copy of which is to be supplied by the conservators to the company."

The plan which was signed showed: (a) the company's freehold property; (b) other areas of the hill land on which the company were to quarry; (c) an area in reference to which the company had a lease, but in which they agreed to relinquish their quarrying rights. The effect of the agreement was that there was a limitation of the area which would be subject to quarrying by the company.

The heads of agreement provided (see cl. 18) that the provisions were to be inserted in an agreement. An agreement was entered into on Dec. 14, 1925. Before that date there was litigation between the company and the conservators and the Malvern Urban District Council, which resulted in judgments in this court on June 24, 1925. The principal issue in the litigation concerned the meaning and effect of cl. 14 of the heads of agreement. It was held that that clause contained a transitory provision having no force or effect when the Bill became an Act. It would appear from the judgment of WARRINGTON, L.J., that one of the chief matters in controversy was whether bye-laws would bind the company. WARRINGTON, L.J., said in his judgment:

> "The substantial point to be decided is whether, on the true construction of the Malvern Hills Act, 1924, the undertaking, property and rights of the plaintiffs [the company] are or are not subject to the powers by the Act

---

* HIS LORDSHIP was here adopting the words of the preamble.

> conferred on the conservators of making bye-laws for the regulation of quarrying in the area subject to their jurisdiction." A

It was held that the company would be so subject, though it may be noted that when later the agreement of Dec. 14 was actually made, it was provided by para. 4 (b) as follows:

> " No bye-law made by the conservators under s. 25 of the Act shall affect the company's quarries except such as may be made with the approval of the Home Secretary (after notice to the company) in regard only to blasting operations in the company's quarries for the protection of the public." B

Section 22 of the Act of 1924 gave certain powers to the conservators to purchase certain lands, property and quarries described in Sch. 2 and Sch. 3 to the Act. Those C schedules included what are known as the " Foley Quarries ". The interests which the Malvern council were to transfer to the company so as to give additional quarries to the company related to the Foley Quarries. The agreement recorded in Sch. 4 gave to the conservators an option to purchase the company's undertaking as a going concern at the expiration of two years after written notice of intention should have been given to the company during the third, fourth or D fifth year after the passing of the Bill. It would have seemed strange if, after an agreement under which additional quarrying rights were secured to the company subject always to a provision that the conservators might exercise an option to purchase the whole undertaking, the conservators should have a general power given them by the Act to purchase quarries which would include the Foley Quarries. Section 54 of the Act gave " protection " to the company, E and it was enacted that:

> " The provisions of this Act shall only apply to or affect the undertaking property or rights of the company subject to the provisions of the said heads of agreement."

It was held in this court that s. 22 of the Act was superseded by the special F provisions of cl. 12 and cl. 13 of the heads of agreement. **Warrington, L.J.**, in his judgment said:

> " Section 22 contains a general power for the conservators to take certain quarries, including the Foley Quarries. The heads of agreement, by cl. 12 and cl. 13, provide specially that the conservators shall have the option to purchase at a certain time and on certain terms the entire undertaking of G the company. The general provision of s. 22 is superseded by the special provisions of cl. 12 and cl. 13."

Atkin, L.J., concluded his judgment with the words:

> " I agree that the special provisions in the rest of the heads of agreement override the more general provisions of the statute, and that the plaintiffs are entitled to the first declaration based upon paras. 12 and 13 of the heads H of agreement."

The reference was to a declaration made by **Romer, J.**, in reference to one of the questions raised, which was propounded as follows:

> " Whether notwithstanding the provisions of s. 54 of the Act and cl. 3, cl. 12 and cl. 13 of Sch. 4, the conservators are at present entitled to acquire I the council's interest in the Foley Quarries under the provisions of s. 22 of the Act."*

Romer, J., had further decided that, pending any acquisition by the conservators of the company's undertaking as a going concern under cl. 12 of Sch. 4, the rights and interests of the company in the Gandolfi licences and in the Foley Quarries were not subject to the jurisdiction of the conservators under the provisions of

---

* **Romer, J.**, had declared that the conservators were not so entitled.

s. 25 to s. 31 of the Act of 1924. That part of the decision of ROMER, J., was reversed in this court. It would appear that in this court there was some concentration on the applicability of s. 25, which dealt with the power of making bye-laws.

It does not seem to me to be wholly clear whether it was being decided that the powers under s. 26 of the Act of 1924 could be exercised in reference to the quarrying areas defined in Sch. 4. Section 26 of the Act gives power to the appropriate Minister, on the application of the conservators, to make orders prohibiting quarrying on any specified part of the Malvern Hills; any such order would be subject to a provision for the payment of compensation. In view of the terms of s. 54 that the provisions of the Act only apply to or affect the company subject to the provisions of the heads of agreement, and in view of the fact that Sch. 4 records detailed agreed arrangements in regard to the company's rights of quarrying, and in view of the fact that the company were being given " protection ", it might seem strange if the conservators had power to apply for an order which would prohibit the company from quarrying. The words of ATKIN, L.J., to which I have referred, and in particular the words

> " the special provisions in the rest of the heads of agreement override the more general provisions of the statute "

might suggest that s. 26 and s. 27 were not applicable to the undertaking, property or rights of the company.

It is not, however, in my judgment necessary to consider this particular matter further, for the issue now arising is really whether the activities of the company were " authorised " by the Act of 1924. That Act was one which effected most carefully worked out planning in regard to the Malvern Hills. The conservators were given additional powers. The company agreed to a limitation and fixation of their rights. From their previously existing rights something was extracted, and to them something else was added. The company's rights were limited, outside their freehold property, to a defined quarryable area. It was implicit in the agreement made that the continuing rights of the company to quarry on their freehold area were recognised. The company were to supply the council with stone for the repair of roads. The company were to put in repair a quarry road between certain defined points, and were to keep such road in repair. The company were to widen the quarry road to permit of a footpath by the side of it. The company were to be at liberty to make and use a tunnel under the area of land dividing their freehold property from the quarries which the council were handing over to the company. All this elaborately worked out detailed planning was, in my judgment, formally approved by Parliament when it provided by s. 54 that

> " for the protection of the company [the Act should] only apply to or affect the undertaking, property or rights of the company subject to the provisions of the heads of agreement."

It seems to me that formal approval and sanction were given by Parliament to the activities of the company as planned and arranged within the scope of the agreement that was made. In this way the activities of the company which constituted " development " were, in a very real sense, " authorised " by the Act of 1924. Parliament enacted that the specific arrangements (under which the range of the company's activities was defined and limited) were confirmed and made binding on the company, the conservators and the Malvern council. I feel impelled to the view that Parliament authorised the arrangements which it confirmed and made binding.

It was submitted that the decision in *R.* v. *Midland Ry. Co.* (3) ((1887), 19 Q.B.D. 540) negatived the view that in the present case development was " authorised " by the Malvern Hills Act, 1924. In that case an agreement had been entered into between the Midland Railway Company and two companies, the Great Western and the West Midland Railway Companies, which two companies were to be amalgamated. At a later date, by the Act of Parliament which effected the amalgamation, the previous agreement was " confirmed and made binding upon " the Midland and Great Western Railway Companies. The agreement had contained an arbitration provision. It was held that differences which later arose were not differences which " under the provisions of any general or special Act " were " required or authorised to be referred to arbitration ". In that case, the agreement between the Midland Railway Company and the two other companies (who, for the purposes of the agreement, were to be considered as one company) was entered into on Mar. 17, 1863; there were, under the agreement, various provisions for through rates and charges, and for through bookings, and for mutual interchange of traffic, and there was the provision for a reference to arbitration in manner provided by the Railway Companies Arbitration Act, 1859, of all disputed questions as to fares, rates and charges, and of other questions of difference arising out of the agreement. Later, the Great Western Railway (West Midland Amalgamation) Act, 1863 (26 & 27 Vict. c. cxiii), amalgamated the Great Western and West Midland Companies. That Act was passed on July 13, 1863. By s. 63, the agreement of Mar. 17, 1863, was " confirmed and made binding upon " the Midland and Great Western Railway Companies.

The Regulation of Railways Act, 1873, provided by s. 8 for a reference to the Railway Commissioners of differences which " under the provisions of any general or special Act ", were " required or authorised to be referred to arbitration ". Certain differences arose. The Midland Railway wanted the differences referred to the Railway Commissioners, and relied on s. 8 of the Act of 1873; they said that under the provisions of the Act of 1863, which was passed on July 13, 1863, the differences were " required or authorised to be referred to arbitration ". The Great Western Railway wanted the differences settled under the machinery of the Arbitration Act, 1859, as the parties had provided for in their agreement made on Mar. 17, 1863; they said that though that agreement had been " confirmed and made binding upon " the Midland and Great Western Companies by the Act passed on July 13, 1863, that did not alter the fact that the companies had, by their agreement of Mar. 17, chosen a particular form of reference, and accordingly that the differences were not such as " under the provisions " of the Act of 1863 were " required or authorised " to be referred to arbitration. The agreement between the parties which provided for arbitration was made four months before the Act was passed, and commenced on July 1, 1863. The Great Western Company succeeded. In examining the meaning of s. 8 of the Act of 1873, Stephen, J., said (19 Q.B.D. at p. 545):

> " It seems to me that its object is to enable the Railway Commissioners to have questions referred to them for their decision where the arbitration rests upon the authority of Parliament, where there is some special authority of Parliament which requires or authorises it; that is to say, cases in which the Railway Companies could not by their own manner of constitution and according to their own independent powers, do the thing for themselves."

The parties had, however, done it for themselves by their agreement of Mar. 17. Wills, J., in his judgment said (ibid., at p. 549):

> " If it was substantially the action of Parliament and the will of the legislature which imposed on the parties the necessity, or conferred on them the right, to go to arbitration, then Parliament may change the forum, and has elected so to do."

In the present case we are not concerned with the phrase " required or authorised ", but only with the word " authorised ". The word " authorised " appears in a great many statutory provisions. It does not mean the same as " required ". Its meaning in any particular case must, I think, be deduced from the context, and must depend on the context. In some instances, statutes are merely permissive: see *Simpson* v. *A.-G.* (15) ([1904] A.C. 476), where a person was authorised and empowered to improve the passage for boats on a river. When the Trustee Act, 1925, refers to " authorised investments ", that phrase means (see s. 68) investments authorised by the instrument (if any) creating the trust for the investment of money subject to the trust, or by law. When the Moneylenders Act, 1927, refers to an " authorised name " or " authorised address ", those expressions respectively mean (see s. 15) the name under which and the address at which a moneylender is authorised by a certificate granted under the Act to carry on his business as a moneylender. In *Evans* v. *E. Hulton & Co., Ltd.* (16) ((1924), 131 L.T. 534) Tomlin, J., pointed to the applicability of the dictionary definition of " to authorise ", that is " to give formal approval to, to sanction, approve, countenance ". The word " authorised " must, therefore, be considered in its context and in its setting. I cannot think that in its context in planning regulations it need be limited to rights newly conferred by an Act of Parliament. I consider that it extends also to rights recognised and sanctioned by an Act of Parliament.

It is to be observed that s. 35 of the Town and Country Planning Act, 1932 (following s. 16 of the Town Planning Act, 1925), refers to an " authorised association ", and by s. 35 (7), an authorised association is defined to mean a society, company or body of persons with certain specified objects, and which satisfies certain conditions, and which is " approved " by the Minister. In the context now being considered, it seems to me that the development which is referred to is development which Parliament has had under consideration, and has, in the case of operations which have not been begun, conferred a right to undertake them, or in the case of some operations already begun has recognised and sanctioned and approved their continuance. Parliament might, for example, do so by giving some exemption or protection from the application to them of certain provisions which Parliament is then enacting. Though, as mentioned hereafter, certain overriding powers are reserved to the Minister or the local planning authority, it would seem reasonable that, subject to the exercise of those powers, there should be no need for further permission in the case of some development operations which constitute a carefully adjusted piece of planning, and which, having come under the consideration of Parliament, have received express recognition.

At the time of the passing of the Malvern Hills Act, 1924, the company had certain existing rights in reference to its freehold land; it also had rights under licences. When the conservators were asking for extended powers, they were opposed by the company. The company might have defeated the Bill. But a settlement was reached, and terms of agreement settled; those terms only became effective and operative when the Act was passed. The company was given " protection ". It gave up some rights in the interests of good planning, it received new rights. The Act was only to apply to the company subject to the agreement. In my judgment, applying the language of Wills, J., quoted previously, it was " the action of Parliament and the will of the legislature " which conferred protection on the company, which protection recognised their existing rights in reference to their freehold property, and governed and defined their other rights. In my judgment, Parliament decreed a settlement which took into account public interest on the one hand, and private interests on the other. Though that settlement was negotiated by those concerned, Parliament then sanctioned it and countenanced it. As a piece of planning, in my judgment, they " authorised " it. I would regard the development operations of the company after the date of the passing of the Act of 1924 as having been done with the recognition, sanction and approval of Parliament, and accordingly, when planning is being considered, as having been done with the authority of Parliament.

It is to be noted that art. 4 (1) of S.I. 1950 No. 728 provides as follows:

> " If either the Minister or the local planning authority is satisfied that it is expedient that development of any of the classes specified in Sch. 1 to this order should not be carried out in any particular area, or that any particular development of any of those classes should not be carried out, unless permission is granted on an application in that behalf, the Minister or the local planning authority may direct that the permission granted by art. 3 of this order shall not apply to:—(a) all or any development of all or any of those classes in any particular area specified in the direction, or (b) any particular development, specified in the direction, falling within any of those classes: Provided that, in the case of development of class xii, no such direction shall have effect in relation to development authorised by any Act passed after July 1, 1948, or by any order requiring the approval of both Houses of Parliament approved after that date."

A direction could, therefore, have been made having the result that the company would have needed express permission to undertake development. The existence of this article (and see art. 4 of S.I. 1948 No. 958) would suggest that no unduly limited or restricted meaning should be given to the word " authorised ".

It is to be remembered that wide powers of control are given by s. 26 of the Act of 1947; orders made under s. 26 may involve the payment of compensation under s. 27. Inasmuch as the company came to terms with the conservators and the council in 1924, and gave up certain rights that they had on the stated and recognised basis that they were continuing their rights of quarrying on their freehold land, and were being given " protection ", it would seem to me to be a very unsatisfactory result if, without receiving compensation, they must cease operations in a few years' time. If new planning considerations and new policy demand some altered arrangements, it would seem but fair that they should be achieved by the exercise of powers that would entail the payment of compensation.

The Minister and the council submit that the company are not entitled to apply to the court for a declaration. They submit that the only right which the company had was to make an application to the planning authority under s. 17 of the Act of 1947. In my judgment, the wording of s. 17 denotes that an option is given to seek a determination by the use of the procedure of the section, but that the right which is given is not to the exclusion of any other rights. I do not consider that there is any withdrawal or negation of the right to come to the court for a declaration.

In *Barraclough* v. *Brown* (1) ([1897] A.C. 615) certain rights were by statute given to undertakers of navigation. If a boat was sunk in the river, the undertakers were given power to follow various courses. One of such courses was expressed* in the words:

> " or the undertakers may, if they think fit, recover such expenses from the owner of such boat, barge or vessel in a court of summary jurisdiction."

If the undertakers adopted that course, they could only recover the expenses in a court of summary jurisdiction, and not by bringing an action in the High Court. The defendants, who were sued in the High Court, were under no liability to pay the expenses at common law; the liability, if it existed, was created by the words of the statute as quoted above. As LORD HERSCHELL said (ibid. at p. 620):

> " I do not think the appellant can claim to recover by virtue of the statute, and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right."

---

* This provision was contained in s. 47 of the Aire and Calder Navigation Act, 1889 (52 & 53 Vict. c. 32).

A Nor, if he was compelled by statute to go to the court of summary jurisdiction, could he go first to the High Court to ask for a declaration that he could recover, for that was the very matter relegated to the inferior court. The High Court could not deal with a matter which the legislature, by plain implication, had enacted should be exclusively committed to the summary court.

B In my judgment, there is no language in the Act of 1947 which debars the company from seeking the ruling of the High Court.

Though it is with diffidence that I arrive at a conclusion differing from my Lords, I consider that the learned judge was right in making the first declaration, and the first part of the second declaration. On this view, the questions which were argued in regard to the conditions and the right of the plaintiff company to seek C a declaration as to them do not arise; but if I had shared the view that they do arise, I would have expressed my concurrence with the conclusions reached by LORD DENNING.

For the reasons which I have given, I would have dismissed the appeal.

LORD DENNING: The result of that is that by a majority (MORRIS, D L.J., and myself) the technical points are held not good. In other words, there is power in the court to make a declaration. As to the substance of the matter, again by a majority (HODSON, L.J., and myself), we hold that this was not authorised by a local or private Act of Parliament, and therefore special permission is necessary. Then together we unanimously agree that the conditions imposed were valid.

E We have to thank counsel for their assistance in a troublesome case which has taken a good deal of time for us to consider.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor, Ministry of Health* (for the Ministry of Housing and Local Government); *Sharpe, Pritchard & Co.*, agents for *Clerk to Worcestershire County Council*; *Stephenson, Harwood & Tatham* (for the company).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

FATSTOCK MARKETING CORPORATION, LTD. *v.* MORGAN (VALUATION OFFICER).

[COURT OF APPEAL (Lord Evershed, M.R., Parker and Sellers, L.JJ.), February 17, 18, 19, 1958.]

Rates—De-rating—Industrial hereditament—Factory or workshop—Slaughterhouse—Whether subject to factory legislation—Factory and Workshop Act, 1901 (1 *Edw.* 7 *c.* 22), *s.* 149 (1)—*Rating and Valuation (Apportionment) Act,* 1928 (18 *&* 19 *Geo.* 5 *c.* 44), *s.* 3 (1).

Rates—De-rating—Industrial hereditament—Adapting for sale—Article—Slaughtering—Treatment of carcases—Factory and Workshop Act, 1901 (1 *Edw.* 7 *c.* 22), *s.* 149 (1)—*Rating and Valuation (Apportionment) Act,* 1928 (18 *&* 19 *Geo.* 5 *c.* 44), *s.* 3 (1).

A slaughterhouse was used for the slaughter of cattle, sheep and pigs, removal from the carcase of horns, head and feet, hide or skin, loose fat surrounding the stomach, white offal and red offal and some trimming and treatment of the carcase and the offal. Some of the heads were boned out, fat was removed from the stomach and intestines and these were emptied and cleaned. The processes constituted normal good slaughterhouse procedure, and unless they followed slaughter immediately the flesh would be unfit for human consumption. The Lands Tribunal found that the primary purpose of the occupation of the slaughterhouse was to produce meat for human consumption and by-products for sale, but it held that the process carried on was not an adaptation for sale, that the Factory and Workshop Acts did not apply to slaughterhouses, and that the slaughterhouse was therefore not a factory or workshop within s. 149 (1) of the Factory and Workshop Act, 1901, as incorporated by s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, and accordingly was not an industrial hereditament*. On appeal,

Held: the slaughterhouse was an industrial hereditament within s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, because

(i) the Factory and Workshop Acts, 1901 to 1920, had applied to slaughterhouses notwithstanding that they were regulated by other statutes, since those statutes related to cleanliness and prevention of cruelty to animals as distinct from protection of workmen, which was the purpose of the factory legislation.

(ii) although the live animal was not an article, and simple slaughtering was not adapting for sale, the processes applied to the carcases were an

---

* Partial relief from rates on industrial hereditaments is provided by s. 68 of the Local Government Act, 1929 (20 HALSBURY'S STATUTES (2nd Edn.) 192). Industrial hereditaments are defined in s. 3 of the Rating and Valuation (Apportionment) Act, 1928, which provides:—

> " 3. (1) In this Act the expression ' industrial hereditament ' means a hereditament . . . occupied and used . . . subject as hereinafter provided, as a factory or workshop: Provided that the expression industrial hereditament does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for the following purposes or for any combination of such purposes, that is to say— . . . (f) any other purposes, whether or not similar to any of the foregoing, which are not those of a factory or workshop.
>
> " (2) For the purposes of this Act—(b) . . . the expressions ' factory ' and ' workshop ' have respectively the same meanings as in the Factory and Workshop Acts, 1901 to 1920."

Section 149 of the Factory and Workshop Act, 1901, defines the factories and workshops to which that Act applies as follows—

> " (1) Subject to the provisions of this section, the following expressions have in this Act the meanings hereby assigned to them; that is to say:— . . . the expression ' non-textile factory ' means— . . . (c) any premises wherein . . . any manual labour is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes, namely— . . . (iii) the adapting for sale of any article . . ."

These definitions were saved by the Factories Act, 1937, s. 159 (3).

A adaptation for sale and, since on the finding of the tribunal the primary purpose of the hereditament was to produce meat for human consumption and by-products for sale, the hereditament was primarily used for such processes, and they were not merely ancillary to slaughter.

Appeal allowed.

B [As to the meaning of " factory " and " workshop " and " adapting for sale" and the application of the Factory and Workshop Act, 1901, s. 149, for rating purposes, see 27 HALSBURY'S LAWS (2nd Edn.) 440-444, paras. 877, 878; and for cases on the subject, see 24 DIGEST (Repl.) 1021-1031, *3-56*; and DIGEST Supps.

For the Factory and Workshop Act, 1901, s. 149 (1) and the Rating and C Valuation (Apportionment) Act, 1928, s. 3 (1), see 20 HALSBURY'S STATUTES (2nd Edn.) 180, 176; and for the saving of s. 149 (1) of the Act of 1901 by the Factories Act, 1937, s. 159 (3), see 9 HALSBURY'S STATUTES (2nd Edn.) 1122.]

Cases referred to:

(1) *Revenue Officer for Surrey* v. *Clarkson. Revenue Officer for Rotherham* v. *Rotherham Co-operative Society, Ltd.*, (1931), 2 D.R.A. 53.

D (2) *Revenue Officer for Woolwich* v. *Royal Arsenal Co-operative Society, Ltd.*, (1931), 2 D.R.A. 282.

(3) *Inland Revenue* v. *Edinburgh Assessor* (*Slaughterhouses Case*), 1930 S.C. 429; Digest Supp.

(4) *Nash* v. *Hollinshead*, [1901] 1 K.B. 700; 70 L.J.K.B. 571; 84 L.T. 483; 65 J.P. 357; 24 Digest (Repl.) 1025, *32*.

E (5) *Wood* v. *London County Council*, [1941] 2 All E.R. 230; [1941] 2 K.B. 232; 110 L.J.K.B. 641; 165 L.T. 131; 105 J.P. 299; 24 Digest (Repl.) 1027, *44*.

(6) *Gledhill* v. *Liverpool Abattoir Utility Co., Ltd.*, [1957] 3 All E.R. 117.

(7) *Bailey* (*Stoke-on-Trent Revenue Officer*) v. *Potteries Electric Traction Co., Ltd.*, [1931] 1 K.B. 385; *revsd.* H.L., sub nom. *Potteries Electric Traction* F *Co., Ltd.* v. *Bailey* (*Stoke-on-Trent Revenue Officer*), [1931] A.C. 151; 100 L.J.K.B. 153; 144 L.T. 410; 95 J.P. 64; Digest Supp.

(8) *Law* v. *Graham*, [1901] 2 K.B. 327; 70 L.J.K.B. 608; 84 L.T. 599; 65 J.P. 501; 24 Digest (Repl.) 1021, *4*.

(9) *Fullers, Ltd.* v. *Squire*, [1901] 2 K.B. 209; 70 L.J.K.B. 689; 85 L.T. 249; 65 J.P. 660; 24 Digest (Repl.) 1025, *27*.

G (10) *Hoare* v. *Green* (*Robert*), *Ltd.*, [1907] 2 K.B. 315; 76 L.J.K.B. 730; 96 L.T. 724; 71 J.P. 341; 24 Digest (Repl.) 1025, *28*.

Case Stated.

The appellant ratepayers were the occupiers of a hereditament assessed in the valuation list for Aberdare Urban District as slaughterhouse, Ynys Road, Aber- H dare, at £180 gross value, £147 rateable value. They appealed to the Lands Tribunal against a decision of a local valuation court of North Glamorgan Local Valuation Panel given on May 28, 1956, confirming the entry of the assessment in Part 1 of the valuation list. Their grounds of appeal were that the hereditament was an industrial hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928, s. 3 (1) and that the assess- I ment should be transferred to Part 2 of the list.

The hereditament comprised a stockyard for the reception of livestock, lairages for cattle, sheep and pigs, three slaughter bays, two hanging rooms adjoining the bays, a condemned meat room, a gut room, a skin room, a mess room, offices and stores. After pining in the lairage, the beasts were taken to a slaughter bay, where they were slaughtered and their horns, head and feet and hide or skin were removed, the body cavity was opened, the loose fat surrounding the stomach, the white offal, i.e., stomach and intestines, the glands and the red offal, i.e., lungs, liver, heart and windpipe, were removed and some trimming of the carcase took place. Pig's carcases were put in scalding tubs and scraped by hand to remove hair. The carcase was then pushed into the hanging room and (in the case of cattle only) split into two sides by a mechanically operated saw. After cleaning and washing, the carcases, together with the red offal and the white offal after further treatment remained in the hanging room till sale. Sides of beef were sub-divided into quarters for ease of handling before sale. If there was no demand for heads, they were boned out on the hereditament, the meat being sold to butchers or sausage makers and the bones to a bone crusher. The stomach was emptied of undigested food and partially digested food and swilled out and fat and trimming were removed. The intestines while still warm were taken to the gut room where fat was separated from them and they were stripped of their contents and prepared for further processing on or off the hereditament for beef casings. Pig's intestines were further cleaned and scraped in the skin room so as to convert them into sausage skins.

It was agreed by expert witnesses called on behalf of both parties that the whole of the processes carried out constituted normal good slaughterhouse procedure. They further agreed that, if a beast were merely killed and the further processes carried out on the hereditament did not immediately follow, the flesh would be unfit for human consumption. A dead cattle beast or carcase could realise £5 to £6 from a knacker and an estimated total of £67 10s. for carcase meat, etc., after the processes carried out on the hereditament.

The ratepayers contended that the primary purpose for which the hereditament was occupied was the adaptation of the carcase after the beast was killed for sale as meat for human consumption and the processing for sale of the various by-products. The valuation officer contended that the predominant user of the hereditament was slaughter which did not render the hereditament a factory, and that the preparing and adapting for sale of the carcases was merely a secondary or consequential purpose of that use. He also contended that the whole of the legislation affecting slaughterhouses such as the Slaughter of Animals Act, 1933, the Food and Drugs Act, 1938, and the Slaughterhouses Act, 1954, showed that slaughterhouses were sui generis and fell outside the purview of the Factory and Workshop Acts.

The Lands Tribunal held that on the authorities there were two purposes of such a slaughterhouse and it was a question of fact which was primary. It found that the primary purpose of the occupation and use of the hereditament was to produce meat for human consumption and by-products for sale and that the actual killing was subsidiary to this main purpose. But it held that the whole process carried on on the hereditament was not an adaptation of an article for sale since the live beast which went in was not an article and the operations were not an adaptation of the dead beast for sale and the dead beast was not an article. It held further that the Factory and Workshop Act, 1901, did not apply to slaughterhouses. The hereditament was therefore not a factory or workshop and not an industrial hereditament within the meaning of s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928.

Michael Rowe, Q.C., and *W. L. Roots* for the ratepayers.
G. D. Squibb, Q.C., and *C. E. Scholefield* for the valuation officer.

LORD EVERSHED, M.R.: The question in this appeal is thus presented by the Case Stated: whether on the findings of fact the Lands Tribunal came to a correct decision in law in holding that the hereditament (the appellant ratepayers' slaughterhouse) is not a factory or workshop within the provisions of the Factory and Workshop Act, 1901. That is a correct posing of the true problem in the case; but this is a rating appeal and the question in the first instance is strictly whether under the Rating and Valuation (Apportionment) Act, 1928, the hereditament is an "industrial hereditament", an expression which by s. 3 (1) of that Act is defined as meaning a hereditament occupied and used.

subject as thereafter provided, as a factory or workshop. There follow in the sub-section certain exceptions, including that contained in para. (f), where the hereditament is primarily occupied and used for

> " any other purposes, whether or not similar to any of the foregoing, which are not those of a factory or workshop."

By sub-s. (2) of the same section it is provided that, subject as there stated, the words " factory " and " workshop " have respectively the same meanings as they have in the Factory and Workshop Acts, 1901 to 1920. So the matter comes back to the application of the Factory and Workshop Act, 1901, and it is thus a proper formulation of the problem before us to ask whether this hereditament is a factory or workshop within the provisions of the Act of 1901.

Elaborate definitions are provided by s. 149 of that Act. So far as relevant, the expressions "factory" and " workshop " mean premises wherein any manual labour is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes, including " the adapting for sale of any article ". It was pointed out to us in argument that in the case of a factory there is the added condition stated in para. (c), relating to the use of power, but that condition does not apply in the case of a workshop. In the end, therefore, the question is whether the operations in the ratepayers' slaughterhouse are conducted for the purpose of adapting articles for sale.

Previously in s. 149 reference is made to a list of factories and workshops contained in Parts 1 and 2 of Sch. 6. The list enumerates many familiar instances, such as print works and earthenware works and the like, but it is clear that that list is by no means exhaustive. Thus, no instance of chemical works is included, well-known though those must have been at the time, nor any reference to a brewery or a distillery.

I return to the problem, as I have now tried to distil it, of stating whether the operations of the slaughterhouse can be described as those of adapting for sale any article. To an ordinary reader of our language at first sight it would not easily appear so, for it might not be natural to regard the live animal or the dead carcase as an " article ". Against that, however, the slaughtering of beasts, like many other things, is no doubt much more mechanised in the second half of the twentieth century than it was one hundred years ago, and, in so far as that is so, the safety and protection of workers for which the Factory Acts were passed would not be unnaturally extended to cover the operations in a slaughterhouse. In any event, certain cases before the courts, which are not binding on us, seem to show that this first impression of the language is not one which has been adopted during the last generation.

Three cases decided in 1931 are reported in vol. 2 of English Derating Appeals; *Revenue Officer for Surrey* v. *Clarkson. Revenue Officer for Rotherham* v. *Rotherham Co-operative Society, Ltd.* (1) ((1931), 2 D.R.A. 53), and *Revenue Officer for Woolwich* v. *Royal Arsenal Co-operative Society, Ltd.* (2) ((1931), 2 D.R.A. 282). In the first two cases the Divisional Court held that no case was made out for disturbing the conclusion of fact of quarter sessions or the recorder that the slaughterhouses there concerned were within the comprehension of the Factory Act legislation. LORD HEWART, C.J., said (ibid., at p. 61):

> " In the second case the learned recorder has come to the conclusion that the hereditament should remain in the special list, and he has said: ' I am not satisfied that the slaughtering business is more important than the food factory business carried on in the said hereditament in that mere proof of floor space does not determine the primary purpose '. Again, I think upon the facts of that case he was entitled to arrive at the conclusion which we know."

The learned Lord Chief Justice then referred to a Scottish case (*Inland Revenue*

v. *Edinburgh Assessor* (*Slaughterhouses Case*) (3), 1930 S.C. 429) and he concludes ((1931), 2 D.R.A. at p. 61):

> " No doubt these two cases are not quite the same, no two cases are, but I think they are the same in this vital respect: That the question was really a question of fact, and there were materials to support the conclusion at which in each case the court of quarter sessions arrived."

The third case emphasises the significance of the last sentence for quarter sessions had arrived at an opposite conclusion (*Revenue Officer for Woolwich* v. *Royal Arsenal Co-operative Society, Ltd.* (2)). Avory, J. (who had participated in the earlier cases), indicated his doubt as to the soundness of the conclusion of fact, but he none the less felt no hesitation in agreeing that it was a conclusion of fact based on some evidence which the Divisional Court ought not to disturb. The not entirely satisfactory impression is left that cases which were apparently very alike in the end resulted in opposite conclusions; but, treating these cases as matters of fact, that may perhaps be an inevitable result.

A passage from the judgment of MacKinnon, J., in this last case was used in the argument and may illustrate some of that argument. He said (2 D.R.A. at p. 286):

> " Premises in which sheep and oxen become mutton and beef, in other words, premises in which they are killed, are not an industrial hereditament. Premises in which beef and mutton are turned into joints, chops, and cutlets are an industrial hereditament. Premises where both those processes go on may or may not be an industrial hereditament. It depends whether the first or second is the primary purpose for which the whole premises are occupied and used."

It has been part of a strenuous argument put forward by the valuation officer that, on the facts in the present case, these are not premises in which beef and mutton are turned into joints, chops and cutlets, but a hereditament in which sheep and oxen become mutton and beef.

The Scottish case was decided in the Inner House of the Court of Session on appeal from the Lands Valuation Court (*Inland Revenue* v. *Edinburgh Assessor* (3), 1930 S.C. 429). The question before the court was whether the slaughter-house, conducted by the corporation of the city of Edinburgh, was within the ambit of the factory legislation. The court had found in favour of the city of Edinburgh and against the Inland Revenue, and that view was sustained in the Inner House. Lord Hunter said (ibid., at p. 432):

> " The main argument presented by the appellant was that the primary use and occupation of the premises was to provide statutory facilities for slaughtering animals, and that they were therefore not entitled to be treated as industrial subjects . . . I think this argument was fallacious, and that, as the subjects were being mainly, if not entirely, used for purposes which were admittedly proper factory purposes, the committee were right in treating the subjects as industrial."

I emphasise the word " admittedly " in deference to the argument of counsel for the valuation officer. Lord Sands was of the same opinion, although he concluded (ibid., at p. 433) by expressing some doubt

> " . . . whether the relief here given in any way subserves the economic purpose of the legislation."

Lord Fleming at the end of his opinion used language which has been much quoted (ibid.):

> " The slaughter of animals, the dividing up of the carcases, and the treatment of the by-products and residuals appear to me to be a process of altering or adapting for sale, and I therefore think that the committee were right in holding that the subjects were industrial lands and heritages."

I have referred to the admission mentioned by LORD HUNTER, because I do not forget the point made by counsel for the valuation officer that in the Scottish case, as in the Divisional Court cases, there were special features on which he relied as showing that they could none of them be taken as in all respects in pari materia with the present case. I also draw attention to the fact that none of the cases are in strictness binding on this court; but they have stood apparently unchallenged for more than a quarter of a century. It seems to me, therefore, that two conclusions may be drawn from the cases for our guidance: first, that it is now too late to be shocked, so to speak, by the application to the processes with which we are here concerned of the phrase " adapting an article for sale "; and, secondly, that these questions should be treated, as they have been treated, prima facie at any rate as questions of degree and therefore of fact.

In its decision at p. 2, after describing the initial operations, including the killing and the separation from the main carcase of the offal, intestines and so forth, the tribunal states:

> " While in the hanging room the meat [the main carcase] cools to atmospheric temperature and sets due to rigor mortis and this cooling and setting is necessary to get the meat into proper condition for human consumption. Prior to sale, which usually takes place the day following slaughter, the sides of beef are weighed and further sub-divided into quarters for ease of handling."

The decision then passes to a discussion of what happens to the component parts. This again I quote by way only of illustration:

> " The intestines, while still warm, are taken to the gut room where the fat is separated from the intestines which are then stripped of their contents and prepared for further processing, either on or off the premises, for beef casings."

Finally, at the foot of p. 3, the tribunal says:

> " It was agreed by the expert witnesses called on behalf of both [the ratepayers] and the [valuation officer] that the whole of the processes carried out on the premises constituted the normal good slaughterhouse procedure. It was further agreed by these witnesses that if a beast was merely killed and the further processes carried out on the premises did not immediately follow, the flesh would be unfit for human consumption."

That no doubt may be so; but I add that it does not seem to me to follow that the other operations are not processes nevertheless.

If I may say so, I think that Mr. Scholefield's attractive presentation of the case is perhaps an over-simplification of it; for, founding himself on certain of the passages which I have read, he says that all that occurs at this slaughterhouse is a particular kind of killing. There is, he submits, the killing of the knacker's yard, where the result is not intended for human consumption, or there is the killing in a slaughterhouse, which is a killing for butcher's meat; in either case all that is really done is a particular kind of killing, but killing of any kind is not an adaptation of an article for sale. I am not satisfied, however, that that is an adequate analysis. After all, killing is an incident, albeit one essential to the whole process which follows and one which indeed initiates all that does follow; but it is an incident none the less, a part only of all that goes on in the slaughterhouse. In other words, the question whether the whole series of operations, including the killing, amounts to an adaptation of an article for sale is (as I have said, guided by the cases that I have quoted) a matter of degree and of fact. So, as I think, the tribunal treated it, and rightly treated it; for at p. 6 it said:

> " We have come to the conclusion upon the evidence before us that the primary purpose of the occupation and use of the premises is to produce

> meat for human consumption and by-products for sale and that the actual killing is subsidiary to this main purpose."

Without any desire to be critical, I should like to say a word about the use of the word " primary " in this sentence. Immediately before that sentence, the question had been posed thus:

> " The question therefore which we have to consider is what is the primary purpose of this hereditament."

Now the word " primary " does not occur at all in s. 149 of the Factory and Workshop Act, 1901. There the language poses the question: Is the hereditament used for any of the following purposes, including the adaptation for sale of any article? In strictness, therefore, the first question for the tribunal to ask and answer is whether, looking at the whole of the process carried on, it can properly be said that the hereditament is being used for the purpose of adapting an article for sale. The word " primary " owes its significance and presence in these cases to the terms of s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928. It is there provided that, notwithstanding that the hereditament may have qualified for being an industrial hereditament by being a factory within s. 149 (1) of the Act of 1901, nevertheless for the purposes of the Act of 1928 it may after all be excluded if its " primary purpose " is not that of a factory or workshop. Other examples of exclusion include that where the primary purpose is that of a retail shop; and in that case no apparent conflict arises. Where the only question as to user is that of adaptation for sale or not, it may no doubt come to much the same thing; but I think that the real point here is not what the primary purpose was (which would be directly appropriate to the question of exclusion under the Act of 1928) but rather the more general question of whether the purposes for which this hereditament was used were within the terms of the Act of 1901 and particularly the phrase " the adapting for sale of any article ".

That possible criticism of the way in which the decision has been formulated does not affect what I take to be the conclusion, so far, of the tribunal, viz., that on the facts the operations conducted in this slaughterhouse, set out earlier in the decision, did qualify the hereditament as a factory or workshop within the meaning of s. 149 (1) of the Act of 1901. So far, then, the tribunal's decision was not adverse to the contention of the ratepayers. The tribunal went on, however, to say that, although it might properly be held that the purpose for which the hereditament was used was an adaptation for sale of an article (strained though the use of the language might thereby be), still the truth was that this slaughterhouse, and indeed any slaughterhouse, was an entity not comprehended in parliamentary intention within the Factory Act code at all; slaughterhouses should be treated, rather, as exclusively governed by what might be called the slaughterhouse special code of legislation. I have already referred to the point that slaughterhouses are not mentioned in Sch. 6, though it is conceded that that of itself is not by any means conclusive.

The point is stated at p. 7 of the decision by the tribunal as follows:

> " Twenty years before the first Factory Act of 1867 [I think that perhaps the word ' first ' might be omitted] slaughterhouses had been the subject of legislation in the Towns Improvement Clauses Act, 1847, and it is clear from the provisions of the Markets and Fairs Clauses Act of the same year that a slaughterhouse was the only place in which not only might cattle be slaughtered but also the carcase dressed for sale for human food. The legislation in regard to slaughterhouses deals specifically with them in a manner similar to that in which factories are regulated by the Factories Act, and it seems to us that Parliament, in passing the Factories Act, 1901, deliberately omitted slaughterhouses from the list of non-textile factories as being already regulated by other legislation."

A It is no doubt true that the circumstance that the process being conducted on a particular hereditament may be properly described (whether the language be strained or not) as an adaptation of an article for sale is not necessarily conclusive of the question whether the hereditament is a factory or workshop, particularly if it appears that the general provisions of the Factories Act as a whole clearly are inapplicable to the circumstances under consideration. That was the effect B of both *Nash* v. *Hollinshead* (4) ([1901] 1 K.B. 700) and *Wood* v. *London County Council* (5) ([1941] 2 All E.R. 230), referred to earlier in the decision. In the former case an agricultural operation, carried on as part of normal farm work, and in the second case a kitchen, providing for meals of operatives, were held to be outside the scope of the Factories Act legislation, because neither a farm nor the kitchen could be fitted at all into the general compass and expressed C purpose of the Factory Acts. I am not satisfied, however, that the same can by any means be said of this case. Even if ninety years ago, i.e., in 1867, slaughterhouses did not so easily fit into the general scope and application of the Factories Act legislation of that year, it does not follow, as counsel for the ratepayers pointed out in his reply, that the same is true of a much more mechanised age or that the workers in a modern slaughterhouse may not naturally be the subject of D Factory Act protection. Indeed, during the course of the argument, SELLERS, L.J., referred to *Gledhill* v. *Liverpool Abattoir Utility Co., Ltd.* (6) ([1957] 3 All E.R. 117) which showed that in Liverpool when that case was decided it was readily admitted that an abattoir was within the Factories Act, so as to give to the workers therein the protection of that legislation.

I would therefore answer this point in this way. I would say that the slaughter-E house legislation is directed to a distinct and quite different purpose from that contemplated by the Factories Acts. It is directed to securing cleanliness for the benefit of the public, who will eat the meat eventually produced, and also to the diminution or elimination of cruelty to the animals which are slaughtered, so far as practicable. On the other hand, the Factory Acts are designed for a quite different purpose, viz., to give protection in cases where protection is F properly required to persons working in what are called factories or workshops. It seems to me that, once that difference in aim is stated, it follows that there is no logical ground for saying that the purposes of one are exclusive of the purposes of the others.

As regards factory legislation, we were referred to the first of the Acts, 3 & 4 G Will. 4 c. 103, known as the Shaftesbury Act, and the Acts which followed in 1840, 1850, 1853 and 1856. It is true that the factory legislation prior to 1867 was largely concerned with the employment of women and children in factories, and it was said by counsel for the valuation officer that it could have no sensible application to slaughterhouses in those days. I am unable to accept that. There is no material in fact before us, but it would not appear to me to be self-evident H that provisions against the employment of women and young children were necessarily wholly inapposite in the case of slaughterhouses in the first half of the nineteenth century. The significance of the date 1867 and the Factory Act of that year is that it was in the legislation of that year that the phrase " adapting for sale of any article " first came into the legislative code. Thereafter the two streams of legislation go on. Prior to 1867, under the head of slaugh-I terhouse legislation, there had been the Markets and Fairs Clauses Act, 1847, and the Towns Improvement Clauses Act, 1847, mentioned in the decision and directed to cleanliness and the absence of cruelty. Thereafter in 1933, 1938 and 1954 there were Acts for similar purposes relating to slaughterhouses. On the other side, in the other stream, so to speak, there came the Factory and Workshop Act, 1901, followed by the Act of 1920.

For the reasons stated, I am therefore unable to agree with the conclusion of the Lands Tribunal that the continuing stream of slaughterhouse legislation from 1847 to 1954, forming something of a code in itself, has the effect of excluding slaughterhouses from the scope of the Factory Act legislation. I do not find any good reason for saying that slaughterhouses were thereby not intended by Parliament to be covered by the latter legislation. I think that the Factory Acts are clearly capable of applying to slaughterhouses, certainly where the use of modern machinery makes it sensible that those working in them should have the protection of those Acts. If that is so, then the case is thrown back on the first question, viz., the question of fact whether the operations of this slaughterhouse did amount to an adapting of an article for sale within the meaning of the Factory Act legislation. On that matter of fact I have already said that I think the tribunal found in favour of the ratepayers and I see no ground for disturbing their conclusion.

The result must be, in my view, that this appeal must be allowed and that the tribunal should have found the ratepayers' hereditament entitled to the derating privilege which they sought.

PARKER, L.J.: I have come to the same conclusion. The first question is whether manual labour was employed in the ratepayers' hereditament for a factory purpose within s. 149 (1) of the Factory and Workshop Act, 1901, the relevant purpose being the adapting for sale of an article. The whole process carried out in the hereditament is undoubtedly the preparation of food for human consumption, but the question is whether any part of that process amounts to the adapting for sale of an article. Clearly, the actual killing is not, since a live animal is not, I think, an article. At the other end of the scale, there may be premises (not these premises) where the meat is in the end made, for instance, into sausages or pies, in which case there is clearly an adapting for sale of an article, if not the manufacture of an article. In between, as in the present case, a number of steps are taken in the preparation of the food, some to preserve the food, some to carve up the carcase and some to separate the products for sale to different purchasers.

I confess that, on a first consideration of the matter, it seems to me a straining of language to say that any of these steps amounted to an adapting for sale, but, having regard to the opinions expressed in the cases to which we have been referred—decisions which have stood for a long time—I am not prepared to differ. Indeed, I think that it can be put in this way. Most, if not all, of the steps taken after the actual killing amount to the dressing of the carcase for sale, a matter which on the facts of any particular case may be said to amount to an adapting for sale. The tribunal has clearly so found and there was evidence on which it could arrive at that conclusion.

The next question is whether, there being an activity here which was not a factory purpose, viz., the actual killing, it can be said that these premises were primarily used for a factory purpose. That must in every case be a matter of degree and accordingly a question of fact. As I read its decision, the tribunal has clearly found that the primary purpose here was a factory purpose. That being so, prima facie the hereditament was an industrial hereditament within s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928.

The tribunal nevertheless held that a consideration of the activities carried on in the premises led to the conclusion that the Factory Act legislation was not applicable and reference was made to *Nash* v. *Hollinshead* (4) ([1901] 1 K.B. 700) and *Wood* v. *London County Council* (5) ([1941] 2 All E.R. 230) to which my Lord also has referred. This contention was supported before us by counsel for the valuation officer by reference to the legislation dealing with factories and that dealing with slaughterhouses. He contended that at the time when the words "adapting for sale" were first introduced into the Factory Acts, in 1867, those Acts contained no provisions apt to apply to slaughterhouses, other than provisions dealing with what one may call sanitary arrangements which already

A appeared in the slaughterhouse legislation: for example, s. 128 of the Towns Improvement Clauses Act, 1847.

I am unable to accept this contention. For instance, it may well be that boys under eighteen or women were being employed at that time in slaughterhouses, in which case the Factory Acts then were certainly apt to cover slaughterhouses. At any rate, looked at today when mechanical saws, hoists and other machinery B are used in slaughterhouses, I cannot think that the factory legislation is in any way inapplicable. The tribunal also referred to the fact that these premises were not registered under the Factory Act, and that slaughterhouses were omitted from the list of non-textile factories in the Act of 1901. Those considerations certainly are not conclusive and to my mind carry little weight.

For those reasons, and the reasons given by my Lord, I would allow this appeal.

C

SELLERS, L.J.: I take the same view. This case takes one back to the legal battlefields of over a quarter of a century ago when, after the Rating and Valuation (Apportionment) Act, 1928, known as the De-Rating Act (although the actual benefit of de-rating was not, I think, given until a year later, 1929*) there were many appeals giving rise to questions such as those which have been D brought before us in this case, and in 1930 a large number of cases came before this court for consideration ([1931] 1 K.B. commencing at p. 385). In *Bailey* (*Stoke-on-Trent Revenue Officer*) v. *Potteries Electric Traction Co., Ltd.* (7) SCRUTTON, L.J., in a judgment beginning at p. 479 said (ibid., at p. 493):

> " It must be borne in mind that if you exclude a hereditament from de-rating because there is no manufacturing process carried on in it, you are E depriving the workmen of the protection of the Factory Acts, as well as the employer of the benefit of de-rating. It must also be borne in mind that in construing the Factory Acts, the courts have given a wide meaning to the words. When in *Law* v. *Graham* (8) ([1901] 2 K.B. 327) the courts thought that mechanical bottle washing did not make a place a factory, the legislature the same year put bottle washing into Part 2 of Sch. 6, making it a fac- F tory, if power were used. Putting chocolates into a decorated box, in *Fullers, Ltd.* v. *Squire* (9) ([1901] 2 K.B. 209), and arranging flowers on a metal cross or circle to make a wreath, in *Hoare* v. *Robert Green, Ltd.* (10) ([1907] 2 K.B. 315) have been treated as ' adapting for sale ' to protect the workpeople employed in that occupation."

I quote that passage, because, as my Lord has pointed out, in a recent case which G came before the Court of Appeal, *Gledhill* v. *Liverpool Abattoir Utility Co., Ltd.* (6) ([1957] 3 All E.R. 117) Liverpool Corporation, who are the occupiers of an abattoir in Liverpool, had accepted the obligations of the Factory Acts, 1937 and 1948, accepting that those premises were within the Acts. As appears from the judgment of MORRIS, L.J., the Court of Appeal were informed that the application of the Factory Acts to the premises was not in dispute and the court proceeded H to apply the regulations applicable to a factory. Of course, that is not conclusive, because the issue was not fought out and decided whether the premises were or were not within the Factory Acts. That case is not, I think, the first occasion when that very abattoir has been accepted in the courts as a factory and it is unlikely that an admission that the premises were subject to the onerous obligations of the Factory Acts would have been made unless a well-informed local I authority had been satisfied that that was the case. It may be that the facts and circumstances existing at that abattoir are not precisely the same as those in the case before us, but I think the probabilities are that there also they carry out what has been referred to in this case as normal good slaughterhouse procedure but on a very much larger scale.

SCRUTTON, L.J. ([1931] 1 K.B. at p. 494) deals with this question of adaptation for sale. I do not propose to read it all, although it is all applicable to the issue which we have had to try in this case. He says (ibid., at p. 495):

---

* See the Local Government Act, 1929, s. 68; 20 HALSBURY'S STATUTES (2nd Edn.) 192.

> " But in view of the fact that ' adapting for sale ' is a separate head from altering, I see no reason for requiring alteration of substance to make ' adapting for sale '. If this were necessary, there would be no need to insert ' adapting for sale '. Where the process of separation or sorting is complicated and substantial, again I think there is adapting for sale. In many cases, it is a question of degree, which is in my view fact and not law, and not properly the subject of a Special Case."

On the facts which have been revealed here and, as I understand it, on the finding of the Lands Tribunal, the processes carried on in this slaughterhouse amount to an adapting for sale and would prima facie make these premises a factory and subject to the Factory Acts. But junior counsel for the valuation officer in particular, developing an argument advanced by his learned leader, stressed that that was a wrong view to take of the facts. He said that what happened after the killing was normal good slaughterhouse procedure and was to be treated as part of the slaughtering. That argument does not appeal to me. Once the killing is done that is final. Of course, the dead animal could be taken away; it could be burned or buried or, I suppose, it could be placed in a deep-freeze container and in that way preserved without decomposition setting in. So far, I would agree that that would be slaughtering and handling incidental thereto. What takes place on the premises here, after the killing, is done for the purposes of preservation and adaptation for food of the carcase of the beast which has just been killed. The acts done are in no way to complete the slaughter, but to make use of the beast after slaughter, and if what is done amounts to an adaptation for sale that particular requirement within the definition of " factory " is, as I see it, fulfilled. I think it has been so found.

The only remaining question is one on which I entirely agree with my Lords for the reasons that they have given. I can see no reason why the special legislation dealing with slaughterhouses cannot run concurrently with the legislation with regard to factories. I do not think that the slaughterhouse legislation is or has been in any way exclusive of the other. They deal with different matters. The slaughterhouse legislation deals with the animals and the products, and the factory legislation deals with the workmen carrying out the work and the processes involved in such an occupation. From another aspect, the slaughterhouse legislation deals with cleanliness and the prevention of cruelty and the Factory Act legislation deals with the safety and health of the work people. There may be matters in which there is some overlapping, such as ventilation, because good ventilation serves the purposes of both types of legislation. I think the appeal should succeed.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Richards, Butler & Co.* (for the ratepayers); *Solicitor of Inland Revenue* (for the valuation officer).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

HARVEY *v.* R. G. O'DELL, LTD. AND ANOTHER (GALWAY Third Party).

[QUEEN'S BENCH DIVISION (McNair, J.), January 28, 29, 30, February 3, 4, 18, 1958.]

Master and Servant—Liability of master—Negligence of servant—Servant authorised to use private motor cycle combination—Accident while returning to work after buying tools and obtaining meal—Injury to fellow servant riding in sidecar.

Master and Servant—Liability of servant—Negligence—Indemnity—Servant employed as storekeeper—Authorised to use his own motor cycle in travelling to and from outside job—Injury to fellow-servant in sidecar—Whether implied term of contract of service to use care while driving.

Tort—Joint tortfeasors—Contribution—Master and servant joint tortfeasors—Negligence of servant resulting in servant's death and injury to another person—Action by injured person against master commenced nearly two years after grant of administration of deceased servant's estate—Third-party notice served by master on administratrix—Law Reform (Miscellaneous Provisions) Act, 1934 (24 *&* 25 *Geo.* 5 *c.* 41), *s.* 1 (1), (3), (4)—*Law Reform (Married Women and Tortfeasors) Act*, 1935 (25 *&* 26 *Geo.* 5 *c.* 30), *s.* 6 (1) (*c*).

The plaintiff and G. were employed by the first defendants, who were builders and repairers of barges and also undertook work of general repair. The first defendants' works were at Battersea. When their workmen were allocated for work elsewhere, they were either conveyed in the first defendants' lorry or made their own travelling arrangements and were reimbursed the cost of travel by public transport whether or not they used it. Travelling time to and from work on an outside job was paid as working time, and, if the men had to travel some distance to get a meal while out on a job, they would normally be paid their fares to and from their meal place. G., who was employed as a storekeeper at the works, owned a motor cycle combination which he used from time to time for his employers' purposes. On Feb. 29, 1952, G., acting on instructions of the defendants, went to Hurley to do repair work, taking the plaintiff with him. They travelled, as they were authorised to do, in G.'s motor cycle combination. The repair work was a day's work. After they had worked for some hours, they went to Maidenhead (some five miles from Hurley) to get some more tools and materials and to obtain refreshments. While they were returning to Hurley in the motor cycle combination, there was a collision between the motor cycle and a motor car, due partly to the negligence of G. The plaintiff was injured and G. was killed in the accident. On May 24, 1952, letters of administration of G.'s estate were granted to his widow; and accordingly no action for negligence could be brought against G.'s estate on or after Nov. 24, 1952*. In April, 1954, the plaintiff commenced an action for damages against the first defendants, alleging that they, as G.'s employers, were vicariously liable for G.'s negligence. On Mar. 14, 1955, the first defendants served a third-party notice on G.'s administratrix claiming contribution against G.'s estate under s. 6 (1) (c) of the Law Reform (Married Women and Tortfeasors) Act, 1935, in the event of their being held liable to the plaintiff in damages. Alternatively, they claimed damages against G.'s estate for breach of an implied term in G.'s contract of service that he would indemnify them for any liability cast on them by his negligence.

---

* Viz., the expiration of the six months' limitation period allowed by s. 1 (3) of the Law Reform (Miscellaneous Provisions) Act, 1934.

A **Held:** (i) the first defendants were vicariously liable to the plaintiff for G.'s negligence, because, on the facts, the journey between Maidenhead and Hurley was within the scope of G.'s employment whether his purpose was to get tools or to get a meal, the journey being in either case incidental to the work which G. was instructed to do (see p. 665, letter E, post).

Canadian Pacific Ry. Co. v. *Lockhart* ([1942] 2 All E.R. 464) and *McKean* v. *Raynor Bros, Ltd.* (*Nottingham*) ([1942] 2 All E.R. 650) followed. B

(ii) as G. was employed by the first defendants as a storekeeper and not as a driver, there was no implied term in his contract of employment that he would indemnify them for failure on his part to drive with care while using his motor cycle combination on their business (see p. 667, letter H, post).

C *Lister* v. *Romford Ice & Cold Storage Co., Ltd.* ([1957] 1 All E.R. 125) distinguished; dictum of Willes, J., in *Harmer* v. *Cornelius* ((1858), 5 C.B.N.S. at p. 246) considered and applied.

(iii) the first defendants, as joint tortfeasors with G., were entitled to one hundred per cent. contribution from the estate of G. for the following reasons—

D (a) although the cause of action for contribution under s. 6 (1) (c) of the Law Reform (Married Women and Tortfeasors) Act, 1935, did not arise until judgment in this action, the claim for contribution was subsisting within the meaning of s. 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934 (by reason of s. 1 (4)) at G.'s death and therefore survived under s. 1 (1) of the Act of 1934 (see p. 669, letters D and E, post).

E *Post Office* v. *Official Solicitor* ([1951] 1 All E.R. 522) applied.

(b) the right to contribution under s. 6 (1) (c) of the Law Reform (Married Women and Tortfeasors) Act, 1935, was a right sui generis conferred by statute and was not a cause of action in tort; therefore it was not barred under s. 1 (3) of the Law Reform (Miscellaneous Provisions) Act, 1934 (see p. 669, letters A and B, post.) F

(c) the words " who . . . would, if sued, have been liable " used in s. 6 (1) (c) of the Law Reform (Married Women and Tortfeasors) Act, 1935, in relation to the person against whom contribution was claimed meant " who . . . would, if sued at any time, have been liable ", and the fact that the first defendants' claim for contribution was made after any cause of action in tort against G.'s administratrix was barred under s. 1 (3) of the Act of 1934 was not a defence to the claim for contribution, since the administratrix would have been liable if she had been sued before Nov. 24, 1952 (see p. 670, letters A and D, post). G

Morgan v. *Ashmore, Benson, Pease & Co., Ltd.* ([1953] 1 All E.R. 328) followed.

H Dicta in *George Wimpey & Co., Ltd.* v. *British Overseas Airways Corpn.* ([1954] 3 All E.R. 661) considered.

[**Editorial Note.** On the right of an employer to recover against his servant for the consequences of negligent driving by the servant, this case may usefully be compared with *Semtex, Ltd.* v. *Gladstone* ([1954] 2 All E.R. 206).

I As to the liability of a master for acts done by his servant in the course of his employment, see 22 Halsbury's Laws (2nd Edn.) 226, para. 405; and for cases on the subject, see 34 Digest 127-129, *981-988*.

As to liability of a servant to his master for negligence, see 22 Halsbury's Laws (2nd Edn.) 183, para. 307; and for cases on the subject, see 34 Digest 117, *884-890*.

As to contribution between joint tortfeasors, see 32 Halsbury's Laws (2nd Edn.) 190, para. 284.

For the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1), see 25 Halsbury's Statutes (2nd Edn.) 359; and for the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1, see 9 Halsbury's Statutes (2nd Edn.) 792.]

Cases referred to:

(1) *St. Helens Colliery Co., Ltd.* v. *Hewitson*, [1924] A.C. 59; 93 L.J.K.B. 177; 130 L.T. 291; 34 Digest 280, *2364*.

(2) *Parker* v. *Black Rock (Owners)*, [1915] A.C. 725; 83 L.J.K.B. 1373; 113 L.T. 515; 34 Digest 295, *2456*.

(3) *Weaver* v. *Tredegar Iron & Coal Co., Ltd.*, [1940] 3 All E.R. 157; [1940] A.C. 955; 109 L.J.K.B. 621; 164 L.T. 231; 2nd Digest Supp.

(4) *Canadian Pacific Ry. Co.* v. *Lockhart*, [1942] 2 All E.R. 464; [1942] A.C. 591; 111 L.J.P.C. 113; 167 L.T. 231; 2nd Digest Supp.

(5) *McKean* v. *Raynor Bros., Ltd. (Nottingham)*, [1942] 2 All E.R. 650; 167 L.T. 369; 2nd Digest Supp.

(6) *Lister* v. *Romford Ice & Cold Storage Co., Ltd.*, [1957] 1 All E.R. 125; [1957] A.C. 555; 121 J.P. 98.

(7) *Harmer* v. *Cornelius*, (1858), 5 C.B.N.S. 236; 28 L.J.C.P. 85; 32 L.T.O.S. 62; 22 J.P. 724; 141 E.R. 94; 34 Digest 72, *487*.

(8) *The Koursk*, [1924] P. 140; 93 L.J.P. 72; 131 L.T. 700; 42 Digest 976, *72*.

(9) *Littlewood* v. *George Wimpey & Co., Ltd.*, [1953] 2 All E.R. 915; [1953] 2 Q.B. 501; *affd.* H.L. sub nom. *George Wimpey & Co., Ltd.* v. *British Overseas Airways Corpn.*, [1954] 3 All E.R. 661; [1955] A.C. 169; 3rd Digest Supp.

(10) *Post Office* v. *Official Solicitor*, [1951] 1 All E.R. 522; 24 Digest (Repl.) 764, *7537*.

(11) *Morgan* v. *Ashmore, Benson, Pease & Co., Ltd.*, [1953] 1 All E.R. 328; 3rd Digest Supp.

Action.

In this action the plaintiff, Leonard George Harvey (formerly an infant suing by his next friend but who adopted the action on coming of age), claimed damages against his employers, R. G. O'Dell, Ltd. (referred to hereinafter as " the first defendants ") and their manager, William George Hudson (referred to hereinafter as " the second defendant "), for personal injuries received in an accident on Feb. 29, 1952, when the plaintiff was a passenger in a motor cycle combination driven and owned by Harry Carlton Galway, also in the employment of the first defendants. Mr. Galway was fatally injured in the accident, and on May 24, 1952, letters of administration of his estate were granted to his widow, Mrs. Louise Galway (now Mrs. Doye). In April, 1954, the plaintiff commenced this action against the first defendants, alleging that the accident was caused by the negligence of Mr. Galway. On Mar. 14, 1955, the first defendants served a third-party notice on Mrs. Galway as administratrix, claiming, in the event of their being held liable in damages to the plaintiff, contribution from her under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6; alternatively, indemnity in respect of any damages and costs awarded against them; and, in the further alternative, damages for breach of contract, on the ground that it was an implied term of Mr. Galway's employment by the first defendants that he would indemnify them against any liability cast on them by negligent acts on his part. The third party, by her defence, pleaded, among other things, that the proceedings against her were barred by s. 1 (3) of the Law Reform (Miscellaneous Provisions) Act, 1934, and that the deceased was not a tortfeasor who would, if sued, have been liable to the plaintiff within the meaning of s. 6 (1) of the Act of 1935. The first defendants having, by their amended defence, alleged that at the time of the accident, the plaintiff and Mr. Galway were working on a private job for the second defendant, he was added as a defendant in 1957.

The facts appear in the judgment.

Gerald Gardiner, Q.C., and *Elson Rees* for the plaintiff.

Stephen Chapman, Q.C., and *A. G. Friend* for the defendants.

H. Marnham and *G. H. Rooke* for the third party.

Cur. adv. vult.

Feb. 18. **McNAIR, J.**, read the following judgment: On Feb. 29, 1952, the plaintiff, Leonard Harvey, then a lad of seventeen years of age and in the employment of the first defendants, R. G. O'Dell, Ltd., was being driven as a passenger in a sidecar attached to a motor cycle, of which the driver was one Galway, also in the employment of the first defendants, when the motor cycle combination came into collision with a motor car owned and driven by one Bolt on the Maidenhead-Hurley road, and the plaintiff received injuries and Mr. Galway was killed. In view of the somewhat complicated issues of law which this simple accident has raised between the plaintiff and the first and second defendants and the third party, who is the personal representative of the late Mr. Galway, it is convenient that I should first deal with the facts of the accident, since, if no negligence is found against Mr. Galway, the action fails. [HIS LORDSHIP, having reviewed the evidence relating to the accident, found that it was due in part to the negligence of Mr. Galway. After stating the nature of the plaintiff's injuries, HIS LORDSHIP assessed the general damages to which the plaintiff would be entitled at £1,500 (the special damages having been agreed at £98 10s.), and continued:] By his statement of claim delivered on Apr. 9. 1954, the plaintiff alleged that the accident happened whilst, in the course of his employment and by reason of his contract of employment with the defendants R. G. O'Dell, Ltd., he was a passenger in the motor cycle combination driven by Mr. Galway, the servant or agent of the defendants, and that, the accident being caused by Mr. Galway's negligence, the defendants were vicariously liable. By their defence delivered on May 18, 1954, the defendants, whilst admitting that the plaintiff and Mr. Galway were in their employment, denied that either of them was acting in the course of his employment at the time of the collision, and alleged that they were in fact coming back to work after dinner, and that it was no concern of the defendants if Mr. Galway chose to use his motor cycle for this purpose, or if the plaintiff chose to travel as Mr. Galway's passenger. However, on Aug. 8, 1957, an amended defence was delivered in which it was for the first time alleged that the work which took the plaintiff and Mr. Galway down to Maidenhead was no concern of the defendants, but was a private job of one Hudson (who was, in fact, their manager) undertaken by him on the instructions of his sister and that Mr. Hudson was acting entirely outside the scope of his employment as manager in sending the plaintiff and Mr. Galway down to Maidenhead, and that, accordingly, Mr. Galway was not at the material time acting as servant or agent of the defendants.

Accordingly, the plaintiff joined Mr. Hudson as a defendant, and by his amended statement of claim delivered on Oct. 2, 1957, alleged in the alternative that he and Mr. Galway were in Mr. Hudson's employment and that Mr. Hudson was vicariously liable for Mr. Galway's negligence, and in the further alternative he claimed against Mr. Hudson damages for breach of warranty of authority. To this statement of claim Mr. Hudson, on Oct. 16, 1957, delivered a defence, in which he purported to admit that his instructions were not given and the work was not done on behalf of the first defendants, but solely on behalf of himself acting outside the scope of his employment, and that he was not expressly or impliedly authorised by the first defendants to give the instructions. He further repeated the allegation made by the first defendants that at the time of the collision the plaintiff and Mr. Galway were not acting in the course of

A their employment, but were on their way back to resume their work at Hurley after having partaken of a meal at Maidenhead. He further alleged in answer to the claim for damages for breach of warranty that the damages, if any, suffered by the plaintiff were not occasioned by any breach of warranty by him, but by the failure of the plaintiff to sue the personal representative of Mr. Galway within the time limited by law. This latter defence was not, however, persisted B in at the trial before me.

I should add that, by way of further particulars of the allegation in the amended statement of claim that Mr. Galway was at the time of the collision driving his motor cycle combination as servant or agent of the defendants and that it was in the course of the plaintiff's employment by the defendants that the plaintiff was a passenger in the motor cycle combination at the material time, C the plaintiff, by leave given at the trial, added (inter alia) the following particulars:

> "The said Galway was authorised by the [first] defendants and directed or requested by one Hudson their manager to go to do a job at Hurley and take with him the plaintiff in his motor cycle combination. At all material D times he was being paid by the [first] defendants and was further entitled to travel expenses. At the time of the accident he was returning from Maidenhead to Hurley having visited Maidenhead for the purpose of obtaining tools or materials for the job and in order to get something to eat for himself and his assistant, the plaintiff. The conduct and control of the whole day's operation had been left to the said Galway by the aforesaid Hudson."

E At the trial both defendants appeared by the same counsel and solicitors. I postpone for mention later in this judgment any reference to the third-party proceedings launched by both defendants against the legal personal representative of the deceased Galway.

On the pleadings the issues may be summarised as follows. (i) Were the plaintiff's injuries caused or partly caused by the negligence of Mr. Galway? F This I have already answered in the affirmative. (ii) Were the plaintiff and Mr. Galway instructed by Mr. Hudson, the first defendants' manager, to go to Hurley to do work there for and on behalf of the first defendants? (iii) If so, had Mr. Hudson express or implied authority from the first defendants so to instruct them? (iv) If not, did Mr. Hudson warrant that he had such authority, or did he employ the plaintiff and Mr. Galway himself? (v) Was Mr. Galway G in proceeding to Maidenhead for materials and food, or for food alone, and returning therefrom towards Hurley, acting within the course of his employment? (vi) Was the plaintiff while travelling in Mr. Galway's sidecar back from Maidenhead acting within the course of his employment?

The facts, as I find them, are as follows. The first defendants, a company incorporated in about 1934, carry on business primarily as builders and repairers H of barges, but they also undertake general repair work; for example, if asked, they would accept orders for the repair of a private garage. There are two directors, Mr. R. G. O'Dell and his son Mr. Leslie O'Dell; neither of these directors attends the first defendants' works at Battersea regularly, although they both keep in touch by telephone daily. The general running of the business and allocation of the work is left to the second defendant, Mr. Hudson, as manager. I Mr. Hudson is a trusted employee with over thirty years' service. At the yard at Battersea at the material time a Mr. Kane acted as general foreman. When men were allocated for work away from the yard (as they frequently were), they were conveyed by the first defendants' lorry or van if the work necessitated the use of substantial materials or heavy tools, but in other cases they made their own arrangements for travel, being reimbursed the cost of travel by public transport whether they in fact used it or not. The normal working day, whether in the yard or on outside jobs, was an eight-hour day from 8 a.m. to 5 p.m., with one hour off for dinner and with pay at overtime rates outside these hours.

When sent on an outside job which involved absence for substantially the whole day, the men were given a subsistence allowance, known as " outdoor money ", of 2s. per day; travelling time to and from the work was paid for as working time or overtime, as the case may be, and, if they had to travel some distance (even several miles) to get a meal while out on a job, they would normally be paid their fares to and from their meal place, and reasonable travelling time for such purposes would probably be allowed and paid for as working time.

The late Mr. Galway, who was about thirty-three years of age, was engaged to act, and did act, as storekeeper at the yard. He owned a motor cycle combination which he used for the journey between his home and the yard. As storekeeper he had from time to time to use his motor cycle for the first defendants' purposes, for instance, collecting light stores, and on occasion he used his motor cycle for travelling to and from an outside repairing job. He paid for his own petrol and maintenance, but when out on the first defendants' business, he was entitled to a travelling allowance based on the cost of public transport. He was a trusted employee of the first defendants.

Some time before February, 1952, Mr. Hudson, as a private venture, had a caravan built for him by the plaintiff's father and sold it to his sister. This caravan, at the material time, stood on a caravan site at Hurley some five or six miles from Maidenhead. On Thursday afternoon, Feb. 28, 1952, Mr. Hudson received a telephone call from his sister at the caravan saying that she was in trouble (some cows having broken down a chain and link fence round her caravan) and asking for help. Without consulting either of his directors, Mr. Hudson decided to do what he could to help her. He saw Mr. Galway and told him that he would like him to go out on a job the next morning to repair the fence round the caravan, that he could take the plaintiff in his sidecar as his mate, and that he could make his own arrangements for meeting the plaintiff at his home or at the yard. He chose Mr. Galway to do the job because he was the most suitable man available, as he had a motor cycle and sidecar. Mr. Galway was free to decline Mr. Hudson's request, but, as Mr. Hudson expected, he agreed. The same evening Mr. Hudson told the plaintiff that he would be going out with Mr. Galway the next morning, and that he was to see Mr. Galway to make arrangements. The plaintiff saw Mr. Galway and was told by him to meet him at the yard next morning at about 7 a.m.; he was also told by Mr. Galway that they would be out all day and that they would get dinner out.

Next morning, shortly before 7 a.m., and after the plaintiff's arrival, Mr. Galway put in an appearance at the yard, and collected a brace and bit and some tools from the store, and, putting them in the sidecar, proceeded with the plaintiff to Hurley, where they worked for four or five hours. Mr. Galway then told the plaintiff that they would have to go into Maidenhead to get some further tools and materials. They went into Maidenhead, Mr. Galway dropping the plaintiff at a café, where he joined the plaintiff half-an-hour later and they both had coffee and sandwiches. Having finished their meal, they returned to the motor cycle combination, where the plaintiff found in the sidecar a small parcel at his feet which he described as being hard and about a foot long, but he said that he had no idea of its contents.

The distance from Hurley to Maidenhead is just over five miles, and a journey of that distance was not unreasonable, whether its object was the collection of further tools and materials or to obtain mid-day refreshments, or either or both; nor was it unreasonable that Mr. Galway, the older man who was in charge of the whole operation, should take the plaintiff into Maidenhead with him. It was on the way back from Maidenhead that the accident happened. It would have been quite impracticable for Mr. Galway and the plaintiff to do the journey to Hurley and back by public transport and to complete the work there in the day. According to Mr. Hudson, it would have been open to the first defendants to render a charge for the work to his sister, although in fact

A they did not; if they had raised a charge against her, Mr. Hudson would have paid it himself rather than trouble her.

After the accident Mr. Hudson himself entered particulars of the plaintiff's accident in the first defendants' accident book, and the plaintiff was credited in the company's wages sheet with wages, apparently for ten hours, for his work on that day. After the accident Mr. Hudson told Mr. O'Dell senior that he had B sent the two men down to do a job on his sister's caravan, and no objection was taken by Mr. O'Dell; in fact, it appears that some time previously Mr. O'Dell had utilised the services of the first defendants' employees for some private work on his own house, although no suggestion was made that this work was not properly paid for. Neither of the directors was called as a witness, but two answers to interrogatories sworn to by Mr. Leslie O'Dell on May 13, 1955 C (before the delivery of the amended defence) were put in, in which he stated plainly that Mr. Galway was instructed by Mr. Hudson to do the work on the caravan site, and no suggestion was made in these answers that Mr. Hudson was acting outside his authority in giving these instructions.

In my judgment it is fully established: (a) that Mr. Hudson was acting within the scope of his authority from the first defendants when he requested D Mr. Galway to proceed to Hurley, taking the plaintiff with him, to carry out the repairs to the fence, and that this request was, in accordance with his general practice, and that of the first defendants when dealing with their employees, in effect an instruction; and (b) that, in using his motor cycle and sidecar for the purpose of his own conveyance and the conveyance of the plaintiff, Mr. Galway E was using the authorised and only practical method of transport in order to carry out their work on behalf of the first defendants as so instructed. There remains for consideration (i) the question whether in using his motor cycle combination for the purpose of the journey from London to Hurley, Mr. Galway was acting within the course of his employment; and (ii) the more limited and vital question whether on the journey from Maidenhead to Hurley, in which F the accident happened, Mr. Galway was so acting.

On behalf of the defendants it was urged that both questions should be answered in the negative, and an elaborate citation of authorities was made by both counsel on these points. On the first point counsel for the defendants relied on a series of authorities under the repealed Workmen's Compensation G Acts to establish the proposition that a workman's journey from his home or other place to his place of work, or vice versa, is not in the course of his employment, even if the transport is provided by the employer (or even if private transport is used which it is contemplated shall be used) unless there is an obligation on the workman to use that means of transport. In support of this proposition counsel cited *St. Helens Colliery Co., Ltd.* v. *Hewitson* (1) ([1924] H A.C. 59), a case in which the workman was injured in a colliery train which was provided by his employers for his journey from his work to his home, but which the workman was under no obligation to use, and *Parker* v. *Black Rock* (*Owners*) (2) ([1915] A.C. 725), a case in which a ship's fireman was injured when going ashore, with leave, to buy provisions for himself, being under no obligation to do so. *Weaver* v. *Tredegar Iron & Coal Co., Ltd.* (3) ([1940] 3 All E.R. 157) is a I case on the other side of the line, which illustrates clearly the very refined distinctions which have been drawn in the cases decided under these particular Acts. Even on these authorities I think that it is probable that, on the facts of this particular case as I have found them, and, in particular, the fact that Mr. Galway had in the course of his duty to pick up his tools and materials at the yard, any injury suffered on the journey would have been held to have arisen out of and in the course of his employment. I am, however, by no means satisfied that this line of authority has any relevance, or any strict relevance, to the question which I have to decide, namely, whether in making the journey to Hurley, Mr. Galway was acting within the course of his employment so as to make his employers vicariously liable.

On this question the Judicial Committee, in *Canadian Pacific Ry. Co.* v. *Lockhart* (4) ([1942] 2 All E.R. 464), a case dealing with the vicarious responsibility of the employer for injuries caused by the servant's negligence in driving a motor vehicle, accepted as accurate the statement of principle contained in Salmond on Torts (9th Edn.) (1936), at p. 95*, as follows:

> "It is clear that the master is responsible for acts actually authorised by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes—although improper modes—of doing them. In other words, a master is responsible not merely for what he authorises his servant to do, but also for the way in which he does it . . . On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside of it."

The headnote in *Canadian Pacific Ry. Co.* v. *Lockhart* (4) ([1942] A.C. 591), which, I think, accurately sets out the effect of the decision, is as follows:

> "Where a servant of the appellant company, in disregard of written notices prohibiting employees from using privately owned motor cars for the purposes of the company's business unless adequately protected by insurance, used his uninsured motor car on a journey for the purpose of, and as a means of execution of, work which he was ordinarily employed to do, and by negligent driving injured the respondent: *Held*, that the means of transport was incidental to the execution of that which he was employed to do, and that the prohibition of the use of an uninsured motor car merely limited the way in which, or by means of which, he was to execute the work, and that breach of the prohibition did not exclude the liability of the company to the respondent."

In that case, therefore, the employer was held liable for the negligence of the servant in performing a journey on his employer's behalf by a prohibited means, namely, in an uninsured private car—clearly a stronger case than the present.

Similarly, in *McKean* v. *Raynor Bros., Ltd.* (*Nottingham*) (5) ([1942] 2 All E.R. 650), Hilbery, J., came to a like conclusion. The headnote of that case reads:

> "A workman employed by the defendants as a general utility hand was instructed by the defendants to take a lorry and meet and give a message to a convoy which was coming by road. He proceeded on his journey, but instead of taking the firm's lorry he used his father's car and whilst driving negligently he collided with and killed the plaintiff's husband . . . The plaintiff contended that the workman was acting within the scope of his authority and in the course of his employment and that the defendants were liable for damages. The defendants contended that by taking a private car instead of the lorry which he was instructed to take the workman had changed the journey from an authorised to an unauthorised journey: —Held: the workman was doing an authorised act within the scope of his employment and, although it was done in an unauthorised way, it was not done in a prohibited way and the defendants were liable."

---

* The same passage occurs in Salmond on Torts (12th Edn.) (1957), at pp. 113, 114.

Both those cases are stronger cases in favour of the injured person than the case which I have to decide.

In my judgment, once it is found that Mr. Galway was instructed to take the plaintiff with him to do work on the first defendants' behalf at Hurley the inevitable conclusion in law is that the first defendants would be vicariously liable for his negligent method of performing that journey even if they had not, as they did, expressly authorised the means of transport which was used, unless in the course of the journey Mr. Galway had gone outside the scope of his employment by doing something solely for his own purpose.

I now turn to the second and more limited question, namely, whether on the journey from Maidenhead back to Hurley Mr. Galway was acting within the scope of his employment. If the primary purpose, or the main purpose, of the trip to Maidenhead was to get further tools necessary for the completion of the work at Hurley, it is clear that the journey into Maidenhead and back to Hurley was as much within the scope of Mr. Galway's employment as was the journey to Hurley from London; and, accepting as I do the plaintiff's evidence on this point, I am prepared to hold that such was the purpose of the journey. In my judgment, however, the same result would follow if the primary purpose of the journey into Maidenhead and back was to get a meal, or if that was the main purpose, provided only that the journey to Maidenhead and back could properly be regarded as fairly incidental to the day's work on which Mr. Galway and the plaintiff were engaged. It is significant that no evidence was given on behalf of the defendants to the effect that Mr. Galway was not entitled to take the plaintiff into Maidenhead for a meal.

In my judgment, while not attempting to lay down any general principle, I am satisfied that, on the particular facts of this case as I have found them, the journey to Maidenhead and back, even if no question of tools had arisen, should be regarded as fairly incidental to the work which Mr. Galway and the plaintiff were instructed to do. It was an all-day job; no instructions were given by Mr. Hudson that the men should take food with them; Mr. Galway told the plaintiff that they would get their dinner out. They were paid subsistence money and the travelling time to and from Maidenhead would have counted, and apparently was counted, as working time. As stated above, I am satisfied affirmatively that the journey should be so regarded. At the same time it is right that I should say that, had the matter been left in doubt, I should have accepted the submission of counsel for the plaintiff that the burden of proof that this particular part of the journey was outside the scope of Mr. Galway's employment lies on the first defendants, and that there was no sufficient evidence to discharge that burden.

Accordingly, there will be judgment for the plaintiff against the first defendants for the sum of £1,598 10s., with costs, including any additional costs incurred by the plaintiff in the proceedings against Mr. Hudson, the second defendant; there will be judgment for the second defendant without costs and an order that the first defendants do pay to the second defendant his costs of the action, all such costs to be taxed if not agreed, and to include costs incurred by Joseph Henry Harvey, the father of the plaintiff suing as his next friend, up to the date of the adoption by the plaintiff of the proceedings on his becoming of full age.

I now turn to the third-party proceedings brought by the first defendants against Mrs. Louise Galway, now Mrs. Doye, the widow and administratrix of the late Mr. Galway. The following dates are material: Feb. 29, 1952, the date of the accident and of Mr. Galway's death; May 24, 1952, the date when letters of administration were granted; and Mar. 14, 1955, the date of the third-party notice by the first defendants.

By their statement of claim in the third-party proceedings the first defendants based their claim on two alternative grounds: (i) on the ground that the deceased

Galway was a tortfeasor who would, if sued, have been liable to the plaintiff, and that, accordingly, there being no personal blame alleged against the first defendants, they are entitled to claim a hundred per cent. contribution pursuant to the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6; and (ii) on the ground that it was a term of the deceased Galway's contract of employment that he would so conduct himself as not, by negligence on his part, to impose liability on the defendants. By her re-amended defence the third party raises two defences of substance: (i) that proceedings in respect of the defendants' alleged rights of action and each of them were not pending against the deceased at the date of his death, nor were they taken within six months after the third party, his personal representative, took out representation, and were and are therefore barred by s. 1 (3) of the Law Reform (Miscellaneous Provisions) Act, 1934; and (ii) that the deceased was not a tortfeasor who would, if sued, have been liable to the plaintiff within the meaning of s. 3 (1) (c) of the Law Reform (Married Women and Tortfeasors) Act, 1935, or at all.

It will be convenient if I first deal with the alleged cause of action based on the implied term in Mr. Galway's contract of employment. On this point the issues may be analysed as follows: A (i) If Mr. Galway had been alive today, would the first defendants have been entitled to recover against him, as damages for breach of the alleged term in his contract of employment, the amount which the first defendants have become liable to pay by reason of his negligence ? A (ii) If so, is that cause of action maintainable against the administratrix (subject to assets being available), or is it barred by s. 1 (3) of the Act of 1934 ?

With regard to A (i), in support of this alleged cause of action reliance was placed on the decision of the House of Lords in *Lister* v. *Romford Ice & Cold Storage Co., Ltd.* (6) ([1957] 1 All E.R. 125). It is, in my judgment, indisputable on the basis of that authority that, if Mr. Galway had been engaged and employed by the first defendants as a driver of a motor vehicle, the first defendants would have been entitled to recover from Mr. Galway, if alive, the amount of the judgment together with costs which they had paid or had become liable to pay as damages for breach of the implied term in his contract of employment that he would use reasonable skill and care in driving; see the speech of VISCOUNT SIMONDS, where the learned Lord said (ibid., at p. 130):

> " It is, in my opinion, clear that it was an implied term of the contract that the appellant would perform his duties with proper care. The proposition of law stated by WILLES, J., in *Harmer* v. *Cornelius* (7) ((1858), 5 C.B.N.S. 236 at p. 246) has never been questioned: ' When a skilled labourer, artisan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes,—Spondes peritiam artis. Thus, if an apothecary, a watchmaker, or an attorney be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts . . . An express promise or express representation in the particular case is not necessary '. I see no ground for excluding from, and every ground for including in, this category a servant who is employed to drive a lorry which, driven without care, may become an engine of destruction and involve his master in very grave liability. Nor can I see any valid reason for saying that a distinction is to be made between possessing skill and exercising it. No such distinction is made in the cited case; on the contrary, ' possess ' and ' exercise ' are there conjoined. Of what advantage to the employer is his servant's undertaking that he possesses skill unless he undertakes also to use it ? I have spoken of using skill rather than using care, for ' skill ' is the word used in the cited case, but this embraces care. For even in so-called unskilled operations an exercise of care is necessary to the proper performance of duty."

From this it was argued on behalf of the first defendants that, once it is established, as it has been by my judgment, that on the occasion in question Mr.

Galway was acting within the course of his employment, the contractual obligation to drive without negligence is established. On behalf of the third party, however, it was submitted that on the authorities the implied term extends only to the performance of those duties which the servant expressly or impliedly professes to possess at the time when he enters into the contract of service. It is not without significance that in the famous judgment of Willes, J., in *Harmer* v. *Cornelius* (7), part of which is quoted in, and forms the starting point of, Viscount Simonds' conclusion in *Lister* v. *Romford Ice & Cold Storage Co., Ltd.* (6), there appears the following passage (5 C.B.N.S. at p. 246) by way of qualification or amplification of the passage quoted:

> " It may be, that, if there is no general and no particular representation of ability and skill, the workman undertakes no responsibility. If a gentleman, for example, should employ a man who is known to have never done anything but sweep a crossing, to clean or mend his watch, the employer probably would be held to have incurred all risks himself."

Furthermore, I think that it is clear that, in each of the speeches of the learned Lords who formed the majority in the House of Lords in *Lister* v. *Romford Ice & Cold Storage Co., Ltd.* (6), there are plain indications that their Lordships were dealing only with the normal engagement of a servant to drive a lorry or other motor vehicle on the road. Viscount Simonds said ([1957] 1 All E.R. at p. 132):

> " Nor was it suggested that, in the present case, there were any features which distinguished the relation of the appellant and the respondents from that of any other driver and his employer."

Lord Morton of Henryton said (ibid., at p. 135):

> " . . . the appellant was under an implied contractual obligation to take reasonable care in driving the vehicle which he was employed to drive."

Lord Tucker said (ibid., at p. 142):

> " . . . a servant employed to drive a vehicle in the course of his employment by his master owes a duty to his master to take reasonable care . . ."

Lord Somervell of Harrow said (ibid., at p. 146):

> " I, therefore, accept the submission on behalf of the respondents that there is normally a contractual duty on a servant to take care."

I do not read *Lister* v. *Romford Ice & Cold Storage Co., Ltd.* (6) as laying down a proposition of general application that, whenever an employed person drives a motor vehicle within the course of his employment, he impliedly agrees vis-à-vis his employer to take reasonable care in such driving and to indemnify him for any failure.

Mr. Galway was engaged and employed by the first defendants as a storekeeper; as a concession to the first defendants he from time to time used his own motor cycle on their business and was so using it at the time of the accident. I find it difficult to see on what grounds of justice and reason I should hold that, by making his motor cycle combination available for his employers' business on a particular occasion, he should be held in law to have impliedly agreed to indemnify them if he committed a casual act of negligence. Suppose in a time of labour disturbance in the docks master stevedores, as sometimes happens, induce their office staff to man the cranes or to do stevedoring; if a third party is injured through the negligence of such staff, no doubt the master stevedore would be vicariously liable, as, indeed, they might be primarily liable, on the basis that they had employed unskilled persons. But it would surely be contrary to all reason and justice to hold that the willing office staff, by abandoning their ledgers and undertaking manual tasks, had impliedly agreed to indemnify their employers against liability arising from their negligence in performing work which they were not employed to do.

I should, therefore, dismiss the claim of the first defendants against the third party, in so far as it rests on an allegation of breach of the contract of employment. This conclusion renders it unnecessary for me to express any final opinion on the second question, A (ii), under this head. It is sufficient for me to say that, inasmuch as this cause of action, if maintainable, would be an action in contract and not in tort, it would not be barred by the Act of 1934, but would survive independently of this Act against the administratrix up to the extent of the assets remaining in her hands, like any other claim arising in contract.

I now turn to the defendants' second ground of claim against the third party, based on s. 6 (1) of the Law Reform (Married Women and Tortfeasors) Act, 1935, which provides:

> "Where damage is suffered by any person as a result of a tort . . . (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise . . ."

The first defendants and Mr. Galway are, in law, joint tortfeasors: see *The Koursk* (8) ([1924] P. 140 per SCRUTTON, L.J. at p. 155): and, inasmuch as the first defendants' liability on the facts found is purely vicarious, the claim for contribution by Mr. Galway, if good in law, should, in my view, be for a hundred per cent.

The material questions on this branch of the case may be summarised as follows. B (i): What is the nature of the right of contribution ? Are the third-party proceedings "proceedings . . . in respect of a cause of action in tort" so as to be barred by s. 1 (3)* of the Law Reform (Miscellaneous Provisions) Act, 1934, as not being pending against Mr. Galway at the date of his death, or as not having been taken against the administratrix within six months of the taking out of representation ? B (ii): Is the cause of action for contribution a cause of action which subsisted against Mr. Galway at the date of his death, within the meaning of s. 1 (1)* of the Act of 1934? If not, is it a cause of action which is maintainable against the administratrix, up to the amount of the assets, apart from the Act of 1934 ? B (iii): Is there in the expression "who . . . would if sued have been liable" any temporal connotation referring to the time when the hypothetical action must be assumed to have been brought ? If it means, as the third party submits, a person who, if sued at the time when the action was brought against the tortfeasor claiming contribution or at the time when the contribution proceedings were brought, the third party was not such a person, since no action in tort could be brought against her in respect of Mr. Galway's tort after Nov. 23, 1952.

---

* Section 1 of the Law Reform (Miscellaneous Provisions) Act, 1934, reads:

"(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate . . .

"(3) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person, unless either—(a) proceedings against him in respect of that cause of action were pending at the date of his death; or (b) the cause of action arose not earlier than six months before his death and proceedings are taken in respect thereof not later than six months after his personal representative took out representation.

"(4) Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this Act, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered."

B (i): What is the nature of the right of contribution ? Are the third-party proceedings " proceedings . . . in respect of a cause of action in tort " ? In my judgment, it is plainly established on the authorities that the right of contribution between tortfeasors is a right sui generis conferred by statute similar to the right of contribution conferred by s. 30 (2) of the Workmen's Compensation Act, 1925; see *Littlewood* v. *George Wimpey & Co., Ltd.* (9) ([1953] 2 All E.R. 915); see also the same case on appeal in the House of Lords, *George Wimpey & Co., Ltd.* v. *British Overseas Airways Corpn.* (9) ([1954] 3 All E.R. 661) and *Post Office* v. *Official Solicitor* (10) ([1951] 1 All E.R. 522). Furthermore, if the third-party proceedings themselves are not founded in tort, they are not proceedings in respect of a cause of action in tort within the meaning of s. 1 (3) of the Act of 1934; the expression plainly means proceedings to enforce a cause of action in tort.

Question B (ii) is: Is the cause of action for contribution a cause of action which subsisted against Mr. Galway at the date of his death ? If not, is it a cause of action which is maintainable against the administratrix up to the amount of the assets apart from the Act of 1934 ? In my judgment, it is also clear that the cause of action for contribution under the Act of 1935 did not arise until judgment in this action. I think that this conclusion is implicit, though not a matter of decision, in the speeches in the House of Lords in *Wimpey* v. *British Overseas Airways Corpn.* (9). In *Post Office* v. *Official Solicitor* (10) ([1951] 1 All E.R. at p. 525) Barry, J., held (it being common ground that a similar claim for contribution under s. 30 (2) of the Workmen's Compensation Act, 1925, did not arise until payment of compensation was made) that, notwithstanding that the payment was not made until after the death of the person from whom contribution was sought, the claim for contribution was subsisting against the deceased person at the date of his death within the meaning of s. 1 (1) of the Act of 1934 by reason of the provisions of s. 1 (4) of that Act.

The reasoning of Barry, J., seems equally applicable to the present claim for contribution under the Act of 1935, and I would respectfully adopt it. Even if this conclusion is wrong, however, it seems to me that s. 1 of the Act of 1934 is not by its terms comprehensive, and that the present claim for contribution would survive against the administratrix like any other claims not expressly dealt with by that section.

Question B (iii) is: Is there in the expression " who . . . would if sued have been liable " any temporal connotation referring to the time at which the hypothetical action must be assumed to have been brought ? In *George Wimpey & Co., Ltd.* v. *British Overseas Airways Corpn.* (9) this point was much debated but was not, as I think, finally decided either way. Viscount Simonds and Lord Tucker decided the case against the appellant, the party claiming contribution, on the ground that the third party having, when sued in the action, succeeded on the plea based on s. 21 (1) of the Limitation Act, 1939, could not be said to be a person who, if sued, would have been held liable, a view not shared by the remaining members of the House. Lord Reid* (who, with Viscount Simonds and Lord Tucker, formed the majority in favour of dismissing the appeal) held that " if sued " had a temporal connotation and meant either " when action was being taken against the other tortfeasor " or when the claim for contribution was made, and that for the purpose of the appeal then before the House it was not necessary to decide which. Viscount Simonds, obiter, was prepared to accept Lord Reid's conclusion. On the other hand, Lord Porter and Lord Keith of Avonholm, who dissented, held that the words of the statute were satisfied if the party against whom contribution was sought would have been liable if sued at any time.

---

* The page references to the relevant passages in the speeches are given in the headnote to the report ([1954] 3 All E.R. at p. 662, letter B) where the opinions of Viscount Simonds and Lord Reid on the temporal connotation are summarised in holding (ii).

In my judgment the phrase " who . . . would if sued have been liable ", if construed literally, contains no temporal connotation except that, for the institution of the hypothetical action, the words " would . . . have been liable " plainly contemplate that the hypothetical action has been instituted at some time before the claim for contribution arose. This, as I have found, is the date of the judgment against the party seeking contribution. Literally construed, the phrase, in my judgment, means " who, if sued at any time, would have been liable "—that is, held liable. Is there any reason for not adopting this literal construction ?

On behalf of the third party, it is argued that it is unreasonable and unjust that she should be exposed to suit many years after she has by lapse of time become protected as against the original injured party. On the other hand, it is pointed out on behalf of the first defendants that it is unreasonable that their rights against their joint tortfeasor should be determined by the whim of the injured party in not proceeding against the other tortfeasor in due time or at all. And it is said that, if the limitation contended for by the third party is adopted, it would be necessary for every person who is involved in an accident causing injury, for which he may be held liable with a right over against another party, to commence declaration proceedings against that other party within that party's limitation period, even though the former party has not yet been sued himself. These arguments based on inconvenience seem to me to be very equally balanced. Accordingly, I see no valid reason why the literal construction should not be adopted. This construction does not, as I think, involve reading in any words at all; on the other hand, it does avoid the necessity of reading in words of limitation which are not there. I am fortified in this conclusion which I have adopted by the judgment of DONOVAN, J., in *Morgan* v. *Ashmore, Benson, Pease & Co., Ltd.* (11) ([1953] 1 All E.R. 328), the reasoning of which I respectfully adopt. There will be judgment, accordingly, for the first defendants against the third party for an indemnity against their liability under the judgment in the action, together with their costs and the costs of the third-party proceedings.

Judgment for the plaintiff against the first defendants. Judgment for the second defendant against the plaintiff. Judgment for the first defendants against the third party.

Solicitors: *R. I. Lewis & Co.* (for the plaintiff); *J. F. Coules & Co.* (for the defendants); *William Easton & Sons* (for the third party).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

DAVIES *v.* PRICE AND OTHERS.

[COURT OF APPEAL (Lord Evershed, M.R., Parker and Sellers, L.JJ.), February 25, 26, 27, 1958.]

Agriculture—Agricultural holding—Notice to quit—Consent of Minister—Exercise of discretion—Comparison of use of land by tenant with proposed use of land by landlord—Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 63), *s.* 25 (1) (*a*).

Certiorari—Error of law not appearing on face of award—Excess of jurisdiction—Remedy by appeal—Agricultural Land Tribunal—Consent to notice to quit—Misconstruction of statute.

The tenant of an agricultural holding having been served with a notice to quit, served a counter-notice on the landlords requiring that s. 24 (1) of the Agricultural Holdings Act, 1948, should apply. Thereupon the Agricultural Executive Committee acting on behalf of the Minister gave consent to the operation of the notice to quit under s. 25 (1) (a) of the Act which provided in effect that consent could be given where " the carrying out of the purpose for which the landlord proposes to terminate the tenancy is desirable in the interests of efficient farming . . ." An appeal by the tenant to the Agricultural Land Tribunal was dismissed, the tribunal stating " that the landlords have satisfied the tribunal that it is in the interests of efficient farming of the land in question to terminate the tenancy of the [tenant] ". According to the " Statement of the Case " prepared by the secretary of the agricultural executive committee and sent to the tribunal in accordance with the Agriculture (Procedure of Agricultural Land Tribunals) Order, 1954, art. 4, the landlords stated that if they got possession of the holding, they had not decided whether to sell or re-let. The tenant applied for an order of certiorari to bring up and quash the decision of the tribunal on the ground (i) that there was an error on the face of the award in that the tribunal gave its consent merely on the ground that the tenant was a bad farmer; alternatively, (ii) that the tribunal acted in excess of jurisdiction because there was no evidence on which it was entitled to give its consent for the purpose of s. 25 (1) (a) of the Act.

Held: certiorari would not be granted for the following reasons—

(i) it was not manifest on the face of the tribunal's decision that the tribunal did not make the comparison, essential to the valid giving of consent under s. 25 (1) (a) of the Agricultural Holdings Act, 1948, to a notice to quit, between the future use of the land proposed by the landlords and the use of the land made by the tenant, for the tribunal was not bound to state all or any of its reasons in its decision and the wording of its decision in fact tended to support the view that the necessary comparison had been made.

(ii) even if the tribunal erred in law in reaching its decision, or acted on insufficient evidence, it was not shown that the tribunal was without jurisdiction and the error was not manifest on the face of the decision; the remedy, therefore, for any such error was by appeal and not by certiorari.

R. v. *Nat Bell Liquors, Ltd.* ([1922] 2 A.C. at p. 151) applied.

Per CURIAM: the Statement of Case only set out the arguments and facts proved before the agricultural executive committee. The reference to the agricultural land tribunal was a hearing de novo, not an appeal, and it was open to the parties to adduce new facts and new arguments. Accordingly, even if the Statement of Case were part of the record, it did not show what was argued before the tribunal, and therefore did not help the court (see p. 676, letters C and D, and p. 678, letter C, post).

Dictum of Denning, L.J., in *R.* v. *Northumberland Compensation Appeal Tribunal, Ex p. Shaw* ([1952] 1 All E.R. at p. 130) considered.

[As to the giving of notice to quit in the interests of efficient farming, see 1 Halsbury's Laws (3rd Edn.) 289, para. 607.

For the Agricultural Holdings Act, 1948, s. 24, s. 25, s. 27, see 28 Halsbury's Statutes (2nd Edn.) 46-51.

For the Agriculture (Procedure of Agricultural Land Tribunals) Order, 1954, art. 4, art. 17, Sch. 1, see 1 Halsbury's Statutory Instruments (1st Re-Issue) 296, 299, 302.]

Cases referred to:

(1) *R.* v. *Agricultural Land Tribunal for Eastern Province of England, Ex p. Grant,* [1956] 3 All E.R. 321; 3rd Digest Supp.

(2) *R.* v. *Northumberland Compensation Appeal Tribunal, Ex p. Shaw,* [1952] 1 All E.R. 122; [1952] 1 K.B. 338; 116 J.P. 54; 3rd Digest Supp.

(3) *R.* v. *Nat Bell Liquors, Ltd.,* [1922] 2 A.C. 128; 91 L.J.P.C. 146; 127 L.T. 437; 16 Digest 419, *2795.*

Motion.

This was a motion with the leave of the Court of Appeal given on Dec. 9, 1957, for an order of certiorari to remove into this court and quash an order of the Agricultural Land Tribunal for Wales dated Oct. 14, 1957, dismissing the appeal of the applicant tenant against the decision of the Minister of Agriculture and Fisheries (acting through the Flintshire Agricultural Executive Committee) granting consent to the operation of a notice to quit an agricultural holding served by the respondent landlords on the applicant on Nov. 26, 1956, and for an order of mandamus directed to the tribunal to hear and determine the appeal according to law. The grounds of the motion were: (i) There was an error appearing on the face of the record in that the tribunal stated that it was satisfied that it was in the interests of efficient farming of the land in question to terminate the tenancy of the applicant, whereas the question before it for its decision was whether it was satisfied that the carrying out of the purpose for which the landlords proposed to terminate the tenancy was desirable in the interests of efficient farming as provided by s. 25 (1) (a) of the Agricultural Holdings Act, 1948. (ii) The tribunal acted in excess of its jurisdiction in purporting to consent to the operation of the notice on grounds or for reasons which were outside and unauthorised by s. 25 (1) (a), viz., to enable the landlords to sell the said agricultural holding with vacant possession.

E. P. Wallis-Jones for the applicant tenant.

R. G. Waterhouse for the respondent landlords.

The Agricultural Land Tribunal for Wales was not represented.

LORD EVERSHED, M.R.: I will ask Parker, L.J., to deliver the first judgment.

PARKER, L.J.: In this case counsel moves on behalf of Owen Lewis Davies, the tenant of a farm known as Springhill Farm, Holywell, in the county of Flint, for an order of certiorari to bring up and quash a decision of the Agricultural Land Tribunal for Wales, dated Oct. 14, 1957, upholding the Minister's consent to the termination of the applicant's tenancy of that farm. Counsel also asks for an order of mandamus directed to the tribunal to hear and determine the matter according to law. That of course only arises if and when this court grants an order quashing the decision. The order of certiorari is asked for on two grounds: (i) that there is an error of law on the face of the record and (ii) that the tribunal acted in excess of jurisdiction. Each of those grounds, if proved, would entitle the applicant to an order of certiorari.

A Before considering the decision and those two contentions, it is necessary to refer to a few sections of the Agricultural Holdings Act, 1948. That Act substantially interfered with the ordinary law of landlord and tenant in regard to agricultural holdings, and in particular imposed restrictions in regard to the operation of notices to quit. By s. 24 (1) it was provided:

> B "Where notice to quit an agricultural holding or part of an agricultural holding is given to the tenant thereof, and not later than one month from the giving of the notice to quit the tenant serves on the landlord a counter-notice in writing requiring that this sub-section shall apply to the notice to quit, then, subject to the provisions of the next following sub-section, the notice to quit shall not have effect unless the Minister consents to the operation thereof." C

Then by s. 25 (1) it is provided:

> "Without prejudice to the discretion of the Minister in a case falling within paras. (a) to (e) of this sub-section, the Minister shall withhold his consent under the last foregoing section to the operation of a notice to D quit an agricultural holding or part of an agricultural holding unless he is satisfied—(a) that the carrying out of the purpose for which the landlord proposes to terminate the tenancy is desirable in the interests of efficient farming, whether as respects good estate management or good husbandry or otherwise."

The other heads in that sub-section are not relevant and I can pass to sub-s. (5) E of that section, which provides:

> "Where the Minister or the agricultural land tribunal consent under the last foregoing section to the operation of a notice to quit, the Minister or the tribunal may impose such conditions as appear to the Minister or the tribunal requisite for securing that the land to which the notice relates will F be used for the purpose for which the landlord proposes to terminate the tenancy."

Pausing there, I should say that the functions of the Minister in regard to the granting or withholding of consent have been delegated by him to the local agricultural executive committees*. That is, as it were, the first stage. But by s. 25 (4) it is provided: G

> "If the landlord or the tenant is dissatisfied with the Minister's decision to withhold or to give his consent as aforesaid, the landlord or tenant may within the prescribed time and in the prescribed manner require that the matter shall be referred to the agricultural land tribunal . . ."

While considering the Act, I think it convenient to refer to certain other H provisions whereby the landlord can get possession of an agricultural holding. I can deal with this quite shortly. By s. 27 procedure is provided for the landlord applying to the Minister for a certificate that the tenant is not fulfilling his responsibilities to farm in accordance with the rules of good husbandry. If the Minister does so certify, then, going back to s. 24 (2) (c), if the landlord within six months of that certificate serves notice to quit which on its face states I the certificate, he is enabled to get possession without applying for any consent at all. Accordingly, there are broadly speaking two ways by which a landlord can get possession: Either by showing that the tenant is a thoroughly bad farmer and getting a certificate of bad husbandry, in which case, as I have said, the consent of the Minister is not required, or he can proceed by serving a notice to quit and obtaining consent, always assuming a counter-notice has been served by the tenant, under one of the heads set out in s. 25 (1).

---

* See the Agriculture (Delegation to County Agricultural Executive Committees) Regulations, 1948 (S.I. 1948 No. 187); 1 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-Issue) 255.

In the present case there was no question of the landlords obtaining such a certificate, but they served a notice to quit this farm. The tenant served a counter-notice and the matter in due course came before the local agricultural executive committee for their consent on behalf of the Minister. The committee in fact granted consent to the operation of the notice to quit and the tenant being dissatisfied referred the matter to the agricultural land tribunal. So much for the history of the matter.

The decision, of which a certified copy has now been produced, as provided by art. 17 of the Agriculture (Procedure of Agricultural Land Tribunals) Order, 1954 (S.I. 1954 No. 1138), is in these terms:

> "The tribunal established in pursuance of the Agriculture Act, 1947, to consider the appeal of Owen Lewis Davies, of Springhill Farm, Holywell, in the county of Flint, against the decision of the Minister of Agriculture Fisheries and Food to grant consent to the operation of a notice to quit in respect of the holding known as Springhill Farm in the parish of Holywell Urban in the said county of Flint, containing 68.555 acres or thereabouts, in the occupation of the said Owen Lewis Davies as tenant thereof, sat at the court room, Holywell aforesaid, on Aug. 30, 1957, and Oct. 12, 1957. Having heard the evidence of all parties concerned and made an inspection of the land, the tribunal hereby determines as follows:—The landlords have satisfied the tribunal that it is in the interests of efficient farming of the land in question to terminate the tenancy of the appellant. The appellant has been employed as a full-time shift worker at a factory in Flint since 1954; the standard of production is and has been for some time unsatisfactory; and the holding has been inefficiently farmed in many important respects. The tribunal finds no ground upon which to exercise its discretion in favour of the appellant, and the appeal is accordingly dismissed."

The tribunal then extends the time for the operation of the notice to quit.

It will be observed at once that the opening sentence of that decision does not follow the wording of s. 25 (1) (a), which is the only relevant head under which consent could be granted. It makes no reference at all to the purpose for which the landlords proposed to terminate the tenancy and does not on its face consider whether user as proposed by the landlords is more desirable in the interests of efficient farming than continued user by the tenant. The only reason expressed in the decision is that the tenant is a thoroughly bad farmer. This, says counsel for the tenant, discloses an error of law since, as he contends, that of itself is not a sufficient ground for giving consent under this section. If that could be said to be the only ground for the decision, then I think that the tribunal might well be said to have erred in law, for s. 25 is not dealing with the case where the landlord seeks permission on the ground alone that the tenant is a bad farmer. In such a case, there is a remedy under s. 27 and s. 24 of the Act. This provision in s. 25, as it seems to me, involves a comparison between what I may call the present régime under the existing tenant and the proposed régime, which will appertain in future if the tenancy is terminated. For myself I think that sub-s. (5), to which I have referred, supports that view because under that sub-section the tribunal may impose such conditions as appear to it to be requisite for securing that the land to which the notice relates will be used for the purpose for which the landlords proposed to terminate the tenancy. No doubt the less efficiently the land is being farmed by the existing tenant, the easier it will be for the landlords to say that the proposed user, if the tenancy is terminated, will be more efficient; but it seems to me that a landlord must

A give some evidence of the proposed user and the tribunal can then and must proceed to make a comparison. Indeed support for that view is to be found in the decision of this court in *R.* v. *Agricultural Land Tribunal for Eastern Province of England, Ex p. Grant* (1) ([1956] 3 All E.R. 321). I need only refer to a short passage in the judgment of SINGLETON, L.J., where in granting an order of certiorari he said this (ibid., at p. 328):

B

> "It [the tribunal] will be entitled to bear in mind the quality of the farming of the landlord. It will ask itself whether it is satisfied that it is desirable that consent should be given in the interests of efficient farming, and it will be entitled to bear in mind the position of the landlord's present holding and farm buildings in relation to this land, which must, I think, C have a bearing on the efficient farming of this piece of land. If it comes to the conclusion that it is satisfied that the requirements of [s. 25 (1) (a)] are fulfilled, it will ask itself whether or not, in its discretion, it should give its consent to the notice."

SINGLETON, L.J., is there saying what I have sought to say, that there must be a comparison between the existing régime and the proposed régime.

D So much I think is clear in regard to the construction of that provision in s. 25, but the question remains whether on the face of this decision it can be said that the tribunal has erred in not making that comparison. In regard to that, the onus is of course on the tenant to satisfy this court that such an error is manifest on the face of the record. For myself I do not think that such an error is established. The tribunal, though bound to give a written decision, E is not bound to state its reasons, or indeed any reasons. In the present case it does not say that the reason given is its only reason. Indeed if it had said: "Having regard to the declared purpose of the landlords, the tribunal is satisfied . . ." there would be no question of there being any challenge of its decision. I do not think that we can infer that it did not consider any declared purpose of the landlords, and indeed, as it seems to me, the very wording of that first F sentence supports its view because the tribunal says that it is satisfied that it is in the interests of the efficient farming of the land in question to terminate the tenancy, and those very words, as it seems to me, involve that it is comparing the position before the operation of the notice to quit with what it is if the notice to quit operates. Accordingly, if one looks at the decision alone, I am not satisfied that any error of law is manifest on its face.

G The matter does not rest there, however, because counsel for the tenant has invited us to look at another document, headed: "Statement of Case and General Grounds for the Minister's Decision", as being a part of the record. This document is apparently a document prepared by the secretary of the agricultural executive committee pursuant to art. 4 of the Order of 1954 to which I have already referred, which is required to be sent to the tribunal once the landlord H or the tenant has referred the matter to that tribunal, and copies are sent to the interested parties. That document sets out the details of the holding and thereafter refers to the rival contentions of the landlord and the tenant and ends with the decision of the committee. From that document it appears that before the committee the contention of the landlords was that if they got possession of the holding they had not decided whether to sell or re-let. There I is no other statement than that in regard to what was proposed to be the user of the land if the tenancy was terminated. Such a declared intention, so runs the argument, would be insufficient to enable any comparison to be made between what I have referred to as the existing régime and the new régime, and accordingly supports the view that the tribunal gave its consent merely on the basis that this tenant was a thoroughly bad farmer.

For my part I very much doubt whether this document can be said to form part of the record. In *R.* v. *Northumberland Compensation Appeal Tribunal, Ex p. Shaw* (2) ([1952] 1 All E.R. 122), DENNING, L.J., dealt with the question of what documents could be said to form part of the record. He says (ibid., at p. 130):

> "It appears that the Court of King's Bench always insisted that the record should contain, or recite, the document or information which initiated the proceedings and thus gave the tribunal its jurisdiction and also the document which contained their adjudication",

and he also says there that pleadings would form part of the record. So far as the present document is concerned, it is not in the nature of a pleading; it does not initiate proceedings because it only comes into existence once a reference has been made to the tribunal, and indeed it does not emanate from the landlords and could not well be said to be in any way binding on them. It is for these reasons that I doubt for my part whether it does form part of the record. In the present case, however, I find it unnecessary to come to any concluded decision in the matter, and for this reason. As I have said, the document only sets out the arguments and facts proved before the agricultural executive committee. The reference to the agricultural land tribunal is not strictly an appeal; it is a hearing de novo and it is open to the parties to adduce new facts and new arguments. Accordingly, if one does look at this further document, it does not in the least help as to what was advanced and argued before the agricultural land tribunal.

Finally, counsel for the tenant took the point that the tribunal in the present case had exceeded its jurisdiction and for that purpose he invited us to look at certain affidavits referring to what took place before the tribunal in order, as I understand, to show either that there was no evidence on which it was entitled to give consent or to show that it must have misconstrued s. 25 (1) (a) or, as he put it, that it was advancing a further ground for granting consent beyond those enumerated in s. 25. Even if on looking at those affidavits there were such evidence, this would not, as it seems to me, mean that the tribunal had acted in excess of jurisdiction. The matter was properly referred to the tribunal; it clearly had jurisdiction to decide whether to give or withhold consent, and if it misconstrued the statute or acted on no evidence, it merely erred in law and unless that error is manifest on the face of the award, the decision cannot be challenged on proceedings for an order of certiorari. That principle is, I think, well known and it is enough to refer to a short passage in Lord Sumner's well known judgment in *R.* v. *Nat Bell Liquors, Ltd.* (3) ([1922] 2 A.C. 128). He said this (ibid., at p. 151):

> "It has been said that the matter may be regarded as a question of jurisdiction, and that a justice who convicts without evidence is acting without jurisdiction to do so. Accordingly, want of essential evidence, if ascertained somehow, is on the same footing as want of qualification in the magistrate, and goes to the question of his right to enter on the case at all. Want of evidence on which to convict is the same as want of jurisdiction to take evidence at all."

That was the argument, and Lord Sumner goes on (ibid.):

> "This, clearly, is erroneous. A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not."

That principle applies whether it is a question of lack of evidence or, as it seems to me, of misconstruing a statute.

Accordingly, I myself would not look at these affidavits. If, as I have said, they disclose that there was no evidence on which the tribunal could have granted consent or showed that it must have misconstrued the statute, that is not a question of want of jurisdiction and there being no error of law on the face of the record, the only remedy is by appeal, if appeal is given by statute. It is to be observed that in the Agriculture (Miscellaneous Provisions) Act, 1954, specific provision was made for the first time (by s. 6) for an appeal by way of Case Stated from agricultural land tribunals to this court, and, as it seems to me, if the tribunal in this case had acted as it is said to have acted, the proper and the only remedy would be by way of appeal under that section. Accordingly, I would dismiss this application.

SELLERS, L.J.: I am in full agreement with the judgment of PARKER, L.J. I would only add that having listened to the argument, widened as it has been by the allegation of excess of jurisdiction, I have not felt satisfied that the tribunal did in fact arrive at its decision in accordance with law, but, on the other hand, I am not satisfied that any error is sufficiently revealed on the face of its decision to justify this court interfering by an order of certiorari.

LORD EVERSHED, M.R.: I also am of the same opinion and I only add a very few words of my own on two points in the case, because it is one of some significance and also out of respect to the very careful arguments by which counsel have instructed and assisted the court.

On the matter of construction, I wish to express my full concurrence with what has fallen from PARKER, L.J. As I read s. 25 (1) (a) of the Agricultural Holdings Act, 1948, the part of the statute which has been most debated before us, it seems to me that if the Minister gives his consent to a notice to quit, then he must have been satisfied of what I will call the agricultural future of the land, the subject of the notice to quit. He must have been satisfied that the efficient farming of that land will be better served by the agricultural use of it which will be consequent on the departure of the tenant than by the use to which the land will be put if the tenant remains; and if that is right, then the same considerations must govern the conclusion of the agricultural land tribunal when its jurisdiction is invoked. When I look, therefore, at the decision in the present case I observe that its first sentence reads:

> " The landlords have satisfied the tribunal that it is in the interests of efficient farming of the land in question to terminate the tenancy of the appellant."

The phrase " efficient farming of the land in question " may be said to reflect the words of SINGLETON, L.J., in *R.* v. *Agricultural Land Tribunal for Eastern Province of England, Ex p. Grant* (1) ([1956] 3 All E.R. 321 at p. 325): he said:

> ". . . I am of opinion, that the words ' in the interests of efficient farming ' should be read as meaning ' the efficient farming of the land in respect of which the notice is given '."

So far, therefore, as the decision has said that it is in the interests of the efficient farming of this land that this tenant should go, it seems to me impossible for the tenant here successfully to assert that the tribunal has failed to consider what will be the alternative agricultural uses to which the particular land will be put whether the tenant stays, on the one hand, or goes, on the other.

The other point on which I would like to say a word or two, though it is of careful reservation, is as regards the document called: " Statement of Case and General Grounds for the Minister's Decision ", a document which has been referred to in the course of the argument as exhibit C.O.J.2 or T.M.2. The question has been whether that document should be regarded as part of the record. It owes its existence to the circumstance that such a statement is one of the documents which by art. 4 of, and Sch. 1 to, the Agriculture (Procedure of Agricultural Land Tribunals) Order, 1954, must be put before the agricultural land tribunal in such a case as the present. As PARKER, L.J., has observed, however, the tribunal is dealing with this case de novo; it is a re-hearing in every sense of that term. What is more, the document " Statement of Case ", is not a document prepared by either party or the solicitors to either party. It would, therefore, seem to me somewhat strange if either party were to be held bound by the contentions therein attributed to him or her. I agree with PARKER, L.J., that even if it were legitimate to treat this document as part of the record and, therefore, to look at it for the purpose of deciding whether or not there was on the face of the record an error in law, the document does not assist to such conclusion one way or the other.

In those circumstances I prefer for my part to express no opinion one way or the other whether a document of this kind in a case of this kind falls within the scope of DENNING, L.J.'s observations in *R.* v. *Northumberland Compensation Appeal Tribunal, Ex p. Shaw* (2) ([1952] 1 All E.R. 122 at p. 131), to which PARKER, L.J., referred:

> " . . . I think the record must contain at least the document which initiates the proceedings, the pleadings, if any, and the adjudication, but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them."

I prefer to express no view at all whether I think this document is covered by the formula which DENNING, L.J., uses—assuming, as I have, for the present purpose, though without deciding, that DENNING, L.J.'s formula is correct. For the reasons which PARKER, L.J., has given and with which I concur, and for those which I have myself added, I also think that this application fails and should be refused.

Application refused.

Solicitors: *Rider, Heaton, Meredith & Mills*, agents for *Clement Jones & Co.*, Holywell (for the applicant); *Lightbounds, Jones & Co.*, agents for *H. A. Cope & Roberts*, Holywell (for the respondents).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

DIRECTOR OF PUBLIC PROSECUTIONS *v.* HEAD.

[HOUSE OF LORDS (Viscount Simonds, Lord Reid, Lord Tucker, Lord Somervell of Harrow and Lord Denning), January 15, 16, March 6, 1958.]

Criminal Law—Carnal knowledge—Mental defective—Whether offence can be committed against person whose original detention in institution was unlawful—Mental Deficiency Act, 1913 (3 *&* 4 *Geo.* 5 *c.* 28), *s.* 56 (1) (*a*).

The respondent was convicted and sentenced on two charges of carnal knowledge of a woman in October, 1956, contrary to the Mental Deficiency Act, 1913, s. 56 (1) (a)*, while she was on licence from an institution for mental defectives. The woman had been committed to an approved school and in July, 1947, had been transferred to a certified institution under an order made by the Home Secretary under s. 9† of the Act. Thereafter continuation orders and orders transferring her to other institutions had been made. Documents to prove the legality of the woman's detention were produced and put in evidence at the trial; these included the original order of July, 1947, and the medical certificates on which it was founded. On the respondent's appeal against conviction, the invalidity of the original order for detention was admitted (owing to defects in the medical certificates) and the conviction was quashed on the ground that, as the woman had not been lawfully made subject to the Act of 1913, s. 56 (1) (a) did not apply. On appeal to the House of Lords by the Crown,

Held: (i) (VISCOUNT SIMONDS and LORD DENNING dissenting) the conviction had rightly been quashed for the following reasons—

(a) since, as was admitted, the original order for detention was invalid on the face of documents produced in support of it, it was not established and should not be presumed that the woman was a defective within the Mental Deficiency Act, 1913, in respect of whom a licence for release was necessary (see p. 686, letter H, post), and

(b) that defect had not been cured by the subsequent continuation orders (see p. 686, letter I, to p. 687, letter A, post), or

(ii) (per LORD DENNING) the appeal should be dismissed because, although the detention of the woman at the time of her release on licence was valid (the original order of July, 1947, being voidable only, not void) and the conviction had, therefore, been quashed on a mistaken ground, the conviction ought not to be restored, as the distinction between voidable orders and void orders had not been raised below and this appeal was exceptional in that it was an appeal from an acquittal.

Per LORD TUCKER, LORD REID and LORD SOMERVELL OF HARROW:—

(a) proof that a person is detained as an inmate in one of the specified institutions and is under care or treatment therein as a defective or is shown by production of the licence to be out on licence from a place to which the system of licences applies is prima facie proof that the person is a defective lawfully under care and treatment as such; and thus (VISCOUNT SIMONDS and LORD DENNING concurring) it is unnecessary for the prosecution to tender also medical evidence to satisfy the jury that the person was a defective within one or other of the provisions of s. 1 of the Mental Deficiency Act, 1913 (see p. 686, letter F, p. 682, letter I, and p. 687, letter H, post).

(b) the foundation of the presumption, in the case of a person under detention or on licence, is the legality of the detention . . . It is proper that the prosecution should have in court, and make available for inspection by defending counsel, the relevant orders or other documents on which the detention is based (see p. 686, letter I, post).

---

* The terms of s. 56 (1) are printed at p. 684, letter H, to p. 685, letter B, post.

† The relevant part of s. 9 is printed at p. 691, letter A, post. This section was amended both by the National Health Service Act, 1946, s. 50 and Sch. 9, and the Prison Act, 1952, s. 52 and Sch. 3, in manners not material hereto, and by the Criminal Justice Act, 1948, s. 79 and Sch. 9, which substituted a specific application of the section to approved schools under s. 79 of the Children and Young Persons Act, 1933.

The distributive construction of the words " under this Act " in s. 56 (1) (a) of the Mental Deficiency Act, 1913 (cf., [1957] 3 All E.R. at p. 429, letter F, and p. 431, letter D) criticised (see p. 686, letters B to D, post).

Decision of the Court of Criminal Appeal (sub nom. *R.* v. *Head*, [1957] 3 All E.R. 426) affirmed.

[**Editorial Note.** Section 56 of the Mental Deficiency Act, 1913, was repealed by the Sexual Offences Act, 1956, s. 51 and Sch. 4, and s. 56 (1) (a) of the Act of 1913 is replaced by s. 8 of the Act of 1956.

As to the offence of carnal knowledge of a mental defective, see 21 Halsbury's Laws (2nd Edn.) 504, 505, para. 917; and for cases on sexual offences against women of weak intellect, see 15 Digest (Repl.) 1013, 1014, *9987-9990*.

For the Mental Deficiency Act, 1913, s. 56, see 17 Halsbury's Statutes (2nd Edn.) 1218; and for the replacing provisions of s. 8 of the Sexual Offences Act, 1956, see 36 Halsbury's Statutes (2nd Edn.) 221.]

Cases referred to:

(1) *The Queen's Case*, (1820), 2 Brod. & Bing. 284, 302; 129 E.R. 976, 983; 14 Digest (Repl.) 133, *962*.

(2) *Strother* v. *Barr*, (1828), 5 Bing. 136; 6 L.J.O.S.C.P. 245; 130 E.R. 1013; 22 Digest (Repl.) 200, *1879*.

(3) *Salte* v. *Thomas*, (1802), 3 Bos. & P. 188; 127 E.R. 104.

(4) *R.* v. *Bourdon*, (1847), 2 Car. & Kir. 366; 175 E.R. 151; 15 Digest (Repl.) 987, *9668*.

(5) *Watson's Case*, (1839), 9 Ad. & El. 731; 112 E.R. 1389; sub nom. *R.* v. *Wixon*, 8 L.J.Q.B. 129; 16 Digest 256, *585*.

(6) *Greene* v. *Home Secretary*, [1941] 3 All E.R. 388; [1942] A.C. 284; 111 L.J.K.B. 24; 166 L.T. 24; 2nd Digest Supp.

(7) *Wilmot's Opinions*, (1758), Wilm. 77; 97 E.R. 29.

(8) *Re Bailey, Re Collier*, (1854), 3 E. & B. 607; 23 L.J.M.C. 161; 118 E.R. 1269; sub nom. *R.* v. *Collier*, 23 L.T.O.S. 111; 18 J.P. 630; 16 Digest 254, *557*.

(9) *R.* v. *Board of Control, Ex p. Rutty*, [1956] 1 All E.R. 769; [1956] 2 Q.B. 109; 120 J.P. 153; 3rd Digest Supp.

(10) *Sergeson* v. *Sealey*, (1742), 2 Atk. 412; 26 E.R. 648; 33 Digest 160, *436*.

(11) *Faulder* v. *Silk*, (1811), 3 Camp. 126; 170 E.R. 1328; 33 Digest 162, *464*.

(12) *Van Grutten* v. *Foxwell, Foxwell* v. *Van Grutten*, [1897] A.C. 658; 66 L.J.Q.B. 745; 77 L.T. 170; 33 Digest 161, *447*.

(13) *Hill* v. *Clifford, Clifford* v. *Timms, Clifford v. Phillips*, [1907] 2 Ch. 236; 76 L.J.Ch. 627; 97 L.T. 266; *on appeal*, [1908] A.C. 12, 15; 33 Digest 161, *450*.

(14) *Harvey* v. *R.*, [1901] A.C. 601; 70 L.J.P.C. 107; 84 L.T. 849; 33 Digest 161, *453*.

(15) *Smith* v. *East Elloe Rural District Council*, [1956] 1 All E.R. 855; [1956] A.C. 736; 120 J.P. 263; 3rd Digest Supp.

(16) *R.* v. *Medical Appeal Tribunal, Ex p. Gilmore*, [1957] 1 All E.R. 796; [1957] 1 Q.B. 574.

(17) *Harnett* v. *Bond*, [1924] 2 K.B. 517; 93 L.J.K.B. 946; 131 L.T. 782; *affd.* H.L., [1925] A.C. 669; 94 L.J.K.B. 569; 133 L.T. 482; 89 J.P. 182; 33 Digest 268, *1869*.

(18) *Dimes* v. *Grand Junction Canal* (*Proprietors*), (1852), 3 H.L. Cas. 759; 19 L.T.O.S. 317; 10 E.R. 301; 16 Digest 382, *2196*.

(19) *McPherson* v. *McPherson*, [1935] All E.R. Rep. 105; [1936] A.C. 177; 105 L.J.P.C. 41; 154 L.T. 221; Digest Supp.

(20) *Leighton* v. *Leighton*, (1720), 1 Stra. 308; 93 E.R. 539; *subsequent proceedings*, 4 Bro. Parl. Cas. 378; 22 Digest (Repl.) 322, *3374*.

(21) *Everett* v. *Griffiths*, [1921] 1 A.C. 631; 90 L.J.K.B. 737; 125 L.T. 230; 85 J.P. 149; 33 Digest 267, *1862*.

(22) *Marshalsea Case*, (1612), 10 Co. Rep. 68b; 77 E.R. 1027; 38 Digest 68, *448*.

(23) *R.* v. *Nat Bell Liquors, Ltd.*, [1922] 2 A.C. 128; 91 L.J.P.C. 146; 127 L.T. 437; 16 Digest 419, *2795*.

(24) *De Reneville* v. *De Reneville*, [1948] 1 All E.R. 56; [1948] P. 100; [1948] L.J.R. 1761; 2nd Digest Supp.

(25) *R.* v. *Algar*, [1953] 2 All E.R. 1381; [1954] 1 Q.B. 279; 118 J.P. 56; 3rd Digest Supp.

(26) *Re Shuttleworth*, (1846), 9 Q.B. 651; 16 L.J.M.C. 18; 8 L.T.O.S. 138; 10 J.P. 760; 115 E.R. 1423; 33 Digest 266, *1854*.

(27) *Murray* v. *Murray*, [1940] 4 All E.R. 250; [1941] P. 1; 110 L.J.P. 1; 164 L.T. 199; 104 J.P. 447; 2nd Digest Supp.

Appeal.

Appeal by the Crown pursuant to a certificate of the Attorney-General dated Nov. 11, 1957, from a decision of the Court of Criminal Appeal (LORD GODDARD, C.J., DONOVAN and HAVERS, JJ.), dated Nov. 1, 1957, and reported sub nom. *R.* v. *Head*, [1957] 3 All E.R. 426, quashing a conviction of the respondent, John Shortriggs Head, at Carlisle Assizes on May 22, 1957, before HINCHCLIFFE, J., and a jury on two charges of carnal knowledge of Elfreda Henderson, a mental defective, for which he was sentenced to four months' imprisonment. The facts are stated in the opinion of LORD TUCKER, p. 683, post.

The Attorney-General (*Sir Reginald Manningham-Buller, Q.C.*), *Rodger Winn* and *A. S. Booth* for the Crown.

G. W. Guthrie Jones for the respondent.

The House took time for consideration.

Mar. 6. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the facts of this case are fully set out in the opinion of my noble and learned friend, LORD TUCKER. I will not occupy time by stating them myself, though I am conscious that the few observations that I have to make are not easily intelligible without them. I do not doubt that questions of great importance are directly or indirectly raised by the judgment of the Court of Criminal Appeal in this case, but, in accordance with the practice which has consistently been observed since the Court of Criminal Appeal was established, they were not formulated for the consideration of the House. In the result, I have, for my part, found it difficult to determine exactly what is the question for decision—and by that I mean, of course, the question which is at issue between the Crown and the respondent in this appeal. I should not think it desirable, particularly in a criminal case, to travel outside that issue.

The bald facts of the case are that the respondent was charged with having had carnal knowledge of a woman who was placed out on licence from an institution for mental defectives, contrary to s. 56 (1) (a) of the Mental Deficiency Act, 1913. He was convicted, but on appeal the conviction was quashed. It was quashed on the ground that the woman was not lawfully detained in the institution. The Lord Chief Justice (LORD GODDARD) said ([1957] 3 All E.R. at p. 429) that, where a man was prosecuted for this offence (now an offence against s. 8 of the Sexual Offences Act, 1956)

> "evidence must be given by the production of the relevant documents that the woman in respect of whom the charge is made was lawfully subject to the Act at the time of the offence."

DONOVAN, J., used similar language (ibid., at p. 431). The documents under which the woman was detained were, in fact, produced at the trial. I need say no more than that, on the face of them, they appeared to be defective. The

Attorney-General, in the Court of Criminal Appeal, admitted that, in appropriate proceedings, they could be successfully challenged, e.g., on a writ of habeas corpus. He did not recede from this admission before the House, but contended that it was irrelevant whether or not in such proceedings they could be challenged. He urged that the relevant section of the Act was passed for the protection of a certain class of women, amongst them women

> " . . . under care or treatment in an institution . . . or whilst placed out on licence therefrom . . ."

He conceded that, in its context, the expression " under care or treatment " meant under care or treatment as a mental defective, but contended that, if the woman was, in fact, under such care or treatment in an institution or placed out on licence therefrom, it was not open to the defendant to question the legality of the detention. He pointed out that the proviso gives adequate protection to a man who, being charged with the offence, proves that he did not know, and had no reason to suppose, that she was a defective.

My Lords, this House, no less than other courts of law, is traditionally jealous to safeguard the liberty of the subject; but I agree with the learned Attorney-General that such a consideration is irrelevant to the present case. Is it the man's liberty or the woman's that is at stake ? Not his, unless a man is to be at liberty to have carnal knowledge of any woman who is under treatment in an institution on the chance that a defect may be found in the order of detention; nor hers, for she is not a party, nor are the proper authorities, parties to the proceedings, and her eventual liberty will be determined by other considerations beyond those of a defect in an order made many years ago.

I speak with diffidence knowing that I differ from the Court of Criminal Appeal and from the majority of your Lordships, but I cannot refrain from saying with what anxiety I regard the possibility that, as a result of this decision, whenever a man is charged with this offence, he can, though he knows that the woman is under care or treatment as a mental defective, demand to see all " the relevant documents " (whatever they may be) and, finding perchance a flaw in them, successfully plead that she was not lawfully detained and that he, therefore, has committed no offence. I must, I think, assume that any defect which would support a writ of habeas corpus would be available to him, and, further, that the same result would follow whether the woman was, as in the present case, on the high road to recovery or was such a defective as to stand in particular need of the protection afforded by the Act.

I would, therefore, decline to read s. 56 of the Act as imposing on the prosecution the burden of proving that the person under care or treatment in an institution or placed out on licence therefrom was not only in fact under such care or treatment or so placed out on licence but also was lawfully detained.

The Attorney-General supported his case by the plea that, if the prosecution had to prove lawful detention of an inmate of an institution, the burden of proof might be very heavy, and this plea was much debated. If, on its true construction, the section imposes this burden, I respectfully doubt whether it is material that the burden is heavy or light. In the view which I take, this question does not arise, but, if it did, I should be content to adopt what my noble and learned friend, LORD TUCKER, says about it, and I would join in the reservations made by my noble and learned friend, LORD SOMERVELL OF HARROW.

One other point should be mentioned. It was not clear to me whether one of the questions at issue in this appeal was whether, in a prosecution for this offence, the Crown must prove that the woman was, at the time of the offence, a mental defective. I think that at one time the learned Attorney-General was inclined to accept that burden. But, if so, he was, in my opinion, wrong. I believe that all your Lordships take the same view.

The appeal will, in accordance with your Lordships' opinion, be dismissed with costs.

LORD REID: My Lords, I have had the advantage of reading the speeches about to be delivered by my noble and learned friends. I agree with that of Lord Tucker, and I would concur in the reservations to be made by Lord Somervell of Harrow.

LORD TUCKER: My Lords, on May 22, 1957, the respondent was convicted of two offences against s. 56 (1) (a) of the Mental Deficiency Act, 1913, after a trial before Hinchcliffe, J., and a jury at Cumberland Assizes held at Carlisle. He appealed to the Court of Criminal Appeal who quashed his conviction on Nov. 1, 1957. The Director of Public Prosecutions now appeals to this House pursuant to the certificate of the Attorney-General granted on Nov. 11, 1957.

The indictment contained two counts alleging that the respondent on two occasions in October, 1956, had carnal knowledge of a girl named Elfreda Henderson, a mental defective on licence from an institution for mental defectives. It will suffice to set out one of these counts, which reads as follows:

> "Statement of Offence. Carnal knowledge of mental defective, contrary to s. 56 (1) (a) of the Mental Deficiency Act, 1913.
>
> "Particulars of Offence. John Shortriggs Head on Oct. 7, 1956, in the County of Cumberland had carnal knowledge of Elfreda Henderson a woman on licence from Dovenby Hall Hospital, an institution for mental defectives."

The superintendent of Dovenby Hall gave evidence for the prosecution, and produced and put in evidence certain documents relating to the girl Henderson for the purpose of proving that she was lawfully detained as a defective and duly let out on licence on the material date. The documents included an order made by the Home Secretary under s. 9 of the Mental Deficiency Act, 1913, and dated July 2, 1947, for Miss Henderson's transfer from an approved school where she then was to a certified institution, as defined in the Act, in Cornwall. Subsequent orders transferring her to other institutions and finally to Dovenby Hall were also produced. The licence permitting her to be absent was not put in evidence. Donovan, J., in the Court of Criminal Appeal, was mistaken in thinking it had been proved and received in evidence.

Counsel for the defence challenged the validity of the girl's detention and certification as a defective as disclosed by these documents. Hinchcliffe, J., ruled that the Home Secretary's order of July 2, 1947, was conclusive and the defence could not go behind it and, in his direction to the jury, he told them as a matter of law that, on the documents produced, Miss Henderson was properly certified as a defective and, on the uncontradicted evidence of the superintendent, Dr. Ferguson, she was a mental defective. In substance, therefore, the only real issue left to the jury was as to the acts of carnal knowledge which were proved by the girl and not seriously challenged. Having been warned by the superintendent, when the girl had been out on licence on a previous occasion, that she was a patient on licence from the institution as a defective, a defence under the proviso to s. 56 was not open to the respondent and he did not give evidence. He was, accordingly, convicted.

Amongst the documents put in evidence at the trial were the two medical certificates required by s. 9 of the Act for the satisfaction of the Secretary of State before he could make a valid order for the girl's transfer to an institution at which she would be under compulsory detention as a defective. These certificates stated that she was a moral defective, but neither of them showed that she "required care, supervision and control for the protection of others" which is, by s. 1 of the Mental Deficiency Act, 1913, as substituted by the Mental Deficiency Act, 1927, an essential requirement before any person can be classified as a moral defective. In the Court of Criminal Appeal (Lord Goddard, C.J., Donovan and Havers, JJ.), the Attorney-General admitted the invalidity of the original order of the Secretary of State, and the court, holding the resulting detention unlawful, quashed the conviction.

In the Court of Criminal Appeal two judgments were delivered, one by the Lord Chief Justice and one by Donovan, J. The Lord Chief Justice stated the contention of the Crown as follows ([1957] 3 All E.R. at p. 429):

> " The Attorney-General submitted that all that the prosecution had to prove to establish a case in addition to the fact of carnal knowledge having taken place was that the girl was in fact in an institution for care or treatment or that she was out on licence from such an institution. He submitted that the section did not require proof that the girl was a defective."

Before your Lordships, I understood the Attorney-General to say that the prosecution must prove that the girl in question was an inmate in one of the institutions named and receiving care and treatment therein or on licence therefrom and that, at the time of intercourse, she was a mental defective. I understood this as meaning that proof of mental deficiency must be given in addition to, and independently of, the fact of lawful detention. At the conclusion of his judgment the Lord Chief Justice said (ibid.):

> " So that there may be no doubt on the matter I desire to say that where a man is prosecuted for this offence, which is now an offence against s. 8 of the Sexual Offences Act, 1956, evidence must be given by the production of the relevant documents that the woman in respect of whom the charge is made was lawfully subject to the Act at the time of the offence."

Donovan, J., used these words (ibid., at p. 431):

> " Accordingly, I think that the prosecution were right to produce the various documents relating to the woman's detention, and to produce the licence. Nor do I think that such a practice, which ought to be followed, can lead to any great difficulty unless there are many of these patients illegally detained, which I prefer not to suppose."

The Attorney-General submitted that these statements placed a burden on the prosecution which was not justified by the Act, and that they would tend to result in a trial within a trial of issues more suitable to proceedings by way of habeas corpus or certiorari, or in actions for false imprisonment, and that the necessity for strict proof of documents made, or facts having taken place, many years ago would, in some cases, render prosecutions impossible.

My Lords, it will be apparent from what I have said, and, indeed, the Court of Criminal Appeal so stated, that this appeal raises questions of considerable importance with regard to the construction of s. 56 of the Act and the matters essential for the prosecution to prove. It may be convenient at this stage to set out s. 56 (1) in full, and to refer to certain other sections of the Act before stating what I consider to be the answer to the problems which have been raised.

> " 56—(1) Any person—(a) who unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of, any woman or girl under care or treatment in an institution or certified house or approved home, or whilst placed out on licence therefrom or under guardianship under this Act; or
>
> " (b) who procures, or attempts to procure, any woman or girl who is a defective to have unlawful carnal connexion, whether within or without the King's dominions, with any person or persons; or
>
> " (c) who causes or encourages the prostitution, whether within or without the King's dominions, of any woman or girl who is a defective; or
>
> " (d) who, being the owner or occupier of any premises, or having or acting or assisting in the management or control thereof, induces or knowingly suffers any woman or girl who is a defective to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally; or

A "(e) who, with intent that any woman or girl who is a defective should be unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally, takes or causes to be taken such woman or girl out of the possession and against the will of her parent or any other person having the lawful care or charge of her;

"shall be guilty of a misdemeanour and shall be liable upon conviction on B indictment to be imprisoned, with or without hard labour, for any term not exceeding two years unless he proves that he did not know, and had no reason to suspect, that the woman or girl was a defective."

Section 1, as substituted, defines mental defectives, and the provisions thereof relevant to the present case are as follows:

C "(1) The following classes of persons who are mentally defective shall be deemed to be defectives within the meaning of this Act:—(a) Idiots [who are defined]; (b) Imbeciles [defined]; (c) Feeble-minded persons [defined]; (d) Moral defectives, that is to say, persons in whose case there exists mental defectiveness coupled with strongly vicious or criminal propensities and who require care, supervision and control for the protection of others.

D "(2) For the purposes of this section, 'mental defectiveness' means a condition of arrested or incomplete development of mind existing before the age of eighteen years, whether arising from inherent causes or induced by disease or injury."

Section 2 provides for defectives being dealt with under the Act by being sent to or placed in an institution or placed under guardianship. Section 4 deals E with sending a defective to an institution or placing him under guardianship by order of a judicial authority or under order of a court, or in the case of a defective detained in a prison or other specified place of a like nature, by order of the Secretary of State. Section 10 authorises the detention of a defective sent to an institution under order, and of a defective placed under guardianship by any such order. And, by sub-s. (2), provides that, subject to regulations, F an order placing a defective under guardianship shall confer on the person named as guardian such powers as would have been exercisable if he had been the father of the defective and the defective had been under the age of fourteen. Section 12 (2) enacts that, subject to the foregoing provisions of the section, a defective placed by his parent or guardian in an institution or under guardianship may be detained. Section 30 places on local health authorities the duty to G ascertain what persons within their area are defectives subject to the Act (otherwise than under para. (a) of s. 2 (1)), and to make provision for them. Section 49 (2) applies to certified houses all the provisions of the Act relating to institutions and the patients therein. Section 50 enables the Minister of Health to approve certain premises wherein defectives are received in certain circumstances, and such premises are referred to as an approved home. Sub-section (2), H however, enacts that it shall not be lawful to receive or detain in an approved home any person ordered to be sent to an institution for defectives under an order of the judicial authority, or a court, or a Secretary of State. Section 56 is in Part 4 of the Act which deals with offences and legal proceedings. Section 52 is, I think, worth setting out. It reads:

I "If any person, having been warned by a person appointed to be guardian of a defective under this Act, or by a person under whose charge a patient absent from an institution or from a certified house has been placed, not to supply intoxicants to or for the use of the person under his guardianship or charge, knowingly supplies any intoxicants to or for the use of that person, he shall be guilty of an offence under this Act: Provided that a person shall not be guilty of the offence of supplying intoxicants in contravention of the warning if the person giving the warning refuses, when required so to do, to produce the authority under which he acts."

It will be observed that the last-mentioned section does not create the offence of knowingly supplying intoxicants to a defective, but of supplying intoxicants after warning to " a person " under guardianship or absent from an institution.

Returning to s. 56, here, also, it will be noticed that nowhere is the simple offence of having carnal knowledge of a defective created, and in sub-s. (1) (a) the word " defective " does not appear. The Court of Criminal Appeal construed the words " under this Act " at the conclusion of sub-s. (1) (a) distributively as applying to the preceding words " under care or treatment in an institution or certified house or approved home, or whilst placed out on licence therefrom ", and concluded that the sub-section applies—to quote from the judgment of Donovan, J. ([1957] 3 All E.R. at p. 430)—only to

> " a person who has been found to belong to one of the four categories of defectives specified in s. 1, and who is, in consequence of an order made under the Act, having care or treatment in an institution, or is out on licence by virtue of regulations made under the Act."

My Lords, I think that the presence of the words " or approved home " negatives this construction as there is no machinery anywhere in the Act for placing anyone in an approved home by order or in any other manner. In the present case, however, your Lordships are concerned only with the case of a person who was purported to be detained in, and let out on licence from, an institution under the provisions of the Act.

In my opinion, the sub-section has been carefully framed for the protection of persons who are undergoing care or treatment as defectives in certain specified institutions, or are on licence or under guardianship under the provisions of the Mental Deficiency Act, 1913. The Lord Chief Justice observed (ibid., at p. 429) that it would, no doubt, be presumed that, prima facie, a person in a certified institution was a defective within the Act. I respectfully agree with this view, which is, I think, reinforced by the words " under care or treatment" which, in the context, must mean under care or treatment as a defective within the meaning of the Act. In my view, on proof that a girl is detained as an inmate in one of the specified institutions and is under care or treatment therein as a defective or is shown by the production of the licence to be out on licence from one of those places to which the system of licences under the Act is applicable, that is prima facie proof that she is a defective lawfully under care or treatment as such, and I think the Attorney-General—if I correctly understood him as previously stated—was assuming an unnecessary burden if he meant that it is incumbent on the prosecution in all cases under s. 56 to satisfy a jury by medical evidence that the girl in question comes within one or other of the categories specified in s. 1. I think this is to be presumed. But the foundation for the presumption, in the case of a person under detention or on licence, is the legality of the detention and the necessity for a licence to justify the patient's absence, and, if it is shown and admitted, as in the present case, that, on the face of the documents produced and received in evidence without objection, the detention was illegal, the whole basis of the sub-section and the presumption of defectiveness goes and the prosecution must fail. I do not think anything more than what I have stated above is required to establish a prima facie case, but it is right and proper that the prosecution should have in court, and make available for inspection by defending counsel, the relevant orders or other documents on which the detention is based, so that, in a proper case, and subject to questions of admissibility in evidence, the presumption of legality may be rebutted.

My Lords, it remains only to state that I agree with the reasons of the Court of Criminal Appeal for rejecting the Crown's contention that, even if the original order was invalid, it had been cured by the continuation orders and a subsequent reclassification of the girl by the superintendent placing her in a different category of defectiveness coupled with his evidence to the effect that she was at the material date a defective within that category.

For these reasons, I would dismiss this appeal.

I desire to add that I have read the opinion about to be delivered by my noble and learned friend, LORD SOMERVELL OF HARROW, and that I agree with the views expressed therein.

LORD SOMERVELL OF HARROW: My Lords, I agree with the opinion that has been given by my noble and learned friend, LORD TUCKER, and have nothing I wish to add to it.

I have had the advantage of reading the opinion about to be given by my noble and learned friend, LORD DENNING, and would like briefly to make my reservations. My noble friend thinks that the Secretary of State's order of July 2, 1947, was voidable and not void. I am not satisfied that the order was not void. On the wording of s. 9 of the Mental Deficiency Act, 1913, I think the certificates may well be for this purpose part of the order to be looked at in order to see whether it is good on its face. If they are not part of the order, it might, I think, be maintained that they afford no evidence on which the order made could validly have been based. In either case, I would wish to reserve the question whether the order would not be void rather than voidable.

It is conceded that the court had material before it which would have led to the order being quashed on certiorari or other appropriate proceedings. The next question, as it appears to me, can be stated in this way. Is a man to be sent to prison on the basis that an order is a good order when the court knows it would be set aside if proper proceedings were taken ? I doubt it. The case was never argued on these lines before the Court of Criminal Appeal. The distinction between void and voidable is by no means a clear one, as a glance at the entry under " void " in STROUD'S JUDICIAL DICTIONARY shows. I am not satisfied that the question whether a man should go or not go to prison should depend on the distinction.

I would dismiss the appeal for the reasons given by my noble and learned friend, LORD TUCKER.

LORD DENNING: My Lords, the first point is whether it is necessary for the prosecution in such a case as this to prove that the woman was lawfully detained; and, if it is necessary, how are they to prove it. The Lord Chief Justice (LORD GODDARD) gave this ruling on the point ([1957] 3 All E.R. at p. 429):

> " So that there may be no doubt on the matter I desire to say that where a man is prosecuted for this offence . . . evidence must be given by the production of the relevant documents that the woman in respect of whom the charge is made was lawfully subject to the [Mental Deficiency Act, 1913] at the time of the offence."

The Lord Chief Justice was, I think, only referring to the case of a woman detained under compulsion, not to a voluntary patient. In such a case I think his ruling is correct. The prosecution must prove that the woman is *lawfully* under care or treatment, and they can only do this by proving that she is *lawfully detained*; and they must prove that she is under care or treatment *as a defective*, not for any other illness. But they need not prove that she *is* a defective. Suffice it to prove that she is lawfully detained *as* a defective. That raises a presumption that she is a defective. The accused man is protected from any injustice by the proviso which gives him a defence if " he proves that he did not know and had no reason to suppose " that she was a defective. So also, with a woman " placed out on licence ", I think there must be in force a subsisting order for her detention. The medical superintendent cannot grant her a licence to be absent unless he has a right to compel her to stay; and she is only " on licence " so long as there is a right to bring her back: see regs. 95 to 97 of the Mental Deficiency Regulations, 1948 (S.I. 1948 No. 1000), and s. 42 of the Mental Deficiency Act, 1913.

The Attorney-General took exception to the ruling of the Lord Chief Justice. He submitted that it was not necessary for the prosecution to prove that the woman was *lawfully detained.* If there were such a burden on the prosecution, he foresaw great difficulty in discharging it. The prosecution would have to call the medical men who examined the woman many years ago when she was first certified as a defective, and also evidence that she was " found neglected ", or whatever else was the particular ground on which she was " dealt with " under the Mental Deficiency Act, 1913. That would be a burden of such magnitude that the imposing of it would make the section a dead letter.

I do not think that the difficulty is nearly so great as the Attorney-General fears. It is only necessary, as the Lord Chief Justice said, to produce the relevant documents. My noble and learned friend, Lord Tucker, says that it is not necessary even to go as far as that. It is sufficient to prove that the woman detained is an inmate in an institution—under care or treatment as a defective—and then rely on a presumption of legality without giving in evidence any of the relevant documents. I cannot bring myself to go as far as this. It seems to me to offend against a fundamental principle. No one in this country can be detained against his will except under the warrant of lawful authority; and, when that warrant is required by law to be in writing, it must be produced on demand to the person detained and to any other person properly concerned to challenge the detention. When the legality of the detention has to be proved in a court of law, the document itself must be produced. It is the best evidence and nothing less will do. In *The Queen's Case* (1) ((1820), 2 Brod. & Bing. 284 at p. 289), Abbott, C.J., giving the opinion of the judges to this House, said that it

> " . . . is a rule of evidence as old as any part of the common law of England, namely, that the contents of a written instrument, if it be in existence, are to be proved by that instrument itself, and not by parol evidence ":

and in *Strother* v. *Barr* (2) ((1828), 5 Bing. 136 at p. 151), Best, C.J., said that

> " . . . great writers on the law of evidence say, if the best evidence be kept back, it raises a suspicion that if produced it would falsify the secondary evidence on which the party has rested his case."

Whilst I readily acknowledge that that rule has been relaxed in modern times, it has never, so far as I know, been relaxed in the case of orders which deprive a person of his or her liberty. If the order is in existence, it ought to be produced. If it is kept back, it raises a suspicion that there is something wrong with it. In 1802, when a man was committed to the Fleet prison for debt, it was held that, to prove that fact, the original warrant of commitment must be produced: see *Salte* v. *Thomas* (3) ((1802), 3 Bos. & P. 188). And in 1847, when a question arose whether a prisoner in the bridewell at Abingdon was in lawful custody, Maule, J., ruled that the oral evidence of the governor was not sufficient; nor was the calendar signed by the clerk of assize; but it could only be proved by the record of his conviction at the assizes: see *R.* v. *Bourdon* (4) ((1847), 2 Car. & Kir. 366).

But this would put the prosecution in a great difficulty, says the Attorney-General. The documents do not prove themselves; and it may be next to impossible to prove them strictly. This is a criminal case and the Evidence Act, 1938, does not apply. Counsel for the respondent says that there is no such difficulty. It is sufficient to produce the original orders. I agree with him.

Consider for a moment how legality would be proved in habeas corpus proceedings. If the woman herself applied for a writ of habeas corpus, it would be sufficient for the medical superintendent of the hospital, in his return to the writ, to set out the order of detention and the continuation orders as a justification

A for her detention. He would not have to prove those orders by calling the makers of them, or by proving the handwriting on them, or anything of that sort: see *Watson's Case* (5) ((1839), 9 Ad. & El. 731 at pp. 787-796). The production of them would suffice: see *Greene* v. *Home Secretary* (6) ([1941] 3 All E.R. 388). If the orders disclosed on the face of them a ground sufficient in law for her detention, the court would hold her detention to be lawful: see B *Wilmot's Opinions* (7) ((1758), Wilm. at p. 77)*: unless she could show that the orders were forgeries or that there was no evidence on which the orders could be sustained: see the Habeas Corpus Act, 1816, *Re Bailey, Re Collier* (8) ((1854), 3 E. & B. 607), *R.* v. *Board of Control, Ex p. Rutty* (9) ([1956] 1 All E.R. 769 at p. 775). It is true, of course, that the procedure in habeas corpus proceedings is far removed from the present. But if the woman herself— C seeking to challenge the legality of her detention in the proper way—can only call for *production* of the orders for her detention, it would seem strange if a third person—seeking to challenge the legality in his own interests—could call for strict proof of them.

The solution to the difficulty is, I think, this: the orders prove themselves by production of the originals from the proper custody. They are the modern D successors of the old inquisitions in lunacy. The findings and orders made on such inquisitions were always receivable in evidence by the production of the original record from the proper custody without more ado. LORD HARDWICKE, L.C., so ruled in 1742 (see *Sergeson* v. *Sealey* (10) (1742), 2 Atk. 412), and LORD ELLENBOROUGH in 1811 (see *Faulder* v. *Silk* (11) (1811), 3 Camp. 126), and those cases were applied just over fifty years ago in *Van Grutten* v. *Foxwell* (12) ([1897] A.C. 658) E (see *Hill* v. *Clifford* (13), [1907] 2 Ch. 236 at pp. 244, 245). The inquisition in lunacy has now been replaced by an inquiry by a justice of the peace, a master in lunacy or other public officer. Just as with the old inquisitions in lunacy, so also with these inquiries into defectiveness of mind, the orders made on them are receivable in evidence on production of the original from the proper custody without further proof except to identify the person who was the subject F of the inquiry.

The reason why these orders are admissible is because they are in the nature of proceedings in rem. They affect the status of the individual and her capacity. They are made by a competent public officer whose duty it is to hold a judicial or quasi-judicial inquiry and to record his findings. If he finds that the woman is a defective, many public servants will be called on to take action, some to G detain her, others to take charge of her property. It is essential to the orderly and just conduct of business that all these public servants—and any one else concerned with her affairs—should be able to act on the faith of the orders as they stand; and should not be put to the proof of the correctness of the findings therein—a task which would often be impossible after the lapse of time. They are, therefore, made admissible in evidence against all the world: see STARKIE H ON EVIDENCE (3rd Edn.) (1842), Vol. 1, pp. 307-310. An interesting parallel is to be found in the orders made by the Home Secretary during the war for the detention of suspected persons. LORD WRIGHT said in *Greene* v. *Home Secretary* (6) ([1941] 3 All E.R. at p. 402):

> " The order made by the Home Secretary in the terms of reg. 18B speaks for itself. It is admissible as a public executive document to show a good I cause for the detention, and needs no extrinsic justification."

Applying this principle, it seems to me that the orders made by a competent authority under the Mental Deficiency Act, 1913, such as the order of a judicial authority under s. 6, or of a Secretary of State under s. 9, or the continuation orders of the board of control under s. 11, are admissible in evidence on production of the originals from the proper custody and on identification of the party who is the subject of the order. If the originals are not available, certified copies are often made admissible by statute. Thus, in the case of an order made by a Secretary of State under s. 9, a certified copy is admissible under the Documentary Evidence Act, 1868. In the case of the continuation orders, there is no need to produce the originals if the secretary to the board certifies, under s. 11 (5), that the initial order has been continued.

---

* On Mar. 9, 1758, WILMOT, J., and other judges gave certain opinions before the House of Lords on the law relating to the writ of habeas corpus. The particular matter to which reference is made here is the subject of the tenth question to which WILMOT, J., delivered his answers and is reported in *Wilmot* at pp. 106-108.

What, then, does an order of this kind prove when produced from the public custody? It is conclusive proof of its own existence, that is to say, that an order was made as the document says it was; and it is prima facie evidence (but not conclusive evidence) of the truth of the facts recited in it which are essential to its validity; and, if uncontradicted, it ought to be regarded as sufficient evidence of those facts: see *Harvey* v. *R.* (14) ([1901] A.C. 601 at p. 611), *Hill* v. *Clifford* (13) ([1907] 2 Ch. at pp. 244, 245).

The result is that, in an ordinary case, in order to show that the woman is lawfully detained as a defective, all that the prosecution have to do is to call the medical superintendent to produce the original order for detention and the continuation orders, and, in addition, if the woman has been placed out on licence, to prove that fact. That was done in this case, and was held by the judge at the trial, Hinchcliffe, J., to be sufficient. But it was upset by the Court of Criminal Appeal on the ground that, looking at the other documents which were also produced—but not proved—Miss Henderson was not lawfully detained at all. This brings me to the second point.

The Court of Criminal Appeal have held that Miss Henderson was unlawfully detained for more than ten years and have severely criticised all those concerned in detaining her. The Attorney-General has challenged this finding. He admitted before your Lordships that the original order for her detention might have been quashed—if the appropriate application had been made for the purpose—but he contended that it stood until it was quashed and, accordingly, that the continuation orders and the licence were good. He cited Lord Radcliffe for his purpose:

> "Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get [the order] quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders":

see *Smith* v. *East Elloe Rural District Council* (15) ([1956] 1 All E.R. 855 at p. 871). This contention of the Attorney-General was, in effect, though not in terms, a contention that the original order was not absolutely *void*, but only *voidable*; and, as it had not been avoided before the continuation orders were made, these remained good. Even if the original order were quashed today, the continuation orders would still be good. This is a point of the first importance which, by itself, would justify the Attorney-General in giving his certificate for an appeal to this House. I have thought it right, therefore, to consider it on principle. But first let me state the relevant facts. These all appear on the documents, and this House is in as good a position to determine them as the Court of Criminal Appeal..

Miss Henderson was born on July 6, 1928, in Cumberland and left school at fourteen. She then went out to work, but when she was nearly sixteen her mother left home. Some months passed. Her father found that she was beyond his control and brought her before the juvenile court as a refractory young person. The court ordered her to be sent to an approved school. She was at an approved school in Somerset for over two years. She then absconded and was brought back by the police. The sister in charge of the school said she was absolutely irresponsible and unfit to be at large. Thereupon the question arose whether she ought not to be sent to an institution for defectives under s. 9 of the Mental Deficiency Act, 1913*, which says:

> " Where the Secretary of State is satisfied from the certificate of two duly qualified medical practitioners that any person who is . . . in [an approved school] . . . is a defective, the Secretary of State may order that he be transferred therefrom and sent to an institution for defectives . . ."

On June 10, 1947, she was examined by two medical men, one the certifying medical officer for Somerset, the other a medical practitioner in Bath. Each examined her separately, and each certified that he had satisfied himself that she was a moral defective. Then, on July 2, 1947, just before she was nineteen the Secretary of State made this order:

> " Whereas, in pursuance of s. 9 of the Mental Deficiency Act, 1913, the above named Freda (properly Elfreda) Henderson has been duly certified to be mentally defective within the meaning of the above mentioned Act as subsequently amended, I hereby order that she be transferred from the school in which she is now detained to the Convent of the Good Shepherd Certified Institution of St. Anne's, Saltash, Cornwall.
>
> (Signed) J. Chuter Ede,
> One of His Majesty's Principal
> Secretaries of State."

If that order is read with s. 9 (as it should be), it means that the Secretary of State was satisfied from the certificate of the two doctors that Miss Henderson was a defective. This reference to the medical certificates means that they are to be read with the order as part of the record: see *R.* v. *Medical Appeal Tribunal, Ex p. Gilmore* (16) ([1957] 1 All E.R. 796 at p. 800). And " satisfied " in the Act means reasonably satisfied. If, on reading the medical certificates, no reasonable person would have been satisfied that she was a defective, the order is liable to be quashed.

What do the medical certificates show ? Each doctor said he was satisfied that she was a moral defective, but each stated insufficient facts to warrant this conclusion. One doctor referred to " her conduct ", the other to " her behaviour " without going into details. One said she needed care and supervision " for her own protection ", but he did not go on to say that she needed it for the protection of others. The other said nothing about it. It is this defect which rendered the certificates insufficient. The Secretary of State ought not to have acted on them as they stood. He ought to have referred them back to the doctors for further consideration.

In fairness to the medical men, I would pause to say that it does not follow that their diagnosis was wrong. It is notoriously difficult to describe the characteristics of mental defectiveness. A doctor may well be able to diagnose it by his own observation of the patient's behaviour, but he may not be able to portray her behaviour adequately in words. The trouble with the two certificates may be, therefore, not in a faulty diagnosis, but in the bad expression of their reasons. The rest of the girl's history supports this view. Within a few days of going to the convent in Cornwall, she was found to be of such dangerous or violent propensities that the board of control ordered her to be removed to the Moss Side State Institution at Liverpool—a place specially set aside for serious cases of mental defectiveness. Whilst she was there, continuation orders were made; and, when she became of age, the statutory visitors held the important reconsideration of her case which the law requires. They reported that she was a moral defective and was a proper person to be detained. The statute gives a right of appeal from that decision, but neither she nor her parents appealed. After she had been five years at Moss Side, she had improved sufficiently to be sent to an ordinary institution. She was sent eventually to Dovenby Hall. In 1954, when she was twenty-six, the medical superintendent of that hospital, Dr. Ferguson (who gave evidence at the trial), classified her as a "feeble-minded person" rather than a "moral defective", but she was still a defective within the Act, and the board of control made a continuation order. By Oct. 31, 1955, she had improved so much that Dr. Ferguson granted her a licence to St. Catherine's College, Keswick. He did this so as to try to rehabilitate her. She worked at that college as one of the domestic staff. It was in 1956, whilst she was still out on licence, that the respondent—in spite of explicit warnings—had intercourse with her. In October, 1957, she was discharged. Apparently she was then cured, for shortly afterwards she married another man.

---

* See, as regards the amendment of this enactment, footnote †, p. 679, ante.

On that history, I ask myself what effect did the initial mistake have on all that followed? Was it the cause of her detention over the next ten years as the Court of Criminal Appeal seems to have thought? I should have said it was not. The chain of causation was broken at innumerable points, just as it was in the celebrated case of *Harnett* v. *Bond* (17) ([1924] 2 K.B. 517 at pp. 538-542; [1925] A.C. 669 at p. 682). It was certainly broken on every continuation order. Under the statute, the original order lasted only for one year and would then have expired unless a continuation order had been made. Before this was made, there had to be special reports on the girl by the statutory visitors and by the medical officer, together with a certificate that she was still a proper person to be detained; and it was only after considering them all that the board of control made a continuation order. That first continuation order would itself have expired after five years unless another continuation order had been made after another investigation. And so on, from one continuation order to another, she was only detained as a result of an independent decision freshly made after the most careful reconsideration of her case. These continuation orders were not made by automata with a rubber stamp. They were made by responsible people to whom Parliament had entrusted the task. On a just appraisal of the case, these continuation orders cannot be ignored in point of fact, but can they be ignored in point of law?

Counsel for the respondent said that the original order was bad and that, therefore, the continuation orders were bad. They depended on the original order which was itself void. Nothing could save the continuation orders, he said, if the original order was bad. This contention seems to me to raise the whole question of *void* or *voidable*; for, if the original order was void, it would, in law, be a nullity. There would be no need for an order to quash it. It would be automatically null and void without more ado. The continuation orders would be nullities too, because you cannot continue a nullity. The licence to Miss Henderson would be a nullity. So would all the dealings with her property under s. 64 of the Mental Deficiency Act, 1913. None of the orders would be admissible in evidence. The Secretary of State would, I fancy, be liable in damages for all of the ten years during which she was unlawfully detained, since it could all be said to flow from his negligent act: see s. 30*.

But if the original order was only voidable, then it would not be automatically void. Something would have to be done to avoid it. There would have to be an application to the High Court for certiorari to quash it. The application would have to be made by the person aggrieved—Miss Henderson—and not by a stranger; and she would have to make it within six months unless the court extended the time. And being only voidable, the court would have a discretion whether to quash it or not. It would do so if justice demanded it, but not otherwise. Meanwhile the order would remain good, and a support for all that had been done under it: see the principles discussed in *Dimes* v. *Grand Junction Canal* (*Proprietors*) (18) ((1852), 3 H.L. Cas. 759 at p. 786), *McPherson* v. *McPherson* (19) ([1935] All E.R. Rep. 105 at pp. 111. 112). In this case, therefore, if the original order was only voidable, the continuation orders would be good. So would the licence. All dealings with her property would be valid. All the orders would be admissible in evidence: see *Leighton* v. *Leighton* (20) ((1720), 1 Stra. 308), Hubback on Succession (1844), pp. 590, 591: and the Secretary of State would not be liable in damages: see *Everett* v. *Griffiths* (21) ([1921] 1 A.C. 631).

---

* Section 30 of the Mental Deficiency Act, 1913, was amended by the National Health Service Act, 1946, s. 50 and Sch. 9. The powers of the Secretary of State under s. 30 of the Mental Deficiency Act, 1913, were transferred to the Minister of Health by the Ministry of Health (Lunacy and Mental Deficiency, Transfer of Powers) Order, 1920 (S.R. & O. 1920 No. 809), art. 2 and Sch. (5 HALSBURY'S STATUTORY INSTRUMENTS, 35, 36).

The vital question to my mind is therefore: Was the original order absolutely void or was it only voidable ? If the order had been outside the jurisdiction of the Secretary of State altogether, it would have been a nullity and void: see the *Marshalsea Case* (22) ((1612), 10 Co. Rep. 68b). But that is not this case. The most that appears here is that the Secretary of State—acting within his jurisdiction—exercised that jurisdiction erroneously. That makes his order voidable and not void. It is said that he made the order on no evidence or on insufficient materials. So be it. His error is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not: see *R.* v. *Nat Bell Liquors, Ltd.* (23) ([1922] 2 A.C. 128 at p. 151, per Lord Sumner). If that error appears on the face of the record—as it is said to do here—it renders the order liable to be quashed on certiorari, but it does not make it a nullity: see *R.* v. *Medical Appeal Tribunal, Ex p. Gilmore* (16) ([1957] 1 All E.R. at p. 804, per Parker, L.J.). Unless and until it is so quashed, it is to be regarded as good. It is, moreover, sufficient to support all the continuation orders made on the faith of it. Even if the original order should be set aside, the continuation orders would remain good; for it is a general rule that, when a voidable transaction is avoided, it does not invalidate intermediate transactions which were made on the basis that it was good: see *De Reneville* v. *De Reneville* (24) ([1948] 1 All E.R. 56 at p. 60, per Lord Greene, M.R.), and *R.* v. *Algar* (25) ([1953] 2 All E.R. 1381 at p. 1384, per Lord Goddard, C.J.). Even if the woman applied for habeas corpus, she would be no better off, because the court, on seeing the continuation orders still standing, would not release her; just as it would not release her if it appeared that there would be danger in setting her at large: see *Re Shuttleworth* (26) ((1846), 9 Q.B. 651). I would uphold, therefore, the contention of the Attorney-General that, whatever the position of the original order, the continuation orders were good.

Another consequence of the order being only voidable is this: that, on a charge under s. 56 (1) (a), there will be no occasion for a trial within a trial—a trial whether the woman could have got the order quashed within a trial of the man for the offence. That would be a very undesirable state of affairs, but it will not arise if the order is to be regarded by the trial court as good, as I think it must—and as, indeed, Hinchcliffe, J., ruled in the present case, I think quite rightly. It all goes to show how important it is to keep this distinction between void and voidable in mind, especially in the case of mental patients. There are many cases in the books where mistakes have been made by medical men in filling in the certificates leading to detention orders. Sometimes it happens through an oversight, sometimes through carelessness, sometimes through misapprehension as to the legal obligation. Very often it is a highly technical ground: see *Murray* v. *Murray* (27) ([1940] 4 All E.R. 250 at pp. 252, 253, per Sir Wilfrid Greene, M.R.). If these orders were on such a ground to be absolutely void it would lead to much injustice in the law of divorce, the law of tort, and so forth; whereas if they are only voidable, there is no such injustice.

It is the failure to keep this distinction in mind which has led to the difficulties in the present case. Instead of considering whether the original order was void or voidable, the Court of Criminal Appeal considered whether it was valid or invalid, and, having held it invalid, they held that the woman was unlawfully detained; whereas they should have held it was only voidable, and, not having been avoided, the detention of Miss Henderson at the material time was lawful. In quashing the conviction, therefore, they acted on a mistaken ground.

But that is not quite the end of the matter. There is another point. Is it right that the conviction should be restored ? The decision of the Court of Criminal Appeal was founded on admissions made by the Crown. I cannot think that the distinction between void and voidable was made clear to the court. I would not allow the Crown to clarify it here at the expense of the respondent so as to obtain a conviction. But I would allow them to clarify it in the public interest. Once a man has been acquitted by an English court, it is altogether exceptional for the Crown to be allowed to appeal from the acquittal. Parliament has only allowed it here so as to enable a ruling to be obtained on a point of law of exceptional public importance. When the Attorney-General comes to this House, seeking for such a ruling, I would, myself, try to give him an answer; and this I have done. But I would not, on this account, restore the conviction if it was not fair to do so, having regard to the course of proceedings in the court below.

On this ground, I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Director of Public Prosecutions* (for the Crown); *Ludlow, Head & Walter* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

W. COLLIER, LTD. *v.* FIELDING (VALUATION OFFICER).

[COURT OF APPEAL (Lord Evershed, M.R., Parker and Sellers, L.JJ.), February 20, 21, 1958.]

Rates—Valuation—Plant and machinery—" Ovens "—" Chambers for conditioning or treatment "—Trays attached to endless belt passing through oven—Whether in the nature of a structure—Plant and Machinery (Valuation for Rating) Order, 1927 (*S.R. & O.* 1927 *No.* 480), *schedule, class* 4—*Rating and Valuation Act,* 1925 (15 *&* 16 *Geo.* 5 *c.* 90), *s.* 24 (1).

A baker's oven weighed forty-five tons and was over thirty-three feet in length; it consisted of mild steel sections bolted together on a concrete platform. Its mechanical equipment comprised five electric motors, shafting and chains, and to the chains were attached sixty metal trays each eight feet long. The purpose of these moving trays was to carry the dough in tins placed on the moving trays at such a speed as would ensure that the time elapsing between the placing of the tins on the trays at the feeding entrance and their removal at the discharge exit was sufficient for cooking the dough into loaves of bread. This mechanical equipment was removable without removing the outer covering, but was only removed for repairs or cleaning. A similar arrangement was used for a prover, a rather smaller apparatus for conditioning the dough before baking. By the Plant and Machinery (Valuation for Rating) Order, 1927, schedule, class 4, specified parts of plant or machinery (including " ovens " and " chambers for conditioning ") are rateable " whenever and only to such extent as " the part " is, or is in the nature of, a . . . structure ". The static parts of the oven, therefore, and of the prover (as a chamber for conditioning) were rateable.

The Lands Tribunal found that the oven and prover could be used as an oven and as a prover respectively without the moving parts, although it would not be economical so to use them, and that " the moving parts do not form an essential feature of the oven as an oven or the prover as a chamber for conditioning, they are provided merely to ensure a continuous flow, and are . . . the furniture and not integrated in the structure and become part of it ".

Held: the moving parts were not rateable because the tribunal's finding amounted to a finding of fact (with which the court would not interfere) that the moving parts (though essential to the commercial purposes of the plant) were not integrated in the structure of either piece of apparatus so as to become part of it as a structure, which was the proper test of rateability of parts of plant or machinery under class 4 of the schedule to the Order of 1927.

Appeal dismissed.

[**Editorial Note.** The decision in the present case should be compared with that in *Shell-Mex and B.P., Ltd.* v. *Holyoak* (*Valuation Officer*) (p. 702, post).

As to plant and machinery deemed to be part of the hereditament for rating purposes, see 27 HALSBURY'S LAWS (2nd Edn.) 393, 394, para. 827; and for cases on the subject, see DIGEST Supps.

For the Rating and Valuation Act, 1925, s. 24 (1), see 20 HALSBURY'S STATUTES (2nd Edn.) 130.]

Case referred to:

(1) *Cardiff Rating Authority & Cardiff Assessment Committee* v. *Guest Keen Baldwins Iron & Steel Co., Ltd.*, [1949] 1 All E.R. 27; [1949] 1 K.B. 385; [1949] L.J.R. 713; 113 J.P. 78; 2nd Digest Supp.

Case Stated.

The respondent ratepayers were the occupiers of a bakery, Duva Bakery, Leigh, assessed in the valuation list for the borough of Leigh at £446 net annual value, £111 rateable value from Apr. 1, 1954, and £696 net annual value, £174 rateable value from Jan. 1, 1955, under a decision of a local valuation court of South Lancashire Local Valuation Panel given on Dec. 13, 1955. They appealed to the Lands Tribunal against the decision on the ground: (i) that the assessments proposed by the valuation officer and adopted by the local valuation court wrongly included as rateable plant and machinery (a) trays, chains, sprocket wheels and shafts, driving wheels and shaft, gears, motors, fans, etc., used in connexion with baking ovens, (b) provers, including trays, chains, sprocket wheels and shafts, driving wheels and shaft, gears and motors, etc.; and (ii) that by reason thereof the assessment under appeal was excessive and ought to be reduced.

The two ovens were " sixty tray Uniflow ovens ", marketed by Baker Perkins, Ltd. They were thirty-three feet, five inches long, twelve feet, four inches wide and nine feet, six inches high, and they each weighed forty-five tons of which nine tons was attributable to the moving parts. Each oven was put together on the site and consisted of mild steel sections bolted together and bolted to the concrete platform which formed the floor. To the sections were attached an inner casing of 3/16ths inch stainless steel sheeting and an outer casing of alloy with insulating material between. The two provers were (i) a ninety-four tray type, shaped like an inverted E, bolted to three channelled concrete bases. The overall length was twenty-four feet, three inches, the overall height, ten feet, six inches, and the overall width ten feet, three inches. The total weight was sixteen tons of which seven and a half tons was due to the moving parts. (ii) an eighty-four tray type of an inverted L shape, also bolted to a concrete base. Its overall length was twenty feet, ten inches, the overall height eleven feet, four inches and the projecting portion was seven feet, four inches above floor level. The weight was similar to that of the other prover. The provers were erected on the site with a framework of mild steel sections on to which the moving parts were fixed, and the whole was covered with alloy sheet panelling to the sides and ends and fitted with a boarded top.

The mechanical equipment of both ovens and provers consisted of electric motors, shafting, etc., and chains to which were attached metal trays eight feet long. The equipment in the ovens was removable without removing the outer casing and was removed for cleaning and repairs, but to obtain access to the moving parts of the prover, panels of the outer covering had to be removed.

The purpose of the moving parts of the ovens was to carry the dough in tins placed on the moving trays at such a speed as would ensure that the time elapsing from the placing of the tins on the trays at the feeding entrance to their removal at the discharge exit was sufficient to ensure the correct cooking of the dough into loaves of bread. The purpose of the mechanical equipment of the provers was to provide an endless belt of trays to carry the dough, which had been cut to pieces of a uniform weight and placed in tins from the feeding entrance to the discharge exit at such a speed as would ensure that it remained in an atmosphere of a suitable fixed temperature and humidity for such a time as would enable the dough to rise or ferment fully so that it was ready for baking and to give a polish to the finished loaf.

The Lands Tribunal held (1 R.R.C. 246) that the static portions of the provers were rateable as chambers for conditioning which were structures or in the nature of structures within the Plant and Machinery (Valuation for Rating) Order, 1927, but it held that the motors were not rateable under class 1 (a) of the schedule to the order and that the moving parts of both ovens and provers were not rateable since they did not themselves form part of the structure of either oven or prover. The valuation officer appealed to the Court of Appeal, contending that: (i) the tribunal misdirected itself and was wrong in law in declining to hold that the whole of each oven including the moving parts and motors (or alternatively excluding the motors), was an oven and a building or structure or in the nature thereof and that the whole of each prover, including its moving parts and motors (or alternatively excluding the motors), was a chamber for conditioning and a building or structure or in the nature thereof within class 4 of the schedule to the Plant and Machinery (Valuation for Rating) Order, 1927, and in holding that the moving part (and motors) were not rateable; (ii) there was no evidence to support the tribunal's finding that the moving parts did not form an essential feature of the oven as an oven or of the prover as a chamber for conditioning and that this finding was essential to the tribunal's decision.

Maurice Lyell, Q.C., and *P. R. E. Browne* for the valuation officer.

Michael Rowe, Q.C., and *R. W. Leach* for the ratepayers.

LORD EVERSHED, M.R.: This case is concerned with certain apparatus in the bakery business of the respondent ratepayers, W. Collier, Ltd., known respectively as provers and ovens. It will suffice for the purposes of this judgment if I confine myself in what follows to the ovens. The ovens are made by the well-known firm of Baker Perkins, Ltd. Their nature is set out carefully and fully in the decision of the Lands Tribunal, which says:

> " The two ovens are identical and are marketed as ' Sixty tray Uniflow ovens '."

The name " Sixty tray Uniflow ovens " may perhaps give some clue to the mechanical nature of the contrivance in that, by a system of an endless belt to which trays are attached numbering sixty, loaves can pass through the oven, emerging at the end and having remained subjected to the oven's heat for a sufficient time to convert them into bread of the required consistency and other qualities.

The decision goes on to give the dimensions and weight of these contrivances. The weight is forty-five tons, of which about nine tons is attributable to the moving parts. The issue before us relates to what is there described as "the moving parts". The decision states that the ovens are put together on the site, and that they consist of mild steel sections which are bolted together on concrete platforms. Then occurs this paragraph:

> "The mechanical equipment of each oven comprises five electric motors [which are then described] a working shaft with two sprocket wheels, an idle shaft with two sprocket wheels, four blocks and bearings carry sprocket shafts, two lengths of chain with slot guides connecting the working sprocket wheel to the idle one, a main drive chain from the driving motor to the working shaft, a tension sprocket to adjust the tension main chain drive, sixty metal trays eight feet long fastened to the chains, two oil heaters which pre-heat the oil supply, a time clock and a hand-operated winding handle."

As I am not mechanically minded, this description does not imprint in my mind any particularly clear picture of how this contrivance works or of what its moving parts consist of. But the tribunal had the immense advantage that it visited the hereditament and inspected the ovens and saw them in operation. The decision goes on:

> "All the parts of this mechanical equipment are removable without removing the outer covering. The motors are easily removable and are all taken out for cleaning about every three months. The other parts are only removed when repairs or cleaning become necessary. The purpose of the moving parts of each oven is to carry the dough in tins placed on the moving trays at such a speed as will ensure that the time elapsing from the placing of the tins on the trays at the feeding entrance to their removal at the discharge exit is sufficient to ensure the correct cooking of the dough into loaves of bread. The ovens apart from their moving parts could not be removed without dismantling and they are intended to remain in their present situation until the time comes for them to be scrapped."

I understand the second part of this last sentence to refer to the ovens apart from their moving parts. The question which presented itself to the Lands Tribunal arises on class 4 in the schedule to the Plant and Machinery (Valuation for Rating) Order, 1927. That order was formulated as a result of the deliberations of the committee envisaged in s. 24 of the Rating and Valuation Act, 1925. After an opening sentence which is of vital significance, class 4 consists of a long list or catalogue of apparatus or plant, beginning with acid concentrators and ending with windmills and wireless masts. Without referring to the actual terms of the statute, I think it well to remind oneself that the general scope of the legislation quoad industrial plant was that plant in general should not be rateable; but that general statement was made subject to the qualification that certain plant or parts of plant specified inter alia in class 4 of this schedule was to be rateable, but only to the extent (and I am anticipating the language itself) that the schedule so made it rateable.

The opening words of this class read:

> "The following parts of a plant or a combination of plant and machinery whenever and only to such extent as any such part is, or is in the nature of, a building or structure . . ."

In the appropriate alphabetical places in the catalogue are the words "ovens" and "chambers for conditioning or treatment", a phrase which admittedly covers the provers in the present case. The problem resolves itself into one of a dual character. First, it is necessary to see whether the subject-matter sought to be rated can be identified with some item in the list. Secondly, the question is asked: To what extent is the item involved in the nature of a building or structure?

It has been conceded by counsel for the valuation officer that those are the vital questions.

There is no doubt as regards the first part of the problem. Ovens are in the fifth item of the list: " Burners, forges, furnaces, kilns, ovens and stoves ". Equally, among the list of chambers is found one appropriate to provers. Therefore, the real point in the case below, and equally here, is: To what extent are the ovens (and provers) with which we are concerned in the nature of a building or structure ?

Counsel for the valuation officer has conceded that the motors, of which there are five in these ovens, are not parts of the ovens at all. Therefore, they are excluded from further consideration. It is not now disputed that the motors, as such, are not in the nature of structures, and it is therefore no part of the case before us that they ought to be a subject-matter of rating.

The question has been as to the moving parts, the nature and function of which have been described in the passage cited. Counsel for the valuation officer said with great force that one could not sensibly sever for any relevant purpose these moving parts from the oven as a whole. After all, the oven is described as a sixty tray Uniflow oven. Its purpose is to bake bread, and that is achieved by passing the dough in these trays through the ovens for that purpose. The mere fact that one can physically detach the trays and the apparatus to which the trays are clipped, says counsel, is quite irrelevant. They are an essential part of the oven and therefore the oven as a whole must be regarded as one item, all of it in the nature of a structure, as it is conceded that the framework bolted to the site is a structure.

But the conclusion of the Lands Tribunal was adverse to the valuation officer. I have felt considerable doubt and difficulty in this case, largely because it is not entirely clear to me what were the points which the tribunal put to itself on this question. The three vital paragraphs in the decision read:

> " Upon [the] main contention [of counsel for the valuation officer] [counsel for the ratepayers] emphasised that under Part 4 of the schedule the material words were ' only to such extent as ' and contended that the moving parts of both oven and prover were in effect nothing but conveyor belts within an oven and were not in themselves structures or in the nature of a structure."

I can indicate by reference to that paragraph at once the kind of difficulty which has presented itself. I think nobody will quarrel (certainly nobody in this case has quarrelled) with the validity of the first reference to the argument of counsel for the ratepayers:

> " [Counsel for the ratepayers] emphasised that under Part 4 of the schedule the material words were ' only to such extent as '."

With that learned counsel before us on both sides have been firmly agreed throughout this appeal. But the contention is then attributed to counsel for the ratepayers that the moving parts were not merely nothing but conveyor belts, but were not in themselves structures, as though the view for which counsel contended was that the test to apply was whether these moving parts, in isolation and being detached, were themselves structures or in the nature of structures. I am quite sure that that was not counsel's contention in the court below, as it most clearly has not been his contention here. Restated, the question is: Looking at this sixty tray Uniflow oven, is it, as to all the mechanism of which it is comprehended, in the nature of a structure; or is it only as to part of it structural by nature, but as to some part of the mechanism not structural? As I conceive it, that is a different question from that attributed to counsel for the ratepayers in the paragraph from the decision just read.

The decision goes on to refer to *Cardiff Rating Authority & Cardiff Assessment Committee* v. *Guest Keen Baldwins Iron & Steel Co., Ltd.* (1) ([1949] 1 All E.R. 27) and continues:

> " But it seems to me that there is a distinction between a movable structure [as in the *Cardiff* case (1)] and movable plant which is used in conjunction with a structure. In the present case I am satisfied by the evidence that the oven could be used as an oven and the prover as a prover without the moving parts although it would not be economical so to use them since the dough would have to be stacked in and unstacked by hand and the whole benefit of the continuous process would be lost."

Then comes this pregnant sentence:

> " But the moving parts do not form an essential feature of the oven as an oven or the prover as a chamber for conditioning, they are provided merely to ensure a continuous flow . . . "

With the utmost respect to the Lands Tribunal, it appears to me there to have misstated the essential point. The question is not so much whether the moving parts form an essential feature of the oven as an oven, but whether they form an essential feature of the oven as a structure. If the matter had rested where I have stopped in my reading, I should feel very doubtful, to say the least, whether the tribunal had posed to itself the proper question, but the learned tribunal continues as follows:

> " and are, as [counsel for the ratepayers] put it, the furniture, and not integrated in the structure and become part of it."

Those last words seem to me essentially to be saying what I venture to suggest should have been said before. They appear to be a finding that these moving parts, being but furniture, are not part of the oven as a structure; I so interpret, and feel bound to interpret, the phrase " and not integrated in the structure ". By that route, therefore, the conclusion is reached by the tribunal which is stated in these terms:

> " I have, therefore, come to the decision that the moving parts of both ovens and provers are not rateable under the order, since the moving parts do not themselves appear to me to form part of the structure of either oven or prover."

Again, in that last sentence I sought to emphasise the vital words " form part of the structure ".

If I have earlier correctly posed the problem which in these cases the Order of 1927 presents, I apprehend that, prima facie at any rate, it will be a question of degree and of fact whether in any given case one can properly say that the identified item of plant or part of plant is, as to the whole of it or as to some part less than the whole, in the nature of a structure. If it be a question of fact and if in determining it the tribunal has in no way misdirected itself, then the finding of fact will not be capable of challenge in this court.

Though I have felt the doubts which the language already read has put into my mind, and the force of the argument of counsel for the valuation officer, I have come to the conclusion that the tribunal did find as a fact that these moving parts, though part of the oven and for any practical commercial purposes an essential part, were none the less not part of the structure of the oven and that the tribunal did not misdirect itself, in so far as it so found, nor did it direct itself to the wrong question.

In concluding that we could not disturb this finding, as I do on the whole, I have been somewhat influenced by considering what else this court ought to do or might do. I stated earlier that the tribunal had the great advantage of seeing this oven, and seeing it in operation. Perhaps I might be allowed to say here that I hope what I have said about the oven can fairly be applied to the case of the prover. My citations from the decision have been those relating or substantially relating to the oven, but I think that no distinction for present purposes arises between the two items of apparatus, nor indeed has counsel for the valuation officer sought to say that as to one apparatus rather than the other the decision should be impeached.

I repeat that the tribunal saw the apparatus. Reading the description of the moving parts will perhaps indicate little to a mechanically untutored mind. There might be a distinction between the moving trays eight feet long which are clipped in some way to the conveyor, on the one hand, and some of these shafts, which no doubt are part of the working attachment, on the other. It may well be that a tribunal of fact in this case, or in another similar case, considering what I have tried to emphasise as being the essential question, might come to a conclusion of fact different from that which the tribunal reached on this occasion. But, if I had been persuaded by counsel for the valuation officer that this decision was based on erroneous premises implicit in the language on which I have commented, I should have felt the greatest difficulty in concluding in a contrary sense that these moving parts or some of them were part of the oven regarded as a structure.

It would therefore seem that, if we were persuaded of the vice in this decision which counsel for the valuation officer has sought to demonstrate, we should have then to refer it back to the tribunal, directing it to reconsider the matter in the light of the questions which we think are the right questions and which I have attempted to formulate. I think that would perhaps make a great pother of this particular case. In future cases (and I hope I am not in this respect assuming more to myself than I ought) it may be that the formulation of the proper questions to be asked which we now make will assist in answering similar problems.

Reading this decision, and being well aware of the great care the learned tribunal takes in deciding these cases, I cannot believe that, if we sent the matter back, the tribunal would be likely to come to a substantially different conclusion from that expressed when applying its mind to the questions we have formulated. I hope that I am justified in that supposition. If I am, it comforts me in the conclusion which I have reached.

One other point was taken on which I should say something. It was said that, according to the extract from the shorthand note which I have, there was no evidence to support the view that the moving parts could be regarded as something distinct from the oven as a whole in any commercial or sensible use of the term. The extract is to be found with our papers and I will confine myself to reading one or two questions and answers from the cross-examination of Mr. John Ackland Hinks. In cross-examination counsel for the valuation officer said:

> "Q.—Do you seriously suggest you could use these sixty tray Uniflow ovens in any way which is practical, if they had not these moving parts in them? A.—One would not just do it, but it could be done; that is the answer . . . Q.—Speaking as a practical commercial matter dealing with these machines, would these provers work if they did not have the moving parts in them? A.—They would not work except that the conveyor belt . . . Q.—If you took the conveyor belt away it would cease to be a prover? A.—You would put the things in by hand, leave them there a period and take them out. Q.—You said that the oven as a matter of practical politics would not do it commercially? A.—I do not think so. Q.—With the prover you equally would not work it except with the moving parts in it? A.—I think so, except in an emergency."

I agree that the evidence shows that, as a practical commercial matter, these moving parts were essentially a part of the mechanism of the oven and one would not find an oven described as a sixty tray Uniflow oven without having this belt and these trays attached to it, to justify that description and make it work in the way it was intended to work. But, though one may criticise certain sentences in the decision on the basis that it may have done less than justice to what Mr. Hinks said, the true view none the less is whether these things formed part of the oven as a structure, not whether they formed part of the oven as an oven. I find nothing in this evidence to disable the conclusion, which I think was in the end the deliberate conclusion of the tribunal, that these moving parts were sufficiently severable and distinct to make it sensible to conclude as a fact that, if and so far as they were part of the oven and an essential part of it as a working piece of apparatus, nevertheless they were not part of it as a structure. On the whole, therefore, and for the reasons which I have tried to state, I would dismiss this appeal.

PARKER, L.J.: I have not found this at all an easy case, involving as it does the interpretation and application of the words " only to such extent as ", which appear in class 4 of the Order of 1927. I think it is clear that in order to make the whole of a piece of plant set out in that class rateable, it is not sufficient that a part of it should be, or be in the nature of, a building or structure. It is clear from the words " only to such extent as " that it is possible that there will be cases where part of the plant in question will not be rateable, though the rest of the plant will.

Accordingly, it seems to me that the approach in any case must be along these lines. First, is the entity in question one of the specified pieces of plant and machinery in the order ? If the answer is yes, looked at generally can it be said that it is, or is in the nature of, a building or structure? Finally, on a second look, is it clear that the whole of it is of that nature? Put in another way, is there any extent to which it is not?

Quite clearly, that does not involve looking at each component part of the plant in question in isolation. If one, as it were, dismembered the plant into its components and looked at each component, no part of it would be a structure at all. It clearly does not mean that. It seems to me, however, that, if one finds an accessory, a piece of equipment, a component, which is not itself a structure and which is not built into that part of the plant which is undoubtedly a structure, then there would be grounds for excluding it under these words and that part would not be rateable. Looked at in that way, it seems clear from the findings of the tribunal that the moving parts in this structure would not be rateable. In one paragraph the tribunal said that the moving parts were " the furniture, and not integrated in the structure and become part of it ", and in another paragraph that they did not appear to form part of the structure. On the face of it, therefore, that finding, which is clearly a finding of fact, is one with which we could not interfere.

Counsel for the valuation officer has stressed very forcibly that that conclusion is arrived at following a finding that these moving parts were not an essential part of the oven, and he points out that on the evidence that is clearly wrong: in any commercial sense they are essentially part of the oven. Nevertheless, for the reasons given by my Lord, I do not think that any useful purpose would be served by remitting the case back to the tribunal. I think that there is a clear finding in this case that no part of these moving parts formed part of the structure, and accordingly I would dismiss the appeal.

SELLERS, L.J.: I have come to the same conclusion, and I do not think that I can add anything affirmatively to assist in the reasoning given by both my Lords.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue* (for the valuation officer); *Godden, Holme & Co.* (for the ratepayers).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

SHELL-MEX AND B. P., LTD. *v.* HOLYOAK (VALUATION OFFICER).

[Court of Appeal (Lord Evershed, M.R., Parker and Sellers, L.JJ.), February 19, 20, 21, 1958.]

Rates—Valuation—Plant and machinery—"Tank"—Underground petrol tank in brick and concrete compartment—Whether whole or tank only to be looked at—Plant and Machinery (Valuation for Rating) Order, 1927 (*S.R. & O.* 1927 *No.* 480), *schedule, class* 4—*Rating and Valuation Act*, 1925 (15 *&* 16 *Geo.* 5 *c.* 90), *s.* 24 (1).

An underground three thousand gallon petrol tank at a petrol filling station constructed in accordance with the conditions imposed by the licence issued by the local authority under the Petroleum (Consolidation) Act, 1928, comprised a metal cylinder thirteen feet, six inches long by seven feet in diameter. The cylinder rested on concrete rests or cradles on a concrete base and had side walls of nine-inch brickwork from the base to the surface, the space between these side walls and the cylinder being filled with dry sand. Between the cylinder and surface of the earth were slabs of reinforced concrete of considerable thickness, with a manhole as a means of filling the cylinder with petrol and extracting it to supply customers. The rating assessment was increased on the ground that the whole underground storage installation was rateable as a "tank" within class 4 of the schedule to the Plant and Machinery (Valuation for Rating) Order, 1927, which rendered such plant rateable to the extent that it was, or was in the nature of, a building or structure. The Lands Tribunal found that the compartment in which the tank was housed did not form a functional entity with the tank any more than any other building in which a piece of plant or machinery was housed, and that, as the cylinder was admittedly not a building or structure or in the nature of a building or structure looked at by itself, it could not be deemed to be a part of the hereditament as a tank within class 4. On appeal,

Held: (i) the tank, within the meaning of the word "tanks" in class 4, was the whole structure whose purpose was the storage of petrol, viz., the metal cylinder, the walls and the support for the cylinder, since any particular part of the structure, taken by itself, was insufficient for the purpose of storage.

(ii) although what constituted an object which it was sought to identify with any item in the schedule to the Order of 1927 was properly a question of fact, the tribunal had misdirected itself in holding that the cylinder and compartment were not a functional entity.

Dictum of Jenkins, J., in *Cardiff Rating Authority & Cardiff Assessment Committee* v. *Guest Keen Baldwins Iron & Steel Co., Ltd.* ([1949] 1 All E.R. at p. 37) considered.

Appeal allowed.

[As to plant and machinery deemed to be part of the hereditament for rating purposes, see 27 Halsbury's Laws (2nd Edn.) 393, 394, para. 827; and for cases on the subject, see Digest Supps.

For the Rating and Valuation Act, 1925, s. 24 (1), see 20 Halsbury's Statutes (2nd Edn.) 130.]

Cases referred to:

(1) *W. Collier, Ltd.* v. *Fielding* (*Valuation Officer*), ante. p. 694.

(2) *Cardiff Rating Authority & Cardiff Assessment Committee* v. *Guest Keen Baldwins Iron & Steel Co., Ltd.*, [1949] 1 All E.R. 37; [1949] 1 K.B. 404; [1949] L.J.R. 723; 113 J.P. 78; 2nd Digest Supp.

(3) *Edwards* v. *Bairstow*, [1955] 3 All E.R. 48; [1956] A.C. 14; 36 Tax Cas. 207; 3rd Digest Supp.

A **Case Stated.**

The respondent ratepayers appealed to the Lands Tribunal against a decision of a local valuation court of Warwickshire Local Valuation Panel given on Feb. 21, 1956, directing that the assessment of a hereditament known as Oaklands Filling Station, Birmingham Road, Budbrooke, in the valuation list for Warwick rural district should be increased from £25 gross value, £18 rateable B value, to £80 gross value, £64 rateable value. The grounds of appeal were that the assessment was incorrect and excessive by reason of the inclusion therein of the value of certain plant or machinery, petrol storage tanks, contrary to s. 24 (1) of the Rating and Valuation Act, 1925. The Lands Tribunal held (Nov. 5, 1956, reported 1 R.R.C. 148) that the only part of the installation comprising the underground petrol tank (a metal cylinder) and the brick and C concrete compartment housing it which could properly be described as a " tank " for the purposes of the Plant and Machinery (Valuation for Rating) Order, 1927, schedule, class 4, was the metal cylinder or tank itself, since the compartment did not form a functional entity with the tank; and as the tank was admittedly not a building or structure or in the nature of a building or structure looked at by itself it could not be deemed to be a part of the hereditament for rating D purposes under the order and the Act. The valuation officer appealed by way of Case Stated to the Court of Appeal. He contended (i) that the tribunal misdirected itself and was wrong in law in holding that the only parts of the underground installation which could properly be described as tanks for the purposes of the order were the metal cylinders; (ii) that, although, looked at by themselves, the metal cylinders were not buildings or structures or in the E nature of buildings or structures, each cylinder as installed on the hereditament was, or was in the nature of a building or structure; and (iii) that on the true construction of the Act and of the order the whole of the underground installation was deemed to be part of the hereditament and was rateable and that the tribunal was wrong in law in holding otherwise.

F *Maurice Lyell, Q.C.*, and *P. R. E. Browne* for the valuation officer.
Michael Rowe, Q.C., and *W. L. Roots* for the ratepayers.

LORD EVERSHED, M.R.: The question raised in this appeal relates to the liability for rating of an underground petrol container (to use for the moment a neutral phrase) which underlies the petrol pumps of a petrol station of the kind with which we are all no doubt familiar. By the Petroleum (Consolida-G tion) Act, 1928, Parliament has in some degree sought to regulate the keeping in bulk of petroleum spirit. So far as is relevant to the present case, the requirements applicable to the respondent ratepayers are those provided in licences issued by the relevant local authority. We have before us a copy of the licence. The conditions at the back of the licence are numerous and involve the construction of elaborate means designed to protect persons and property in the H immediate neighbourhood from the risks of leakage and explosion. Thus, to take one or two illustrations, No. 1 in the schedule of conditions reads:

> " The petroleum spirit tank together with the connexions, pipes and fittings shall be so constructed and maintained as to prevent any leakage of petroleum spirit."

I No. 4 provides:

> " The filling and dipping pipes shall be carried down to within two inches of the bottom of the tank."

I think it more helpful in the present case to consider the actual construction with which we are concerned; for the question is whether that which now exists underground at the ratepayers' petrol station is or is not liable to be rated as to the whole or any part. That construction is well illustrated by a plan which we have before us and which is described as " Details of petrol storage tanks ", the details so illustrated being those in fact required by the local authority at or near Birmingham.

I can best describe the resulting construction in this way. There is first made in the ground at the required depth a concrete base and the thickness of it is such as this plan requires and indicates. Then there are side walls of nine-inch brickwork from the base to the surface, such that the brickwork has a three-quarter inch cement rendering to line it. On the base are concrete rests or cradles, and on those rests is placed the actual metal cylinder which contains three thousand gallons, or is capable of containing three thousand gallons, of petroleum spirit. The dimensions of that container are thirteen feet six inches in length by seven feet in diameter. The space round the outside of the cylinder and between it and the walls is filled, again in accordance with requirements, by what is described as being " well consolidated sweet dry sand ". In the plan the space which has been created by the base and walls is called a chamber. The cylinder has at the top of it a means whereby it is filled with petroleum and from which, on the other hand, petroleum can be extracted for supply to customers. This means is provided on the surface of the earth by a manhole, but save for that manhole above the cylinder and between it and the surface of the earth are placed slabs of reinforced concrete to a considerable thickness.

This description shows that the three thousand gallon cylinder is encased in a construction of concrete, brick and sand, etc., tightly encased and embedded in the ground, the whole thing being designed for the protection of persons and property, so that, if there should be leaks or explosions, the effect will be taken by the earth and the surround and it will not do damage outside. That being the construction in accordance with the local authority requirements, the question then is: How much of it, if any, should be rated ? As I understand it, counsel for the ratepayers conceded that the cradle, the walls and the base as such would be buildings on or in the hereditament and liable as such to be rated without any reference to the Plant and Machinery (Valuation for Rating) Order, 1927, which we discussed in the judgment in the case immediately before the present*. But that is not the end of the matter; for it has been the claim of the valuation officer to rate the whole of the structure as a single unit as constituting a " tank ", a word which hitherto I have been careful to avoid.

The opening words of class 4 of the order provide:

> " The following parts of a plant or a combination of plant and machinery whenever and only to such extent as any such part is, or is in the nature of, a building or structure . . ."

In the catalogue appears the word " tanks ", and that is the only item in the catalogue with which this construction or the cylinder inside it can be identified. There has been no attempt to say that the construction as a whole can be identified with some other item in the list, e.g., as one of the chambers for any of the purposes there described. We are concerned with the item " tanks " in the list and with the question accordingly: what constitutes for present purposes " the tank " ? and, when that question has been answered, is it as to the whole, or to the extent of any part of it, in the nature of a structure ?

It was the view of the Lands Tribunal† that the tank was limited to the cylindrical object inside the concrete, brick and sand structure which I have described. Further, it was said that that tank was not in itself in the nature of a structure: it was a movable piece of apparatus, large no doubt, but not so large as to be other than an ordinary piece of movable plant.

On the other side, for the valuation officer it was said that that is not a correct way to look at this contrivance. Counsel said that the ratepayers were storing petrol in a tank which consisted of base, walls and side packing and of which the metal cylinder was merely the containing lining or skin. The valuation officer submits that, on such a view of the matter, the whole thing, cylinder and all, is not only a tank but in the nature of a structure. As I have understood the argument, if that view is right, it is not in doubt that the whole thing is rateable. It has not been suggested that, treating the whole construction as a tank, it is a structure or in the nature of a structure as to less than one hundred per cent. of it. It is not suggested, e.g., that the metal cylinder could be treated as a detachable part and therefore not itself part of the tank as a structure. That is perhaps natural enough, because it would be quite impossible to extract the tank by any means whatever other than by demolition of the whole thing, walls, sand, concrete and everything.

---

* *W. Collier, Ltd.* v. *Fielding* (*Valuation Officer*) (1), ante, p. 694.

† Reported in 1 R.R.C. 148.

In my judgment in *W. Collier, Ltd.* v. *Fielding* (1) I said that whether and to what extent an identifiable piece of apparatus was in the nature of a structure was prima facie a matter of degree and of fact. So also, I apprehend, it will be prima facie a matter of fact to say what constitutes the thing to be identified with the item in the catalogue in any case. Therefore, if, after examining the material and perhaps the site, the tribunal had merely said, " I conclude that the tank here is no more than the cylinder ", that might well have been the end of the matter, but the tribunal has not so confined itself. Finding this case difficult, I have come to the conclusion that the tribunal materially misdirected itself and therefore I think on the whole that the decision ought not to stand.

Having described the way in which this underground containing apparatus was put together, the tribunal referred to *Cardiff Rating Authority & Cardiff Assessment Committee* v. *Guest Keen Baldwins Iron & Steel Co., Ltd.* (2) ([1949] 1 All E.R. 27), and to the formula there used by JENKINS, J. (ibid., at p. 37), a " functional entity ", and continued:

> " I have come to the conclusion that the only part of the installation which can properly be described as a 'tank' for the purposes of the order is the metal cylinder."

If the tribunal had stopped there, it might have been the end of the matter, but it continued:

> " It seems to be clear that the licence deals solely with this cylinder as a 'tank' in which the petroleum spirit is to be stored."

I must explain what I understand that to mean. It may well be that the two conditions which I read and others like them, when they mentioned the tank, were referring to the metal cylinder or the lining; e.g., when condition No. 4 spoke of the dipping pipes going to within two inches of the bottom, that must have referred to the bottom of the cylinder, the lining. Further, the drawings mark and show the tank by that name, as distinct from the walls, elsewhere called a chamber; though the whole thing (lining, base, cradle and everything) is described in the title to the drawing as " Details of petrol storage tanks."

The decision continued:

> " The licence requires this tank to be below ground and requires a plan of the layout of the premises to be deposited and adhered to in order to ensure that the tank is so placed as to reduce to a minimum the risk of fire or explosion. But it seems to me that the compartment in which the tank is housed does not form a *functional entity* with the tank any more than any other building in which a piece of plant or machinery is housed. That compartment appears to me to form an integral part of the hereditament like any other building thereon but the metal tank which is admittedly not a building or structure or in the nature of a building or structure looked at by itself should not under s. 24 and the order be deemed to be a part of the hereditament."

I emphasised in reading the two words " functional entity ", which are no doubt extracted from the judgment of JENKINS, J., in *Cardiff Rating Authority & Cardiff Assessment Committee* v. *Guest Keen Baldwins Iron & Steel Co., Ltd.* (2).

With all respect, I cannot help thinking that the tribunal may have been somewhat diverted by that phrase. It depends on what function one has in mind, but I should doubt whether it could be said in this case that the compartment with the concrete and the sand filling was not " a functional entity " with the container, since the whole object of the installation was that the petrol should be so contained as to minimise to the greatest possible extent the risks and consequences of fire and explosion. With all respect, it seems to me that the fallacy lies in this sentence:

> " But it seems to me that the compartment in which the tank is housed does not form a functional entity with the tank any more than any other building in which a piece of plant or machinery is housed."

I have been unable to escape from the conclusion that in the end the tribunal came to the view that what it called " the compartment ", the installation other than the cylinder, was no more relevant to the question of the rating of the cylinder in this case than would be an ordinary above ground edifice in which a cylinder, a tank, happened to be found, resting on a cradle. In my judgment, quite manifestly that is not so. To translate this installation to an above ground equivalent, one would not simply place the metal cylinder on a cradle in a building. One would have to create a structure with outer walls, concrete, sand filling, etc., of which the cylinder would be nothing more than the convenient lining. One would require to produce a much more solid piece of apparatus, designed and required to protect the outside world in the form of human beings and material from the risk of leakage and explosion.

The conclusion, therefore, that the tank for the purposes of the order is confined to the metal cylinder rests on the ground stated, that in the view of the tribunal the housing, what the tribunal calls " the compartment ", is no more relevant to the cylinder than would be the surrounding building in the ordinary case of a cylinder found on cradles in such a building above ground. I think that that reasoning disables the conclusion, and I would therefore in this case allow the appeal and say that the tank in the ratepayers' hereditament is the installation in its entirety. I have already said that, if that view is right, there is no question that it is not as to the whole of it of the nature of a structure.

PARKER, L.J.: I agree, and I would only add this. As it seems to me, the question is what in relation to the hereditament is the nature of the underground structure, using that word in a neutral sense. It is perfectly true that, in relation to the licence and the local authority plans, the only part which is described as a tank is the metal container and that the surrounding walls are treated as a chamber. The question is, however, what is properly described as " the tank ", in relation to the hereditament, not in relation to the licence. Looking at the primary facts found by the Lands Tribunal, the only reasonable conclusion is that the whole structure, walls and metal lining, itself forms the tank. After all, the purpose is the storage of petrol. The brick and concrete structure without the lining performs no function at all. Equally, the lining without the walls and concrete performs no sensible function, quite apart from any question of legality. I say " no sensible function ", because this is not merely a case of some added safety precaution, but a question of storing a highly dangerous and inflammable liquid which, quite apart from legality, cannot in any sensible sense be stored without very careful precautions. In other words, this is a long way away from a piece of machinery or plant put into a building for convenience. It is a case where the so-called chamber is a housing which forms part of the plant itself.

For these reasons, and those given by my Lord I would allow this appeal.

SELLERS, L.J.: The significant matter is that these tanks are for the storage of petrol, as my Lord has just indicated. The matter has so to be viewed. The mere cylinder would be quite insufficient for that purpose having

A regard to the liabilities of the occupiers, who are the respondents. It would
not be sufficient to have the petrol simply in the cylinder. It has to be dealt
with in some manner similar to that in which it is dealt with here for the purposes
of safety and proper user. The manner of protecting it or lagging it or securing
it has turned what was simply a cylinder into a structure or building. I cannot
think that in law or in fact it would be sensible or realistic to split the two
B things up. What has been called the structure or building and the cylinder
form one tank for the purpose of storage of petrol and it should be so regarded.
In my view, there is an error of law in the conclusion at which the Lands Tribunal
arrived (see *Edwards* v. *Bairstow* (3), [1955] 3 All E.R. 48). I agree that this
appeal should be allowed.

C *Appeal allowed. Leave to appeal to the House of Lords granted.*

Solicitors: *Solicitor of Inland Revenue* (for the valuation officer); *Sydney Morse & Co.* (for the ratepayers).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

D

Re HASTINGS.

E [QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Streatfeild and Slade, JJ.),
March 7, 1958.]

Criminal Law—Sentence—Concurrent sentences or general sentence—Indictment containing five counts—No sentence on individual counts—Conviction on one count quashed—Validity of sentence.

H. was convicted in July, 1957, at Liverpool Crown Court on one indictment
F containing five counts, the first count being of larceny as a bailee, the
second, third and fourth counts being of obtaining money by false pretences
and the fifth count being of fraudulent conversion. In sentencing him the
learned recorder used the following words: "You have been convicted
on the plainest evidence of deliberate, calculated and systematic frauds . . .
You will go to prison for four years' corrective training". The sentence
G indorsed on the indictment was "to undergo corrective training for four
years" without any reference to concurrent sentences. On appeal against
conviction on the first three counts, the Court of Criminal Appeal on Dec. 18,
1957, quashed the conviction on the count of larceny as a bailee and added
"in other respects the appeal fails and there will be no alteration of sentence".
H. moved for his release from gaol on the ground that no legal
H sentence had been passed on the remaining four counts. Each of the convictions
would itself have supported a sentence of four years' corrective
training.

Held: the sentence passed on H. was, on its true interpretation, a sentence
of concurrent terms on each count, having regard particularly to the use of
the word "frauds" in the plural and to the fact that the description
I "fraud" was more applicable to the last four counts than to the first count;
therefore, the motion was dismissed.

Per LORD GODDARD, C.J.: it is desirable that some words should be used, when passing the same sentence on several counts, to show that it is passed on each count, e.g., such words as "on each count" or "concurrent" (see p. 711, letter A, post; cf. p. 711, letters C and D, post).

[**Editorial Note.** Before the Indictments Act, 1915, it had been the usual practice at assizes at Liverpool or Manchester to pass concurrent sentences on different counts, but subsequently a practice of passing general sentence on several counts grew up, though the practice was never wholly uniform. The present decision seems to show that the former practice is preferable.

As to concurrent and consecutive sentences, see 10 HALSBURY'S LAWS (3rd Edn.) 492, 493, para. 898, particularly ibid., text and note (i).]

Cases referred to:

(1) *O'Connell* v. *R.*, (1844), 11 Cl. & Fin. 155; 5 State Tr. N.S. 1; 3 L.T.O.S. 429; 8 E.R. 1061; 14 Digest (Repl.) 356, *3448*.

(2) *R.* v. *Grubb*, (1945), 173 L.T. 24; 109 J.P. 132; 30 Cr. App. Rep. 148; 14 Digest (Repl.) 566, *5660*.

Motion for habeas corpus.

Edward Thomas Hastings was detained in Liverpool Gaol, having been sentenced to four years' corrective training at Liverpool Crown Court in July, 1957. The indictment on which he was convicted contained five counts, the first of which was for larceny as a bailee, the second, third and fourth of which were for obtaining money by false pretences, and the fifth of which was for fraudulent conversion. In passing sentence the recorder stated to the prisoner that he had been convicted " of deliberate, calculated and systematic frauds ", and sentenced him to four years' corrective training, but did not pass sentence separately on each count* or state that concurrent terms of corrective training were being imposed. On appeal against conviction on the first three counts the Court of Criminal Appeal, on Dec. 18, 1957, quashed the conviction on the first count. The prisoner moved the court for his release from gaol on the ground that as no sentence had been passed on the remaining counts his continued detention was illegal.

A. P. Marshall, Q.C., and *N. McL. Butter* for the applicant.

Rodger Winn and *G. J. Bean* for the respondent.

LORD GODDARD, C.J.: Counsel for the applicant moves in this matter for a writ of habeas corpus to bring up the body of one Edward Thomas Hastings, at present detained in Liverpool Gaol (where he is serving a sentence of four years' corrective training), with a view to his being discharged on the ground that his detention is illegal. The main ground put forward is that no sentence of the court was ever passed on him.

The circumstances which it is necessary to detail are quite short. He was tried at the Liverpool Crown Court before the learned Recorder of Liverpool last July on an indictment containing five counts. The first count was a count of larceny as a bailee, in other words, that being a bailee he fraudulently converted the bailed goods to his own use. The second, third and fourth counts were for obtaining money by false pretences, and the fifth count was a count of fraudulent conversion. The jury found him guilty on all counts, and the learned recorder sentenced him to four years' corrective training in these words:

---

* In *O'Connell* v. *R.* ((1844), 11 Cl. & Fin. 155), subsequently cited (see p. 710, letter D, post), the defendant had been convicted on eleven counts, five of which were subsequently held to be bad. The record showed that the sentence on the defendant was that he " for the offences aforesaid, be fined and imprisoned " (see per LORD CHIEF JUSTICE TINDAL, ibid., at p. 256). The eleventh question put to the judges by the House of Lords, to whom the case was taken on writ of error, raised incidentally the issue whether a sentence in that form was itself a ground for reversing the judgment. The Lord Chief Justice construed the record as meaning that the defendant was sentenced for such offences stated in the counts of the indictment as were free from objection. The third and eleventh questions put to the judges, on which alone their opinions were not unanimous, involved the issue whether, where one general sentence had been passed on several convictions of which some were subsequently found to be bad, the sentence could be sustained. Of the nine judges seven, including the Lord Chief Justice, held that the objection taken to sustaining a general judgment on convictions on several counts, some of which were afterwards quashed, was bad, but two judges upheld the objection. In the House of Lords the majority (LORD DENMAN, LORD COTTENHAM and LORD CAMPBELL) were of opinion, among other grounds that they stated, that it was not right to presume that the court passing the original sentence had discriminated between the good counts and the counts that were afterwards found to be bad (see 11 Cl. & Fin. at pp. 387, 393, 420). They decided, therefore, that the original judgment could not stand. Writs of error were abolished by the Criminal Appeal Act, 1907, s. 20 (1), and the Court of Criminal Appeal now has the wide powers conferred by s. 4 and s. 5 of the Criminal Appeal Act, 1907; 5 HALSBURY'S STATUTES (2nd Edn.) 929, 930. A court of error had been empowered by s. 5 of the Crown Cases Act, 1848 (referred to at p. 711, letter I, post) to pronounce the proper judgment or remit the case, if the court of error reversed the judgment brought before it.

> "You have been convicted on the plainest evidence of deliberate, calculated and systematic frauds. Those frauds have not only affected companies well able to sustain loss but have cruelly brought grave financial burdens on little men which it will be difficult for them to bear. This is by no means the first time you have been convicted of dishonesty. You are a menace to the integrity and health of the commercial community. You will go to prison for four years' corrective training."

I emphasise the learned recorder's references to frauds in the plural.

The point that is made before this court is that the sentence of four years' corrective training was duly indorsed on the indictment but the indorsement did not show four years' corrective training on each of the counts, nor did the learned recorder use the words "concurrent on each count". Accordingly, counsel for the applicant in the course of a learned and clear argument has submitted that, as the Court of Criminal Appeal subsequently quashed the conviction on count 1, therefore it follows that the sentence having been passed on an indictment containing five counts, one of which has been quashed, there is nothing to show to which count the sentence is applicable. He contends that no sentence was passed on the other counts at all, therefore there has been no legal sentence passed and there is no authority for holding this man in gaol.

In my opinion, the question is simply one of construction. Counsel for the applicant agrees that if the word "concurrent" had been used or if the learned recorder had said "on each count" he would have no ground on which he could sustain the motion. It seems to me that it is perfectly obvious here that the learned recorder meant to pass a sentence of four years on each count of the indictment. It is to be noticed that each count of this indictment was for quite a separate and distinct offence. They were not alternative offences, they were separate and distinct offences all of which would support a sentence of four years' corrective training, as they would have sustained a sentence of four years' imprisonment, and I think one has only to see here that the learned recorder was dealing with a course of fraud and saying he is sentencing this man for systematic frauds. Every one of these cases was a case of fraud. It is true that the first case was a felony and the others misdemeanours, but there is no point in that because the four convictions which stood were all convictions for fraud, and of course the first crime, larceny as a bailee, depends on the fraudulent conversion of the property entrusted to the bailee. If there was a bailment, then by statute the offence of larceny as a bailee can be sustained. I am clearly of opinion in this case that the intention of the learned recorder was to pass a concurrent sentence although he did not use the word "concurrent". It is not a question of the exact words that are used; it is a question of what the court considers to be the intention of the learned recorder when passing the sentence, and one can see that the learned recorder meant that on each of these counts a sentence of four years' corrective training was to be passed. That was the view which the Court of Criminal Appeal took when this matter was brought before them because the point had been raised in the notice of appeal; but the court in quashing the conviction on count 1 expressly said that they were not making any difference in the sentence because of the gravity of the crimes which had been committed by this man and which had formed the subject of the other counts. It would follow that if the point counsel for the applicant has strenuously urged on us is right, it applies equally to what the Court of Criminal Appeal said as to that which the learned recorder said in passing the sentence. Pearson, J., who gave the judgment of the court when the case was before the court on appeal, started his judgment by saying:

> " In this case the appellant was convicted on five counts involving fraud in the Liverpool Crown Court, and he was sentenced on each count concurrently to a term of imprisonment. Leave to appeal was given with regard to three counts only, and leave to appeal was given only in respect of conviction. That, in fact, was all that was asked for, but in any case the actual sentence given was in our view a reasonable sentence and there would be no reason for interfering with it on any view."

Then he said at the end of his judgment:

> " The conviction on the first count is quashed, in other respects the appeal fails, and there will be no alteration of sentence."

In my judgment the real question which we have to decide is: What was the true effect of the learned recorder's sentence in this case? I think it is abundantly clear that the effect of the recorder's sentence is that he intended this to be a sentence concurrent on each count. For that reason, therefore, this application fails.

I have only to say one or two more words with regard to the authorities which have been cited to us. Reference was made to the case in the House of Lords in 1844 on a writ of error, *O'Connell* v. *R.* (1) ((1844), 11 Cl. & Fin. 155). In that case there were eleven counts and five counts turned out in the opinion of the House to be defective and were quashed as bad counts. In those days the way of challenging a criminal conviction was by writ of error, and when the writ of error in *O'Connell* v. *R.* (1) was brought before the House of Lords it appeared that the judgment recorded was " for the offences aforesaid ". The majority of their Lordships, contrary to the opinions which the learned judges who had been called on to assist the House had given, came to the conclusion that there had not been a judgment on all the counts. It is quite obvious from reading the opinions of Lord Denman and Lord Cottenham that they were very much impressed by the inconveniences that could arise in those days, but things are very different now because the matter could be easily brought before the Court of Criminal Appeal. If a case comes before the Court of Criminal Appeal in which a sentence of this sort has been pronounced, which the court thinks means concurrent sentences, and if, for instance, two or three counts of an indictment containing a large number of counts are quashed, it is always open then to the court, whether there has been an appeal against sentence or not, to say: " We, having quashed the convictions on certain counts, consider that makes such a difference that we shall reduce the sentence ". That is a matter of the court exercising its discretion, but nothing was said in the House of Lords to the effect that a general sentence could not be given. The only thing is that a general sentence in those days did become defective if it was given on many counts, some of which were afterwards quashed. I do not propose to go at length into the history of the abolition of writs of error* which are no longer available to a prisoner. His privileges are now given to him by the Criminal Appeal Act, 1907, and I see nothing here to force us to say that the learned recorder in passing the sentence he did was not passing a sentence on each count of the indictment. Therefore, in my opinion, the sentence of four years' corrective training is applicable to counts 2, 3, 4 and 5, and accordingly this motion fails.

There are two things that I wish to add. It is common at assizes or at quarter sessions for the sentence to be pronounced in this manner, but since 1844 an appeal has not been brought before the court on that ground, although one would suppose that many prisoners would have escaped if it had been thought that the fact that

---

* The enactment abolishing writs of error is cited at p. 708, letter I, ante.

A the judge had omitted to use the word " concurrent " made any difference. The
other thing is that this case has shown that perhaps it would always be desirable
for the court to use some words like " on each count ", or to say " concurrent ".
Although we have no difficulty in holding here that that was the learned recorder's
intention, and we can get it from the use of the plural in passing sentence,
we think that it would be desirable to use some such words in order to prevent
B this sort of question arising hereafter.

STREATFEILD, J.: I am of the same opinion, and I want to make it
clear that for my part I would certainly uphold the principle which counsel for
the applicant has insisted on, that a court should make it clear that it is in fact
passing a sentence in respect of each count on which the accused person has been
C found guilty or has pleaded guilty, and in that respect the judgment of HUMPHREYS,
J., in *R.* v. *Grubb* (2) ((1945), 173 L.T. 24) is very much in point. At the
same time, I do not think for my part that any particular form of words is
necessary, if it is made clear that a sentence which is passed is in fact applicable
to each count of an indictment where there has been a finding of guilt. It may
be convenient that some such phrase as " on each count " or " counts numbered "
D so-and-so " the sentence shall be " such-and-such a term. It may be that the
word " concurrently " puts that matter beyond all doubt, but provided that the
meaning is clear in the passing of the sentence and made clear to the accused, no
particular form of words is necessary.

In my view this case narrows down to the one question what is the proper
interpretation of the words which were used by the learned recorder in passing
E sentence, not merely what he meant but what he actually said. I agree with
my Lord that the words of the learned recorder's sentence are really perfectly
clear. He is referring to an indictment which contained five counts, one of which
was for larceny as a bailee and the others for frauds, three of them being false
pretences and the other one fraudulent conversion. He refers throughout to
those frauds in the plural. He then puts the matter beyond all argument in my
F view, by going on to categorise the people who have been victimised by those
frauds, and he ends by saying " You will go to prison for four years' corrective
training ". It is to my mind perfectly obvious that the learned recorder was
applying his mind to each one of those frauds. Indeed, it would seem that the
word " fraud " was actually more applicable to the last four counts of the
indictment than to the first one for larceny, but having regard to the " frauds "
G in the plural, the learned recorder made up his mind perfectly correctly in my
judgment, that each count merited a sentence of corrective training, having
regard to the record of the accused; so, when he proceeded to pass sentence of
corrective training, the sentence must have referred to each of the frauds to
which he had alluded. In my judgment, therefore, although he has not used the
words " on each count " separately, or has not used the word " concurrently " it is
H almost too clear for argument that the totality of those words amounts to a sentence
by the learned recorder of four years' corrective training in respect of each
and every one of the five counts of the indictment.

In those circumstances, it seems to me that the remainder of counsel for the
applicant's argument does not really arise, and with regard to *O'Connell* v. *R.* (1)
((1844), 11 Cl. & Fin. 155) it would seem likely, without expressing any further
I opinion on it, that s. 5* of the Crown Cases Act, 1848, was passed with the express
purpose of getting rid of the difficulty which arose in *O'Connell* v. *R.* (1). Nowadays
it would seem that those difficulties can equally well be dealt with by the
Court of Criminal Appeal under either s. 4 or s. 5 of the Criminal Appeal Act, 1907.
However, having come to the conclusion that I have reached as to the proper
interpretation of the learned recorder's sentence, those latter matters do not arise

---

* Repealed by the Criminal Appeal Act, 1907, s. 22 and Sch.; the effect of s. 5 is summarised in the footnote at p. 708, letter I, ante.

and I found my judgment on what I believe to be the interpretation of the sentence. In my view it was the perfectly clear intention that there should be concurrent sentences on each one of the counts. For those reasons, therefore, I agree with the judgment of my Lord.

SLADE, J.: I agree. The conclusion that the learned recorder's sentence of four years' corrective training was to relate to each of the five counts of the indictment is almost irresistible from the language that he used. I am fortified in this view by asking myself the question, if that is not its true interpretation, to which one or more of the five counts did it relate? I have heard the suggestion made, as is the fact, that count 1 is a felony and counts 2 to 5 are misdemeanours, but I cannot help thinking that that suggestion is made solely because the felony was the only count quashed by the Court of Criminal Appeal. The word "frauds" in the plural which preceded the actual sentence is more appropriate to the four counts of misdemeanours than the count of larceny, though it is true that in this particular case, being larceny by a bailee, the words "fraudulently converts" appear in s. 1 (1) of the Larceny Act, 1916. I am satisfied that the only possible construction of the words used by the learned recorder is that he intended to pass a sentence of four years' corrective training on each of the five counts of the indictment.

Motion dismissed.

Solicitors: *Field, Roscoe & Co.*, agents for *Keith Moore*, Birkenhead (for the applicant); *Treasury Solicitor* (for the respondent).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

PENN AND ANOTHER *v.* GATENEX CO., LTD.

[COURT OF APPEAL (Lord Evershed, M.R., Parker and Sellers, L.JJ.), February 10, 11, 12, 28, 1958.]

Landlord and Tenant—Lease—Fixtures—Use of landlord's fixtures and fittings granted by tenancy agreement—Refrigerator operated by central plant in landlord's control—Plant in disrepair—Whether landlord liable to repair plant and supply refrigeration.

In 1942 R.P. Ltd. let to the plaintiffs "All that flat situate and known as 255b, Minehead Court . . . with the use of the fixtures and fittings therein belonging to the landlord". The tenancy agreement also contained a covenant for quiet enjoyment, in the usual form, that the tenants "shall peaceably hold and enjoy the demised premises . . . without any interruption by the landlord . . .". The flat, which was one of a block of twenty-four, contained a refrigerator which depended for its operation on motive power being supplied from a central apparatus under the sole control of the landlords. The refrigerator occupied about as much space as a larder would occupy and the flat contained no larder. At the time when the plaintiffs' occupation began, the refrigerator worked spasmodically. In 1956 the defendants acquired the reversion to the tenancy. The mechanism controlling the refrigerator fell into disrepair, and the refrigerator ceased to function. The tenancy agreement contained no mention of the refrigerator. The plaintiffs claimed damages from the landlords for breach of implied terms of the agreement of tenancy that the landlords should provide the motive power for the refrigerator and should maintain the central plant in proper working order.

Held (Sellers, L.J., dissenting): an obligation on the part of the landlords to supply motive power to the refrigerator or to maintain the central plant would not be implied, either from the words " with the use of the fixtures or fittings " (of which the refrigerator was clearly one) in the parcels of the tenancy agreement or from the covenant for quiet enjoyment or otherwise from the agreement; the plaintiffs were not, therefore, entitled to damages.

R. v. *Paddington & St. Marylebone Rent Tribunal, Ex. p. Bedrock Investments, Ltd.* ([1947] 2 All E.R. 15), and *R.* v. *Croydon & District Rent Tribunal, Ex p. Langford Property Co., Ltd.* ([1948] 1 K.B. 60) applied.

Appeal allowed.

[As to fixtures included in demise, see 20 Halsbury's Laws (2nd Edn.) 96, 97, para. 106; and for cases on the subject, see 31 Digest (Repl.) 199-201, *3311-3319*.

As to enlargement of grant by covenant for quiet enjoyment, see 20 Halsbury's Laws (2nd Edn.) 244, 245, para. 273.]

Cases referred to:

(1) *Birmingham, Dudley & District Banking Co.* v. *Ross*, (1888), 38 Ch.D. 295; 57 L.J.Ch. 601; 59 L.T. 609; 19 Digest 47, *261*.

(2) *Aldin* v. *Latimer Clark, Muirhead & Co.*, [1894] 2 Ch. 437; 63 L.J.Ch. 601; 71 L.T. 119; 30 Digest (Repl.) 541, *1755*.

(3) *Booth* v. *Thomas*, [1926] Ch. 109; *affd.* C.A., [1926] Ch. 397; 95 L.J.Ch. 160; 134 L.T. 464; 31 Digest (Repl.) 140, *2794*.

(4) *R.* v. *Paddington & St. Marylebone Rent Tribunal, Ex p. Bedrock Investments, Ltd.*, [1947] 2 All E.R. 15; [1947] K.B. 984; *affd.* C.A., [1948] 2 All E.R. 528; [1948] 2 K.B. 413; [1949] L.J.R. 284; 112 J.P. 367; 31 Digest (Repl.) 730, *8122*.

(5) *R.* v. *Croydon & District Rent Tribunal, Ex p. Langford Property Co., Ltd.*, [1948] 1 K.B. 60; 177 L.T. 538; 31 Digest (Repl.) 729, *8120*.

Appeal.

This was an appeal by the defendants (the landlords) from a judgment of His Honour Judge Leon given at Willesden County Court on Nov. 12, 1957, whereby he awarded the plaintiffs (the tenants) £35 damages for breach of an implied covenant in the plaintiffs' tenancy agreement to keep a centrally operated refrigeration plant in repair and to supply refrigeration to a refrigerator in the plaintiffs' flat.

H. Heathcote-Williams, Q.C., and *B. Finlay* for the defendants, the landlords.

G. D. Lovegrove for the plaintiffs, the tenants.

Cur. adv. vult.

Feb. 28. The following judgments were read.

LORD EVERSHED, M.R.: This was an action for damages for breach of covenant consisting of a failure to keep the refrigerator in the plaintiffs' flat in proper working order. The two plaintiffs are now joint statutory tenants of the flat, No. 255b, Minehead Court, South Harrow. The original contract of tenancy is dated July 3, 1942, and was made between the defendants' predecessors in title, Regional Properties, Ltd., and the two plaintiffs together with a lady (whom I take to be the mother of the first plaintiff) as guarantor. This contract has been duly determined by notice to quit. Nothing, however, turns on this last-mentioned circumstance since it is conceded by counsel that so long as the plaintiffs remain statutory tenants, they and the defendants alike are bound by all the relevant terms of the original contract. The refrigerator is not of a kind working by gas or electricity such that the tenants can plug it to the main gas or electricity supply in the flat. It seems to be of a kind the operation of which depends on the supply of the appropriate fuel or motive power from a central apparatus which has always been in the sole control of the landlords. It appears that the defendants and their predecessors in title own and owned twenty-four flats including that of the plaintiffs, and that each flat was similarly equipped by a refrigerator only capable of working by the means which I have stated. The plaintiffs' claim (as a result of an amendment allowed by the learned judge) is put alternatively on the basis of an express or of an implied covenant. Paragraph 3 of the particulars of claim as amended states:

> " there were express or implied terms of the said agreement (of tenancy) that the said Regional Properties, Ltd., should supply refrigeration to the said refrigerator and/or the said premises and should maintain and keep the said central plant in proper working order. Further or alternatively the aforesaid terms . . . are to be implied from the nature and circumstances of the said agreement."

Counsel for the plaintiffs has in no way sought before us to qualify or to resile from this statement of the plaintiffs' claim.

The relevant facts, as found by the judge or as conceded before us, are these: At the time that the second plaintiff went into occupation (for her husband was then absent serving with the armed forces of the Crown) the refrigerator worked only spasmodically. It was, said she, temperamental; but from the date of the acquisition of the reversion of the flats by the defendants (which the second plaintiff placed in October, 1956) the refrigerator ceased altogether to function. The second plaintiff may or may not be right in saying that the acquisition by the defendants of their title to the flats coincided with the total cesser of functioning on the part of the refrigerator; but it does not for present purposes matter. True, the learned judge somewhat reduced the damages having regard to the early imperfections in the performance of the refrigerator, and there is no appeal from his award as to damages. There is, however, no doubt that the mechanism controlling the refrigerator is now in such a state of disrepair that the plaintiffs' instrument does not and cannot work at all unless the mechanism is entirely rehabilitated. It is the case of the defendants that there is no obligation on them to make the refrigerator work. On the other hand, the case of the plaintiffs is, as already stated, that the defendants are bound to maintain and keep the central apparatus in proper working order.

It is plain that the learned judge greatly sympathised with the plaintiffs, and in this respect I entirely share his view. The refrigerator is a bulky object which fully occupies the space that would otherwise be employed as a larder. It was said with great force by counsel for the plaintiffs that in its present condition the flat lacks the ordinary means which every housewife requires for keeping perishable food. True, the tenancy agreement was made in the most critical period of the late war when, as we all know, it was difficult to obtain supplies of many kinds of goods and labour and then the apparatus for supplying power to the refrigerator was already deficient. Still, the then landlords forbore from inserting in the document which they put forward any reservation clearly protecting them from the alleged liability. On the contrary, they put forward a document which required the joinder of a guarantor for the plaintiffs' obligations and of which cl. 2 contained no less than eighteen separate covenants on the part of the tenants comprehending such matters as the keeping of rabbits and reptiles, the mowing of lawns and the weeding of gardens, which may have owed their presence more to precedents than the requirements of the actual contract being made. But these criticisms and the sympathy which I feel for the plaintiffs cannot be invoked in order to enable the court to discern the covenant alleged if the covenant is not there expressly or by necessary implication.

The essential provisions of the contract are found in the habendum, with such assistance as can be got from the landlord's covenant for quiet enjoyment in cl. 3. The habendum, so far as relevant, is as follows:

> " . . . All that flat situate and known as 255b, Minehead Court . . . with the use of the fixtures and fittings therein belonging to the landlord."

The material terms of the covenant for quiet enjoyment, which is in common form, include cl. 3 (a):

> " . . . shall peaceably hold and enjoy the demised premises . . . without any interruption by the landlord . . . "

Although the plaintiffs' case is pleaded alternatively on the basis of express or implied obligation, in truth the problem is in my judgment one and the same. Nor, in my view, can counsel for the plaintiffs improve his position by invocation of the principle that a landlord cannot derogate from the grant; for it is well established that the principle cannot serve to enlarge the grant. The question then is:—according to the terms of the contract and particularly cl. 1 and cl. 3 (a), did the landlords expressly or by necessary implication promise to provide the motive power which alone would render the refrigerator capable of use as such, and to do all such other things by way of repairs as would be incidentally necessary? I can conveniently dispose here of one point. Counsel for the defendants contended that the refrigerator, even if incapable of use for the purposes for which it had been made, could still serve for the tenants the purpose of containing such things as tinned food and boots or other objects which called for no treatment by way of refrigeration. In my judgment, there is no substance in this argument. Beyond doubt the use of the refrigerator, in so far as it was contemplated by the parties to the contract, must have been its use for refrigeration.

Counsel for the plaintiffs put his case very simply (and therefore, as is so often true, most effectively) thus:—It is not in doubt that the refrigerator was and is one of the fixtures and fittings belonging to the landlords, the use of which was included in the grant: if, therefore, the landlords promised that the tenants should have the use of the refrigerator, how is that promise fulfilled, if in fact the refrigerator cannot be used at all? In support of this formulation of his case, counsel referred to such authorities as *Birmingham, Dudley & District Banking Co.* v. *Ross* (1) (1888), 38 Ch.D. 295) (in this court) as supporting the proposition that

> " when a man grants a house, he grants that which is necessary for the existence of the house "

and

> " prima facie he cannot interefere with that which he has granted; there is an implied obligation on him not to interfere with that which he has granted, namely, the house, and the enjoyment of the house "

(see per COTTON, L.J., ibid., at pp. 306, 308). Counsel referred also to the judgment of STIRLING, J., in *Aldin* v. *Latimer Clark, Muirhead & Co.* (2) ([1894] 2 Ch. 437), where the learned judge referred (ibid., at p. 447) to

> " the principle . . . that the grantor of land to be used for a particular purpose is under an obligation to abstain from doing anything on the adjoining property belonging to him which would prevent the land granted from being used for the purpose for which the grant was made."

Assuming, however, that counsel for the plaintiffs can get in the present case so far as to make such principles applicable, he would still be faced with the difficulty that the landlords here have not in fact done anything. They have not, according to the evidence, deliberately disconnected the refrigerator from its motive power. They have merely refrained from taking steps to prevent the mechanism already deficient from becoming altogether inoperative. Their sins, if sins they be, are, therefore, sins of omission only. It is true that omissions may amount to breaches of the ordinary covenant for quiet enjoyment: but it seems that such omissions should be of a character as would amount, or be liable to amount, in themselves to wrongful acts: see *Booth* v. *Thomas* (3) ([1926] Ch. 109), a decision of RUSSELL, J., and (ibid., at p. 397) of this court, where a landlord's omission consisted of failure to repair an artificial watercourse so that the results would have been liable to constitute wrongs to a neighbouring landowner.

In my judgment, however, counsel for the plaintiffs cannot in the present case surmount the first hurdle which confronts him. If the habendum here contained express reference to the use of the refrigerator, he would to my mind be in a far stronger position, and counsel for the defendants so conceded. The case would then be fairly analogous to the example put in the course of the argument of the grant of a tenancy of a flat at the top of a building, together with the right to use the lift which remained in the landlord's control and was the ordinary means of access to the flat. But there is no reference in terms to the refrigerator in the contract before us. To that extent it seems to me that counsel for the plaintiffs cannot assert any express obligation. He must rely on the necessary inferences to be extracted from the general words " fixtures and fittings ". Undoubtedly the refrigerator was one of the fixtures and fittings: but the general phrase would include many other things such as cupboards, and bathroom and lavatory fittings. What, if counsel for the plaintiffs is right, is the extent of the landlords' obligation, quoad these last mentioned things, implicit in the grant plus the covenant for quiet enjoyment ? Are they bound to supply water for the bath—more particularly, hot water for the hot tap ? And do the obligations extend for the twenty-four hours of day and night throughout the tenancy—an aspect of the matter on which the learned judge obviously felt a difficulty. It is true that it cannot be said of the bath that it would be wholly incapable of use as such in the absence of a central supply of water; whereas the refrigerator is wholly useless as a refrigerator in the absence of the motive force which the landlords alone control. But I have felt compelled to the conclusion that so much significance cannot be extracted fairly, and still less necessarily, from the general terms of the habendum aided by the covenant for quiet enjoyment; and I observe for what it is worth (though I do not attach much significance to it) that the tenants appear not to be under any obligation to keep the refrigerator in repair (see cl. 2 (iii)).

Somewhat similar contentions were considered by the Divisional Court in the years 1947 and 1948 in cases affecting the Furnished Houses (Rent Control) Tribunals. The first case was that of *R.* v. *Paddington & St. Marylebone Rent Tribunal, Ex p. Bedrock Investments, Ltd.* (4) ([1947] 2 All E.R. 15). In that case the terms of the grant included the words:

> " together with the right to use the water closets lavatory accommodation and bathrooms situate in the building."

It was held that no covenant could be implied to supply hot water to the bathrooms. Similarly in the second case, *R.* v. *Croydon & District Rent Tribunal, Ex p. Langford Property Co., Ltd.* (5) ([1948] 1 K.B. 60), the Divisional Court held (though MACNAGHTEN, J., vigorously dissented from his brethren) that no covenant to supply hot water for the central heating radiators could be implied, though such radiators would plainly be quite useless without such supply and the tenant could not remedy the matter for himself. In the *Croydon* case (5) there appears to have been no grant of the use of the radiators, though the landlord had not failed to advertise the central hot water supply as an attraction. The learned county court judge therefore distinguished the present case in reliance on the express language " with the use of the fixtures and fittings . . . "; but, in my judgment, the *Paddington* (4) and *Croydon* (5) cases cannot be distinguished on so narrow a ground. The basis of the decisions is well illustrated by LYNSKEY, J.'s citation in the *Croydon* case (5) from the earlier judgment (ibid., at p. 65):

> " There is no ground in my opinion for implying any covenant and none ought ever to be implied unless the implication is so necessary that the

> court can have no doubt what covenant or undertaking to write into the agreement."

True, these cases are not binding on this court; but they have, I do not doubt, been frequently acted on since they were decided in many of the numerous cases to which rent control has given rise. I think, therefore, that this court should be very slow to disturb them. It would no doubt be possible, by basing the result on the particular words of the particular contract here in question, to distinguish this case from the Divisional Court cases; but, again, I think this court should be slow to introduce fine distinctions into the law. Moreover, I do not think that on principle such distinctions could be supported.

In the result, I have come to the conclusion that the plaintiffs' cause of action cannot be sustained. The result is no doubt a hard one for the plaintiffs, and I reach with some regret a conclusion which may be said in modern conditions to reflect a blemish in the law of landlord and tenant. But sympathy for the plaintiffs is, I fear, no safe guide to legal conclusions, particularly for conclusions in the long established law relating to landlord and tenant. I would, therefore, allow the appeal.

PARKER, L.J.: I have come to the same conclusion. It is, I think, important to bear in mind the exact facts of this case. When the tenants entered into occupation the refrigerator was not in proper working order. It was only working intermittently, though it was of some use. From about October, 1956, it ceased to work entirely. Why this occurred is not as clear as it might be, since the defendants called no evidence, but from the evidence of Mr. White, an engineer called on behalf of the plaintiffs, it seems to me that the only proper inference is that the plant was old, and that long before 1956 its condition was such that Mr. White's company had refused to undertake a maintenance contract. In his view it would cost £500 to put the plant in order, always assuming that spare parts were obtainable. It is not, therefore, a case of the defendants having deliberately cut off the refrigeration. Indeed, as I understand it, no suggestion of that kind was made at the trial.

The question, in these circumstances, is whether the county court judge was right in holding that it was a term of the tenancy agreement that " the landlord would keep the refrigerator in reasonable working order ". So far as demised premises themselves are concerned, I take it to be the law that, in the absence of express covenant, a landlord is under no obligation to keep the premises in repair. No such covenant will be implied. Nor in the case of unfurnished premises is there any implied warranty that the premises will be fit for habitation. It is true that in the case of furnished premises such a warranty will be implied as at the commencement of the letting, but it does not extend to the period of the letting. Apart, therefore, from the words " with the use of the fixtures and fittings therein belonging to the landlord " the position is, I think, plain. The refrigerator, being clearly a fixture, would have passed in the demise to the tenants, and there would have been no warranty that it was then in reasonable working order, much less a warranty or implied term that the landlords would keep it in reasonable working order throughout the letting. Do the words quoted have a contrary effect ? I think not. Apart from these words the tenants would have had the right to use the refrigerator, it being, as I have said, a fixture included in the demise.

The matter does not, however, end there, since the " defect " complained of is not in the refrigerator as a fixture, but in the plant supplying the refrigeration which is situated outside the demised premises. If, in these circumstances, there had been a specific grant of the use of the refrigerator the position might well be different, but here the only specific grant is of the use of the refrigerator as a fixture and, therefore, any obligation to supply refrigeration must be based on an implied term. Once that position is reached, I find it quite impossible to imply a term which could be said to be necessary or inevitable in the minds of both parties had they considered the matter. In the first place it would have to be a term applicable to all the " fixtures and fittings ". Secondly, what are its precise terms in regard to the extent of the refrigeration and as to the contingencies, if any, which will excuse the landlord bearing in mind, inter alia, that at the time of the demise the war was at its height.

A somewhat similar question came before the Divisional Court in *R.* v. *Croydon & District Rent Tribunal, Ex p. Langford Property Co., Ltd.* (5) ([1948] 1 K.B. 60). A furnished rent tribunal had claimed to exercise jurisdiction on the basis that under the contract of letting in question the landlords were obliged to render services, in that case the supply of hot water and central heating. The contract provided for the letting of the premises

> " together with all fixtures, privileges, rights, easements and appurtenances to the said premises."

The fixtures and appurtenances included a hot water system for the supply of hot water to the kitchen taps, the bath and the heating radiators. The hot water system was controlled by the landlords. It was argued that it was a necessary implication that the landlords should supply the heating and the hot water, but the court (Lord Goddard, C.J. and Lynskey, J., Macnaghten, J., dissenting) refused to accept that argument. Lynskey, J., delivering the judgment of Lord Goddard, C.J., and himself, said (ibid., at p. 65):

> " A similar argument was advanced in *R.* v. *Paddington & St. Marylebone Rent Tribunal, Ex p. Bedrock Investments, Ltd.* (4) ([1947] 2 All E.R. 15) without success. We said in that case: ' There is no ground in my opinion for implying any covenant and none ought ever to be implied unless the implication is so necessary that the court can have no doubt what covenant or undertaking to write into the agreement.' In these days of shortage of essential commodities, landlords may well refuse to provide any service, however willing to give it as a matter of grace or concession. Where it is intended to impose upon a landlord an obligation to give such services it is usually set out in express terms in the agreement of tenancy with limitations as to hours and periods during which such services are to be rendered. In this case, such a term is missing from the agreement, and, in our view, this was a deliberate omission. In our opinion, it is unlikely that, in the circumstances, the landlords would have been prepared to bind themselves contractually to give these services. In this case we are satisfied that no such term as suggested can or should be implied. It may well be that the tenant expected and the landlords hoped that such services as could reasonably be given for heating and the supply of hot water would be given, but unless there was a contractual obligation to render such services on the part of the landlords, this would not avail to make the rent one which includes payment for services so as to confer jurisdiction on the rent tribunal."

Each case must, of course, depend on its own facts, and counsel for the plaintiffs sought to distinguish the present case. He pointed out that in the *Croydon* case (5) the words " and the use of the fixtures and fittings " did not appear, a fact which the county court judge also relied on. For my part, however, I do not think that the presence of those words affords any valid distinction. Whether it said so expressly or not the tenants in the *Croydon* case (5) clearly were granted the use of radiators, the bath and the taps. Indeed in *R.* v. *Paddington & St. Marylebone Rent Tribunal, Ex p. Bedrock Investments, Ltd.* (4), the tenant was expressly granted the " right to use . . . lavatory accommodation and bathroom ". Counsel for the plaintiffs further contended that hot water was not, whereas refrigeration in the absence of a larder was, essential, but again I doubt whether this argument is sound. Whether the one is more " essential " than the other may be a matter of taste. Nor does it make any difference, in my judgment, that a supply of hot water is not needed every hour of the day and night, whereas a supply of refrigeration is.

Counsel for the plaintiffs, however, invited us to overrule the *Croydon* case (5). For my part I think that it was properly decided, but even if I felt any doubt I should hesitate a long time before overruling a decision which has stood unchallenged for ten years, and on which furnished rent tribunals throughout the country have acted. Moreover, no doubt as a result of that decision, Parliament has by the Housing Repairs and Rents Act, 1954, s. 40 (3), provided a remedy for tenants in such circumstances.

Counsel for the plaintiffs also based his claim on the covenant for quiet enjoyment, and he has referred to *Booth* v. *Thomas* (3) ([1926] Ch. 109, 397) in support of the proposition that there may be a breach of that covenant by acts of omission as well as acts of commission. Whilst accepting that proposition, I feel myself some difficulty in seeing how the tenants are in any better position by basing their claim on this covenant. Prima facie the covenant for quiet enjoyment is an undertaking to indemnify the tenant against lawful acts. If an unlawful act is committed whether by the landlord or anyone else, the tenant has a right against the wrongdoer. No doubt, however, if the landlord is guilty of a wrongful act against the tenant, as in *Booth* v. *Thomas* (3), by reason of his being an adjoining occupier he also may be liable under the covenant for quiet enjoyment. But here there being no wrongful act, unless it be under the agreement, one is at once thrown back on the meaning of the words " with the use of the fixtures and fittings ".

Finally, counsel for the plaintiffs said that the landlords were derogating from their own grant. The validity of this contention, as it seems to me, stands or falls with the answer to the question whether there has been a breach of covenant. I do not think the principle assists. Accordingly, I feel constrained to allow the appeal.

SELLERS, L.J.: The agreement on which the plaintiffs sue for damages for its breach provides that the landlord lets and the tenant takes " all that flat situate and known as 255b, Minehead Court, with the use of the fixtures and fittings therein belonging to the landlord ". There was no inventory or statement of what the fixtures and fittings were and the evidence does not refer to anything except a refrigerator. It would seem that there were electric light fittings, but in the absence of evidence I see no reason to infer that there were any radiators or other provision for central heating. The plaintiffs complain that since Oct. 1, 1956, they had not had the use of the refrigerator as the tenancy agreement provided for them.

It appears that the plaintiffs' flat is one of twenty-four flats, each of which was provided with a refrigerator worked from a central plant solely in the control of the landlords as regards its situation and its operation. The " fitment " in the flat was not a refrigerator unless it was continuously supplied through the central plant with the means of refrigeration. The flat which the plaintiffs covenanted to use only as a private dwelling had no larder and was not in any practical sense equipped for keeping the food which would ordinarily and normally be kept in any household. It would appear that the refrigerator provided in the plaintiffs' flat was a substitute for a larder—it may be that this was so in respect of all the flats—and the inclusive rent for the flat to be used as a private dwelling included the use of the refrigerator. If the refrigerator had been a self contained unit—operated by electricity or gas which was supplied to the flat—and solely under the control of the tenants, then under this agreement the tenants could not complain against the landlords if the refrigerator was old, defective or unsatisfactory or if in the course of time it became unusable. But they could at least have taken steps to keep it in running order.

The well-established law on which my Lords have relied may well apply in such circumstances. Where I differ from my Lords, with deference, is that I feel that the new and different circumstances revealed in this case permit and require a different construction of the contractual obligation of the landlords. Fixtures let to a tenant are normally complete in themselves and are capable of being maintained by the tenant (frequently under the requirement of a covenant) in serviceable order and suitable for their purpose. It is unusual to have the necessary component parts of a fixture partly in control of the tenant and partly (and in this case in respect of a vital part) in the control of the landlord. Here an essential part of its functioning is in the hands of the landlords who have contracted to give the use of the refrigerator to the plaintiffs. This seems to me to be an express obligation. It is not specific as to the quality of refrigeration, which does not seem to have been very good at any time since the plaintiffs acquired the tenancy, but if it ceased—as it did—to operate at all, the landlords seem to me to alter the character of the fixture and deprive it of its service for which the tenants were paying, in part, a rent.

If an agreement gives a tenant the use of something wholly in the occupation and control of the landlord, for example a lift, it would I think be accepted that the landlord would be required to maintain the lift, especially if it were the only means of access to the demised premises. I recognise that a lift might vary in age and efficiency but in order to give meaning to the words " the use of " and to fulfil them it should at least be maintained so that it would take a tenant up and down, subject to temporary breakdown and reasonable stoppages for maintenance and repairs. The substantial part of the refrigerator as far as its function is concerned is in the occupation and control of the landlords and without the refrigerator this flat, having no larder, is incomplete for ordinary domestic living. The refrigeration should be maintained, in my view, so as not to deprive the tenants of the use of the fixture, but there must no doubt be room for varying standards of efficiency. In so far as the use was given of " the fixtures and fittings therein belonging to the landlord " and the refrigerator was not specifically mentioned, it may be that a similar construction should, on the face of it, be applied to all the fixtures and fittings so let. Having regard to the unusual and particular feature of the refrigerator (not being a complete fixture in the control of the tenants and the major part of the whole remaining in the landlords' control) I am not sure that that is a necessary construction, but clearly it could not apply to any of the fixtures and fittings referred to in cl. 2 (iii) which expressly excludes them and places the obligation to maintain and repair them on the tenants.

The presence of hot water radiators or pipes in a flat, which " go with " the demised premises, are not, I think, quite in the same category as a refrigerator. Even if the premises are let " with the use of the hot water radiators " this may not, in itself, require a landlord to provide hot water. A central heating system is not used for many months in a year and it may be very much a matter of choice for what period it should be utilised. It is not as vital for the use of a flat as a refrigerator where no other reasonable place for keeping food is provided. But this question does not arise in this case and I would reserve any decision on it.

Apparently the defendants acquired this property from the previous landlords on or about Oct. 1, 1956, and as they gave no evidence or explanation why the failure of the refrigerator coincided with the change of ownership it is a reasonable inference that the new landlords decided to discontinue the service. There was no offer of a reduction in rent, although the tenants were deprived of a facility for which they had contracted to pay in their inclusive rent. The trial judge found a breach of contract in respect of the refrigeration. I would not hold that he was wrong in so doing and there was no challenge to the amount awarded as damages. I would dismiss the appeal.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Harewood & Co.* (for the defendants); *Syed A. Rafique* (for the plaintiffs).

[*Reported by* F. GUTTMAN, ESQ. *Barrister-at-Law.*]

A HOLMES AND ANOTHER *v.* KEYES (LORD) AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), February 28, 1958.]

Company—Director—Vacation of office—Failure to acquire qualification shares within two months after election—Election by poll—Result declared on following day—Date of election—" Holding " shares—Companies Act, 1948
B (11 *&* 12 *Geo.* 6 *c.* 38), *s.* 182 (1), (3).

Company—Meeting—Completion—Business of meeting and voting on poll completed on one day—Counting votes completed on following day—When meeting completed.

By a company's articles of association, the qualification of a director was " the holding in his own right of five hundred ordinary shares of the company
C ", and the office of a director was to be vacated if he did not acquire the number of shares required to qualify him for office within two months after appointment (which was also the maximum period permitted under s. 182* of the Companies Act, 1948). The articles further provided that, on a transfer of a share, " the transferor shall be deemed to remain the holder of the share until the name of the transferee is entered in the register of members
D in respect thereof ". It was also provided that, in the case of an equality of votes at a poll, the chairman of the meeting should be entitled to a further or casting vote, in addition to the votes to which he might be entitled as a member. At a general meeting of the company held on Dec. 23, 1957, resolutions were presented that K. and L. be appointed directors. A poll having been demanded in respect of the resolutions, voting took place on
E Dec. 23, but the counting did not take place until the following day. On that day, Dec. 24, the company was informed by the scrutineers that K. and L. were duly elected. K. and L. did not know of their election until Dec. 27 and did not hold sufficient shares to qualify them to be directors. On Jan. 31, 1958, they purchased their qualification shares, but their names were not entered in the register of shareholders in respect of those shares
F until Feb. 24.

Held: the elections of K. and L. took place on Dec. 23, 1957, on which day the voting and the meeting were completed; their offices as directors were therefore vacated at midnight on Feb. 23/24, 1958, because the two months' period within which to acquire qualification shares expired then and neither of them had then a " holding " of the qualifying number of shares as his
G name was not on the register as holder of the shares that he had purchased (*Spencer* v. *Kennedy*, [1926] Ch. 125 applied on the last point).

[As to the effect of the requirement that the holding of shares is a condition precedent to becoming a director, see 6 HALSBURY'S LAWS (3rd Edn.) 287, para. 587.

For the Companies Act, 1948, s. 182, see 3 HALSBURY'S STATUTES (2nd Edn.)
H 602.]

Cases referred to:

(1) *Spencer* v. *Kennedy*, [1926] Ch. 125; 95 L.J.Ch. 240; 134 L.T. 591; 9 Digest (Repl.) 463, *3028*.

(2) *Shaw* v. *Tati Concessions, Ltd.*, [1913] 1 Ch. 292; 82 L.J.Ch. 159; 108 L.T. 487; 9 Digest (Repl.) 620, *4131*.

I (3) *Spiller* v. *Mayo* (*Rhodesia*) *Development Co.* (*1908*), *Ltd.*, [1926] W.N. 78; 9 Digest (Repl.) 620. *4132*.

(4) *Jackson* v. *Hamlyn*, [1953] 1 All E.R. 887; [1953] Ch. 577; 9 Digest (Repl.) 620, *4135*.

Motion

This was a motion by the plaintiffs, William Arthur Holmes and Zena Daniels (suing on behalf of themselves and all other shareholders in the defendant company, Gordon Hotels, Ltd.), in an action claiming (i) a declaration that the first defendant, Baron Keyes of Zeebrugge and Dover, and the second defendant, Fredman Ashe Lincoln, had vacated their offices as directors of the defendant company; and (ii) an injunction restraining the first defendant and the second defendant from acting as directors of the defendant company. The plaintiffs moved for interlocutory relief in the terms of the indorsement of their writ.

---

* The relevant provisions of s. 182 are printed at p. 722, letter H, post.

Charles Russell, Q.C., and *H. L. P. A. Sieghart* for the plaintiffs.
R. W. Goff, Q.C., and *T. D. D. Divine* for the first and second defendants.
Denys B. Buckley for the defendant company.

DANCKWERTS, J.: The question raised by this motion is the validity of the appointment and the qualifications of two persons (Lord Keyes, the first defendant, and Mr. Ashe Lincoln, the second defendant) who claim to be directors of the defendant company, Gordon Hotels, Ltd. On Dec. 23, 1957, sundry resolutions were presented to a general meeting of the company for, among other things, the election of the first and second defendants to be directors of the company. A poll had been previously demanded in respect of the resolutions, and, accordingly, on Dec. 23, 1957, a poll was taken on the resolutions relating to the first and second defendants. The voting was completed on that day, but the counting did not take place until the next day, Dec. 24, when it was alleged that they had been duly elected, and the result was communicated by the scrutineers to the company. The first and second defendants did not know about the election until Dec. 27. Directors of the defendant company are required by the articles to have the qualification of holding five hundred shares in the capital of the company. No steps appear to have been taken by either the first defendant or the second defendant to acquire such a qualification until about Jan. 31, 1958, when the requisite number of shares were purchased by brokers on behalf of each of the two; but the completion of those purchases was delayed until well into February, and they were not put on the register of the company as holders of five hundred shares each until the afternoon of Feb. 24, 1958. The contention on behalf of the plaintiffs in this action is that that was too late because, under s. 182 of the Companies Act, 1948, and by the company's articles of association, the period in which the proper qualification has to be obtained is two months. It was contended by the plaintiffs that the period of two months began to run at midnight on the night of Dec. 23/24, 1957, and expired on the night of Feb. 23/24, 1958. On the contention of the defendants, the period in question did not begin to run until midnight on Dec. 24, 1957 (for reasons which I will mention presently), and, therefore, did not expire until midnight on the night of Feb. 24/25, 1958.

I will now turn to the provisions of.the statute and the articles. Section 182 of the Companies Act, 1948, provides:

> " (1) Without prejudice to the restrictions imposed by the last foregoing section, it shall be the duty of every director who is by the articles of the company required to hold a specified share qualification, and who is not already qualified, to obtain his qualification within two months after his appointment, or such shorter time as may be fixed by the articles.
>
> " (3) The office of director of a company shall be vacated if the director does not within two months from the date of his appointment, or within such shorter time as may be fixed by the articles, obtain his qualification, or if after the expiration of the said period or shorter time he ceases at any time to hold his qualification.'

The articles of the company which are relevant are these, taking them in order. Article 23 provides:

> " The instrument of transfer of a share shall be signed both by the transferor and the transferee, and the transferor shall be deemed to remain the

> holder of the share until the name of the transferee is entered in the register of members in respect thereof."

Article 66 provides that, if a poll be demanded in the manner mentioned in the preceding paragraph:

> ". . . it shall be taken at such time and place and in such manner as the chairman shall direct, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded. The demand for a poll may be withdrawn."

Under art. 68:

> "In the case of an equality of votes, either on a show of hands or at a poll, the chairman of the meeting shall be entitled to a further or casting vote, in addition to the votes to which he may be entitled as a member."

Article 81 reads:

> "The directors may from time to time appoint any other person to be a director, either to fill a casual vacancy or by way of addition to the board, but so that the maximum number fixed as above shall not be thereby exceeded."

Then there is provision about how he shall hold office. Article 83 is to be found in a substituted article contained in a resolution passed on July 29, 1947, and is as follows:

> "The qualification of a director other than a nominated director shall be the holding in his own right of five hundred ordinary shares of the company of £1 each and s. 141 of the Act shall be duly complied with by every director requiring such qualification."

"Section 141 of the Act" is a reference to s. 141 of the Companies Act, 1929, which was similar to s. 182 of the Act of 1948. Article 98 provides:

> "The office of a director shall be vacated . . . (C) if he ceases to hold the number of shares required to qualify him for office or does not acquire the same within two months after election or appointment."

It may be that in that article a distinction was being drawn between an appointment of a director which would be made, for the purposes mentioned, by the board of directors and an election by the company at a general meeting.

The case put forward on behalf of the plaintiffs is quite simple. It is said that the election by the company of the first and second defendants to be directors took place on Dec. 23, 1957, and that, therefore, the period within which they had to obtain that qualification expired at the latest at midnight on Feb. 23, 1958, and their registration as holders of shares in the afternoon of Feb. 24 was too late. On the other hand, it is said on behalf of the defendants (as I have already mentioned) that the election took place on Dec. 24, and, therefore, Feb. 24 was not too late.

I will mention at once a point raised by counsel for the defendants, as it seems to me to be quite untenable on the form of the articles. There is no doubt that the first and second defendants became beneficially entitled in equity to shares in the company, of the requisite number, at an earlier date than Feb. 23, 1958; but it is plain to me that the qualification must relate back to what is said in the article [i.e., art. 83], viz., that they must *hold* the shares, and there is the provision* that the previous holder remains the holder of the shares (in effect) until the person who acquires the shares from him is placed on the register of the company. There cannot be two holders of the same shares at the same moment, and, therefore, it seems to me quite plain that the word "holding" [in art. 83] is used in the sense that the legal title to the shares has been completed by the entry of the person in question as the holder of the shares on the company's register, and he does not become the holder until he is so registered. That seems to me to be in accordance with the decision of ASTBURY, J., in *Spencer* v. *Kennedy* (1) ([1926] Ch. 125), which is, as I conceive, binding on me, and which accords with my own view of the matter.

---

* In art. 23: see p. 722, letter I, ante.

The other points taken by counsel for the first and second defendants, and argued by him with great ingenuity and persistence, present much more difficulty. He pointed out that the result of the poll was not known, either to the company or to anyone else, until some time on Dec. 24, 1957, and he submitted that it was in accordance with common sense that the time at which the persons had to obtain a qualification did not start to run until the result was known, and that it would be unfair if time was running before anyone knew anything about it. He also added that the company could not be said to have elected anybody before the company itself knew what was the result of the election. So far as the argument on the question of the time running is concerned, it does not seem to me to be of much weight, because, after all, a period is mentioned in the Act, and counsel's submission in regard to the persons who have to acquire the shares would be equally forceful in regard to the fact that the first and second defendants did not actually know of their election until Dec. 27, 1957, and it is quite impossible to contend that the time did not start to run until then. The point, as it seems to me, really is: When did the election take place? There was only one meeting on the day, Dec. 23, 1957, and at the conclusion of the operations on that day the chairman closed the meeting, the business was determined, and the meeting came to an end. The poll had been taken by all the votes being cast and no further votes could have been received on Dec. 24, although, as counsel for the first and second defendants pointed out with some force, if there had in fact turned out to be a tie on the votes taken on the poll, the chairman would have been able to exercise his casting vote. Counsel submitted that the poll, therefore, could not be considered to be complete until it had been ascertained whether the chairman's vote was necessary or not and the result had been declared.

Counsel for the first and second defendants referred to three cases which contain observations of the court which seem to support him, at first sight at any rate, in the conclusion which he seeks to draw. These cases are *Shaw* v. *Tati Concessions, Ltd.* (2) ([1913] 1 Ch. 292)—see the observations of SWINFEN EADY, J. (ibid., at p. 297); *Spiller* v. *Mayo* (*Rhodesia*) *Development Co.* (*1908*), *Ltd.* (3) ([1926] W.N. 78); and *Jackson* v. *Hamlyn* (4) ([1953] 1 All E.R. 887), which was actually a case concerning the affairs of this somewhat stormy company. Those cases, however, were, quite plainly, on different sets of circumstances. In the first two cases a poll had been postponed to be taken at a later date than the date of the original meeting. In the last case the question was simply one of an adjournment: there was a motion whether a meeting should be adjourned or not, and a poll was demanded. On a poll being taken, the motion to adjourn was defeated, but this was not made known until two days after the meeting. It had been announced at the meeting that, if the poll was not in favour of an adjournment, another meeting would be held. On the facts of that case, UPJOHN, J., held that the second meeting which was to be convened would be a continuation of the meeting which had begun on the day on which the poll was taken. It seems to me, therefore, that in those cases, having regard to the expressions used by the learned judges, and in particular to the observations of RUSSELL, J., in *Spiller* v. *Mayo* (*Rhodesia*) *Development Co.* (*1908*), *Ltd.* (3), the meeting remained incomplete until the result of the poll was declared. It seems to me that, in the present case, the meeting was called on Dec. 23, and was on no other day. It is true that the result was not ascertained until the next day, but the meeting was complete and the poll was complete, except for the declaration of the result, on Dec. 23; and it seems to me that the elections of the defendants, if they were valid, took place on that day and on no other day. Consequently, it seems to me that time started to run from midnight at the end of that day, Dec. 23, and, therefore, had expired at midnight on Feb. 23, 1958, and the registration of the first and second defendants' shares in their names on Feb. 24 was too late.

Injunction restraining the first defendant and the second defendant from acting as directors of the defendant company until judgment or valid election or appointment as directors, or further order.

Solicitors: *Basil Greenby & Co.* (for the plaintiffs); *A. B. S. Thomson* (for the first defendant); *A. Kramer & Co.* (for the second defendant); *Herbert Oppenheimer, Nathan & Vandyk* (for the defendant company).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

ADAMASTOS SHIPPING CO., LTD. *v.* ANGLO-SAXON PETROLEUM CO., LTD.

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Keith of Avonholm and Lord Somervell of Harrow), February 3, 4, 5, 6, 10, March 6, 1958.]

Shipping — Charterparty — Construction — Incorporation of U.S. Paramount Clause—Application to charterparty of United States Carriage of Goods by Sea Act, 1936*—Whether Paramount Clause must be rejected as insensible—Whether loss or damage excepted by s.* 4 (2) (*a*) *of the Act includes loss of services of vessel—Whether damages assessed solely in relation to the voyage in which the breach occurred—United States Carriage of Goods by Sea Act,* 1936 (*Public Statutes No.* 521), *Preamble, s.* 3 (1), *s.* 4 (1), (2), *s.* 5, *s.* 13.

An oil tanker was chartered from the owners by a voyage charterparty which was to remain in force for as many consecutive voyages as the vessel could perform within a period of about eighteen months. By cl. 1, the vessel "being tight, staunch and strong, and every way fitted for the voyage, and to be maintained in such condition during the voyage, perils of the sea excepted" was to proceed to the port of loading. The charterparty incorporated the U.S. "Paramount Clause", which was attached to the charterparty and was in these terms: "This bill of lading shall have effect subject to . . . the Carriage of Goods by Sea Act of the United States . . . which shall be deemed to be incorporated herein . . . If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further". Section 5 of the U.S. Act provided that the Act should "not be applicable to charterparties"; s. 13 limited the scope of the Act to contracts for carriage of goods by sea to or from ports of the United States in foreign trade. Owing to mechanical breakdowns, the first of which occurred on the vessel's voyage to the port of loading, and owing to other breakdowns and incidents, she lost 106 days. The charterers claimed damages for this delay. It was found that, in the main, the breakdown of the machinery was due to incompetence of the engine-room staff amounting to unseaworthiness, but that the owners had exercised due diligence in appointing the staff; in one respect, however, the vessel was unseaworthy, and the owners had not exercised due diligence to make her seaworthy. Under s. 4 (1) and (2)* of the U.S. Act, the owners would not be liable for "loss or damage arising from unseaworthiness unless caused by want of due diligence" on their part, and would not be responsible for

---

* The material terms of s. 4 (1) and (2) are set out at p. 729, letters G and H, post.

"loss or damage arising or resulting from act, neglect or default of the A master . . . or the servants " of the owners in the management of the ship. Section 3 (1)* of the U.S. Act bound the owners before and at the beginning of the voyage to exercise due diligence to " (a) make the ship seaworthy . . . (c) make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation ". B

Held: (i) on the true construction of the charterparty the Paramount Clause was incorporated in the contract, and accordingly (a) the words " bill of lading " in that clause should be rejected as falsa demonstratio and the reference should be read as referring to the charterparty, and (b) it being insensible for the Paramount Clause to incorporate s. 5 of the U.S. Act in the charterparty (as s. 5 would prevent the Act from applying C to it) that enactment would be rejected as inapplicable.

Golodetz v. *Kersten Hunik & Co.* ((1926), 24 Lloyd's Rep. 374) considered by Lord Morton of Henryton and Lord Somervell of Harrow.

(ii) (by Viscount Simonds, Lord Keith of Avonholm and Lord Somervell of Harrow) on the true construction of the charterparty the owners were excepted by it from liability where they had observed due D diligence (within s. 3 (1) and s. 4 (1), (2) of the U.S. Act) for the following reasons—

(a) (Lord Morton of Henryton and Lord Reid dissenting) the contractual modification of the liability between owners and charterers effected by the incorporation of the U.S. Act in the charterparty applied to all voyages under the charterparty, whether to or from ports of the United E States or ports of other countries, notwithstanding the territorial limit enacted by s. 13 of the U.S. Act (see p. 732, letter D, p. 748, letter H, to p. 749, letter A, and p. 752, letter C, post).

(b) (Lord Morton of Henryton dissenting) the same qualified standard of obligation as to the vessel's seaworthiness was applied contractually between the owners and the charterers to all voyages under the charter- F party, whether cargo was or was not carried (see p. 733, letters A to D, p. 748, letters C to G, and p. 752, letter I, post).

(c) the words " loss or damage " in s. 4 (1) and s. 4 (2) of the U.S. Act were not limited to physical loss of or damage to goods, and were subject only to the limitations imposed by s. 2 of the Act that they must arise in relation to loading, handling, stowage, carriage, custody, care and discharge G of the goods; therefore the charterers' claim for damages for time lost fell within the ambit of the words " loss or damage " in those provisions as incorporated in the contract (see p. 733, letter F, p. 749, letters A and B, p. 752, letter I, post).

Principles of construction laid down in *Hamilton & Co.* v. *Mackie & Sons* ((1889), 5 T.L.R. 677) and approved in *Thomas & Co., Ltd.* v. *Portsea S.S. Co.,* H *Ltd.* ([1912] A.C. 1) applied.

Application of the principle that an exception to an obligation can be established only by clear words (see *Nelson Line* (*Liverpool*), *Ltd.* v. *Nelson & Sons, Ltd.*, [1908] A.C. 16; *Hillas & Co., Ltd.* v. *Arcos, Ltd.*, (1932), 147 L.T. 503; *Petrofina S.A. of Brussels* v. *Compagnia Italiana Transporto Olii Minerali of Genoa*, (1937), 42 Com. Cas. 286) considered. I

Decision of the Court of Appeal (sub nom. *Anglo-Saxon Petroleum Co., Ltd.* v. *Adamastos Shipping Co., Ltd.*, [1957] 2 All E.R. 311) reversed.

[**Editorial Note.** The United States Carriage by Sea Act, 1936, gives legal effect to the Hague Rules of 1921. A concise statement of the object of the Brussels Convention and the background to the Act and the Rules is at p. 750, letter H, to p. 751, letter C, post. The text of the U.S. Act is printed in Scrutton

---

* The terms of s. 3 (1) are set out at p. 729, letter F, post.

ON CHARTERPARTIES (16th Edn.) 546-552. The corresponding English statute is the Carriage of Goods by Sea Act, 1924, for which, see 23 HALSBURY'S STATUTES (2nd Edn.) 884.

As to the construction of charterparties, see 30 HALSBURY'S LAWS (2nd Edn.) 365, para. 542; and for cases on the subject, see 41 DIGEST 305, *1670* et seq.]

Cases referred to:

(1) *Hamilton & Co.* v. *Mackie & Sons*, (1889), 5 T.L.R. 677; 2 Digest 331, *138*.

(2) *Thomas & Co., Ltd.* v. *Portsea S.S. Co., Ltd.*, [1912] A.C. 1; 2 Digest 331, *141*.

(3) *Joseph Constantine S.S. Line, Ltd.* v. *Imperial Smelting Corpn., Ltd.*, [1941] 2 All E.R. 165; [1942] A.C. 154; 110 L.J.K.B. 433; 165 L.T. 27; 12 Digest (Repl.) 436, *3333*.

(4) *Glynn* v. *Margetson & Co.*, [1893] A.C. 351; 62 L.J.Q.B. 466; 69 L.T. 1; 41 Digest 311, *1715*.

(5) *Nelson Line* (*Liverpool*), *Ltd.* v. *Nelson & Sons, Ltd.*, [1908] A.C. 16; 77 L.J.K.B. 82; 97 L.T. 812; 41 Digest 474, *3056*.

(6) *Hillas & Co., Ltd.* v. *Arcos, Ltd.*, (1932), 147 L.T. 503; 38 Com. Cas. 23; Digest Supp.

(7) *Petrofina S.A. of Brussels* v. *Compagnia Italiana Transporto Olii Minerali of Genoa*, (1937), 42 Com. Cas. 286; Digest Supp.

(8) *Golodetz* v. *Kersten Hunik & Co.*, (1926), 24 Lloyd's Rep. 374.

(9) *G. H. Renton & Co., Ltd.* v. *Palmyra Trading Corpn. of Panama*, [1956] 3 All E.R. 957; [1957] A.C. 149; 3rd Digest Supp.

(10) *Elderslie S.S. Co.* v. *Borthwick*, [1905] A.C. 93; 74 L.J.K.B. 338; 92 L.T. 274; 41 Digest 446, *2800*.

(11) *Scammell* (*G.*) *& Nephew, Ltd.* v. *Ouston*, [1941] 1 All E.R. 14; [1941] A.C. 251; 110 L.J.K.B. 197; 164 L.T. 379; 2nd Digest Supp.

(12) *Nicolene, Ltd.* v. *Simmonds*, [1953] 1 All E.R. 822; [1953] 1 Q.B. 543; 3rd Digest Supp.

(13) *Serraino & Sons* v. *Campbell*, [1891] 1 Q.B. 283; 60 L.J.Q.B. 303; 64 L.T. 615; 41 Digest 406, *2526*.

Appeal.

Appeal by the shipowners, Adamastos Shipping Co., Ltd., from an order of the Court of Appeal (DENNING, PARKER and SELLERS, L.JJ.), dated Apr. 16, 1957, and reported sub nom. *Anglo-Saxon Petroleum Co., Ltd.* v. *Adamastos Shipping Co., Ltd.*, [1957] 2 All E.R. 311, reversing an order of DEVLIN, J., dated Feb. 1, 1957, and reported [1957] 1 All E.R. 673, whereby he reversed in part the interim award on the question of liability in the form of a Special Case of the umpire, JOHN MEGAW, Q.C. The umpire had awarded that the shipowners were liable to the charterers, Anglo-Saxon Petroleum Co., Ltd. (the claimants) for breach of a charterparty dated May 25, 1950, subject to the court affirming his affirmative answers to eleven questions*. At the hearing before DEVLIN, J., certain questions (in lieu of the questions stated by the umpire) were agreed and raised for determination before the damages should be finally assessed, and the Case was treated as if it contained those questions. The questions were—

"(i) Whether the United States Act affects the rights and liabilities of the parties under the charterparty ?

"(ii) If the answer to (i) is 'yes', whether under the charterparty any material provisions of the Act affect the rights and liabilities of the parties in connexion with (a) non-cargo-carrying voyages, (b) cargo-carrying voyages other than those to or from ports in the U.S.A. ?

"(iii) Do the words 'loss or damage' in s. 4 (1) and/or s. 4 (2) relate only to physical loss of or damage to the goods ?"

---

* The questions are set out at p. 749, letter I, to p. 750, letter C, post.

The facts appear in the opinion of VISCOUNT SIMONDS.

Ashton Roskill, Q.C., *T. G. Roche*, Q.C., and *Basil Eckersley* for the appellants, the owners.

A. A. Mocatta, Q.C., and *S. O. Olson* for the respondents, the charterers.

The House took time for consideration.

Mar. 6. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the question in this appeal is whether, and to what extent, the appellants are, on the facts found in an interim award stated in the form of a Special Case, in breach of a charterparty made on May 25, 1950, between the appellants as disponent owners and the respondents as charterers. I will refer to them in this opinion as " owners " and " charterers ". The Court of Appeal has held them to be in breach in respect of all the matters raised in the Special Case, overruling the decision of DEVLIN, J., who, in effect, held them to be in breach in respect of one matter only. The question would, I think, be stated more accurately by asking whether, on the true construction of the charterparty, the owners are, by reason of its provisions, exempt from any liability in respect of their acts or omissions for which they might otherwise be liable.

My Lords, by the charterparty, the charterers agreed to charter the vessel the Saxon Star from the owners. The document was headed " Tank Vessel Voyage Charterparty " and, in its original printed form, contemplated performance thereunder of a single voyage. By cl. 1, it was provided that the vessel

> " being tight, staunch and strong, and every way fitted for the voyage, and to be maintained in such condition during the voyage, perils of the sea excepted "

should sail and proceed to one of a number of named ports to load a full and complete cargo of petroleum products as therein provided and that, being so loaded, she should proceed to one of two discharging ranges. There were, however, attached to the document a number of typewritten clauses which made specific provision for loading and discharge otherwise than as permitted by cl. 1. By cl. 44, it was provided that the charterers were to have the option of performing any other voyage at their discretion, but within the limits of the institute warranties clause of Apr. 15, 1941, and, by cl. 43, it was provided that the charterparty was to remain in force for as many consecutive voyages for which the vessel could tender for loading within a period of about twelve months from the date of her readiness to load on the first voyage. By an addendum of May 26, 1950, this period was extended for a further six months, making in all about eighteen months.

Here, then, was a contract of practically world-wide scope covering a substantial period of time. I need only refer further to cl. 52, which has been the cause of all the trouble in this case. It was as follows:

> " It is agreed that the Chamber of Shipping War Risks Clauses dated April, 1937, New Jason Clause, Paramount Clause and Both to Blame Collision Clause as attached, are to be incorporated in this charterparty."

So much turns on the so-called Paramount Clause, that I must set it out in full. It is in these terms:

> " This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved Apr. 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further."

This clause provides that the provisions of the Carriage of Goods by Sea Act of the United States " shall be deemed to be incorporated herein ". " Herein " can only mean " in this contract ". The contract must, therefore, be read as if the provisions of the Act were written out therein and thereby gained such contractual force as a proper construction of the document admits. Much of the Act is quite irrelevant, a fact which need not surprise us since it was passed to comply with the Brussels Convention. It dealt first and last with bills of lading and, by s. 5, expressly enacted that its provisions should not be applicable to charterparties, but that, if bills of lading were issued in the case of a ship under a charterparty, they should comply with the terms of the Act.

I am reluctant to burden your Lordships with many of its provisions, but it has been strenuously urged that the persistent reference to bills of lading, carriage of goods and so on limits the possibility of adapting the clauses to the contractual relation of owner and charterer under a charterparty. I will, therefore, set out some of the provisions, hoping that I omit nothing which is deemed of importance. The Act enacts that

> " every bill of lading or similar document of title which is evidence of a contract of carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this Act."

Section 1 is a definition section, defining " carrier ", " contract of carriage ", " goods ", " ship " and " carriage of goods ". Section 2 provides that (subject as therein mentioned) under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities thereinafter set forth. Section 3 and s. 4 (so far as material) are as follows:

> " *Responsibilities and Liabilities*
>
> " 3. (1) The carrier shall be bound before and at the beginning of the voyage, to use due diligence to—(a) Make the ship seaworthy; (b) Properly man, equip, and supply the ship; (c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation . . .
>
> " *Rights and Immunities*
>
> " 4. (1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of para. (1) of s. 3. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.
>
> " (2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship . . ."

I can now conveniently state the questions of law which it fell to the learned judge to answer, not in the first place, indeed, as stated in the Special Case*, but as subsequently agreed by the parties and assented to by him. They were (see [1957] 1 All E.R. at p. 676):

> " (i) Whether the United States Act affects the rights and liabilities of the parties under the charterparty ?

---

* For the questions as stated in the Special Case, see p. 749, letter I, to p. 750, letter C, *post*.

> "(ii) If the answer to (i) is 'Yes', whether under the charterparty any material provisions of the Act affect the rights and liabilities of the parties in connexion with (a) non-cargo-carrying voyages, (b) cargo-carrying voyages other than those to or from ports in the U.S.A.?
>
> "(iii) Do the words 'loss or damage' in s. 4 (1) and/or s. 4 (2) relate only to physical loss of or damage to the goods?"

On the answers given to these questions depended the answers to the eleven questions set out in the Special Case. It will be clear to your Lordships, when I have briefly summarised the facts as found by the umpire, that the single issue is whether, and how far, the owners can escape liability to the charterers by reason of findings in their favour that they exercised due diligence in respect of those acts or omissions which might otherwise have rendered them liable.

The relevant facts are briefly these. During June and July, 1950, the vessel underwent special survey and repair at Baltimore. Officers and crew to man her were engaged at New York by the owners and, on July 27, 1950, she sailed in ballast for Curaçao there to load her first cargo under the charterparty. I note in passing that this was the only "non-cargo-carrying" voyage with which your Lordships will be concerned. While the vessel was on passage to Curaçao, her machinery was seriously damaged. She was taken in tow to San Juan, where repairs were carried out. She then resumed her voyage to Curaçao. Having there loaded a cargo of oil for carriage to Buenos Aires, she sailed on Aug. 19, 1950, but on her passage her boilers began to leak. She, therefore, put in to Recife (Brazil) for repairs and, on completion of the repairs (which remedied the defects then existing in her machinery), resumed her voyage to Buenos Aires where she duly arrived and discharged her cargo. On Oct. 5 she sailed from Buenos Aires, picked up a cargo of fresh water from the river as ordered by the charterers, and, having bunkered at Monte Video, proceeded again to Curaçao. On her passage there, there was continuous trouble with her machinery, and, on her arrival, repairs were carried out to enable her to go to the United States for much more extensive repairs. On Nov. 30 she left Curaçao, having loaded a further cargo of oil for discharge at Bayonne in New Jersey. Having discharged it, she proceeded to Hoboken, also in New Jersey, where repairs were carried out and completed on Feb. 9, 1951. On the next day she left Hoboken and, in accordance with the charterers' orders, proceeded to Aruba, where she again loaded. Nothing remains to be told of the remainder of the period covered by the charterparty.

I will now state in his own words the findings of the arbitrator on the vital questions of the seaworthiness of the vessel at various times and the diligence exercised by the owners. Your Lordships will note that only in one respect was there a finding that the owners had not exercised due diligence. The umpire found as follows:

> "(i) On the vessel's departure from Baltimore on July 27, 1950, although she was seaworthy as regards her machinery, she was not seaworthy in that the engine-room staff were incompetent; but due diligence had been exercised by the owners in the selection and appointment of the engine-room staff.
>
> "(ii) The damage to the machinery which was caused between Baltimore and San Juan was caused by the incompetence of the engine-room staff, which resulted in a series of negligent acts and omissions.
>
> "(iii) On the vessel's departure from Curaçao on Aug. 19, 1950, the vessel was not seaworthy in respect of her machinery and due diligence had not been exercised to make her seaworthy. The vessel, further, was not seaworthy in that the engine-room staff were incompetent; but due diligence had been exercised by the owners in that respect; and in that respect, though not in respect of her machinery, reasonable and proper steps had been taken to put the vessel in a seaworthy condition.

> "(iv) The damage to the machinery which was found at Recife was caused by the unseaworthiness of the vessel at the start of the voyage from Curaçao, which unseaworthiness was, in its turn, caused as is set out in (ii) above, the defects thus caused not having been fully repaired at San Juan.
>
> "(v) On the vessel's departure from Buenos Aires on Oct. 5, 1950, she was seaworthy in respect of her machinery; but she was not seaworthy in that the engine-room staff were incompetent; but due diligence had been exercised by the owners in that respect, and all reasonable and proper steps had been taken to put the vessel in a seaworthy condition both as regards machinery and engine-room staff.
>
> "(vi) The damage to the machinery which occurred between Buenos Aires and Curaçao was caused by the incompetence of the engine-room staff, which resulted in a series of negligent acts and omissions."

My Lords, I return to the questions of law which I have already set out. On the first question, a broadside attack was made on the owners' claim to rely on the Paramount Clause. In the context of this charterparty, it was said, the clause is insensible and must be rejected. It opens with the words "This bill of lading", and it purports to incorporate the provisions of an Act of the United States which itself enacts that it shall not apply to charterparties. It is, therefore, ex facie inapplicable to this charterparty. My Lords, I must confess that this is to me an attractive approach and I would willingly adopt it. For it is not agreeable to find a business transaction of some importance carried through in a manner which DEVLIN, J., as I think, too indulgently, described as slapdash (see [1957] 1 All E.R. at p. 677). But I do not think that I can do so. I can entertain no doubt that the parties, when they agreed, by cl. 52 of the charterparty, that the "Paramount Clause . . . as attached" should be incorporated in their agreement and proceeded physically to attach the clause which I have set out, had a common meaning and intention which compels me to regard the opening words "This bill of lading" as a conspicuous example of the maxim "falsa demonstratio non nocet cum de corpore constat". There can be no doubt what is the corpus. It is the charterparty to which the clause is attached. Nor, pursuing this main line of attack, can I be driven to a wholesale rejection of the clause because the Act, whose provisions are in turn deemed to be incorporated, itself enacts that its provisions shall not apply to charterparties. I cannot attribute to either party an intention to incorporate a provision which would nullify the total incorporation.

My Lords, I should have come to this conclusion without the aid of any external circumstance. But I am confirmed in it by the notorious fact, to which both the learned judge and the editors of SCRUTTON ON CHARTERPARTIES (16th Edn.)* refer, that the parties to a charterparty often wish to incorporate the Hague Rules in their agreement; and by that I do not mean, nor do they mean, that they wish to incorporate the ipsissima verba of those rules. They wish to import into the contractual relation between owners and charterers the same standard of obligation, liability, right and immunity as under the rules subsists between carrier and shipper; in other words, they agree to impose on the owners, in regard, for instance, to the seaworthiness of the chartered vessel, an obligation to use due diligence in place of the absolute obligation which would otherwise lie on him.

Here, then, my Lords, is the agreement that the parties have made, an original printed document with sundry erasures and typed additions, a complex of attached clauses and an Act of the United States of America whose provisions are deemed to be incorporated. How shall it be construed? The same sort of problem has arisen before, and I agree with DEVLIN, J., that the procedure should be followed here which was laid down in *Hamilton & Co.* v. *Mackie & Sons* (1) ((1889), 5 T.L.R. 677) and approved in this House in *Thomas & Co., Ltd.* v. *Portsea S.S.*

---

* See pp. 456, 464.

Co., Ltd. (2) ([1912] A.C. 1). The learned judge cited ([1957] 1 All E.R. at p. 678) the material passage from the judgment of Lord Esher, M.R., and I need not repeat it. It is obvious that there is much in the Act which, in relation to this charterparty is insensible, or, as I would rather say, inapplicable, and must be disregarded. But, in regard to the matters with which the questions now to be answered are concerned, there has been acute controversy.

First, the Act, being an Act of the United States, is geographically confined to its own jurisdictional limits.

> ". . . every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States in foreign trade, shall have effect subject to the provisions of this Act."

Therefore, it is said, let it be granted that the incorporation of the Act is not altogether insensible, and that the statutory standard of obligation is contractually imported into the charterparty. Yet why should it extend beyond the limits prescribed by the Act itself? Why should it apply to any other voyages than those to or from ports of the United States? I do not think that there is a clearer answer to this question than that given by the learned judge. The contract between the parties is of world-wide scope; the area of state jurisdiction is necessarily limited, and, because it is limited, the Act is given a restricted operation. No reason has been suggested, nor, as far as I am aware, could be suggested, why a similar restriction should be imported into the contract. On the contrary, to do so would, from the commercial point of view, make nonsense of it. I find it easy, therefore, as did the learned judge, to construe this contract as making the substituted standard of obligation coterminous with the enterprise.

The second, and perhaps more difficult question, relates to the non-cargo-carrying voyages. The learned judge, though he felt the weight of the argument to the contrary, decided that to such voyages the express warranty of seaworthiness in cl. 1 of the charterparty must apply. It is with great diffidence that I come to the opposite conclusion. I do not want to anticipate what will presently be said about the nature of the loss or damage in respect of which obligations and immunities are created by the Act. I will merely assume that it is not confined to loss or damage to goods, but extends also to the loss suffered by the charterers owing to the delay caused by unseaworthiness, the loss in fact alleged to have been suffered by the charterers in the present case. It is in this context that the question must be considered to what voyages the new immunity extends.

My Lords, it is, I think, permissible in a consideration of this commercial transaction to ask what possible difference it makes to the charterers whether the delay, to which their loss is due, occurs when the ship is in ballast or is loaded with a cargo of oil or of water. It matters not for this purpose whether the charterparty was for a single voyage, as the original document seemed to contemplate, or for a number of consecutive voyages. The contractual subject-matter was the whole period during which the vessel was under charter and it is, in my opinion, to this whole period that the parties agreed that the statutory standard of obligation and immunity should relate. I think that the learned judge might have come to the same conclusion but for the fact that he thought that it might lead to an unreasonable and unnecessary burden being placed on the owners. For it appeared to him that it would, or might, impose, on them an obligation under s. 3 (1) (c) of the incorporated Act to exercise due diligence to

> " make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation "

even at a time when the vessel was leaving in ballast for her port of loading. I do not feel myself qualified, in the absence of any evidence, to say how serious a burden this would be. But I would, with great respect, doubt whether the obligation under s. 3 (1) (c) arises until the vessel arrives at the port of loading, though it may be convenient substantially to perform it at an earlier stage. I do not in any case find in this consideration a sufficient counterweight to the fact that, from a commercial point of view, it is unlikely that owner and charterer will adopt a shifting standard of obligation between cargo-carrying and non-cargo-carrying voyages. It does not appear to me that the fact that voyage charterparties often contain a cesser clause offers a useful analogy.

On this part of the case it was further argued that non-cargo-carrying voyages could not be brought within the scope of the diminished obligation because the Act is an Act dealing with the carriage of goods by sea under bills of lading, and in almost every section deals with obligations, liabilities, rights and immunities in respect of goods so carried. Therefore, it was said, the incorporated provisions could have no application to a voyage in which no goods were carried. But this seems to me merely to restate the problem in other words. The question remains: What is the meaning and effect of a commercial agreement which contemplates voyages with or without cargo and introduces by reference to the United States Act a qualified standard of obligation? I have already stated my opinion, and would only add that I find it difficult, on a broad consideration of the case, to make any distinction between non-cargo-carrying voyages and voyages to or from other than United States ports. A narrow interpretation would exclude, a generous one include, both of them in the substituted standard of obligation.

I conclude, therefore, this part of the case by saying that here, also, the owners are entitled to succeed in their appeal.

I come now to the question of loss or damage. Owing to the delay caused by the unseaworthiness of the vessel, she was able to complete fewer voyages than she otherwise would have done within the period of the charter. The charterers, therefore, claimed damages in a very large sum, the claim being for the difference between the charter and market rates of freight on cargo-carrying voyages which might have been performed within the eighteen months if she had been continuously fit for service. I have stated the claim in the words of the learned judge. The question is whether the words " loss or damage " in s. 4 (1) or s. 4 (2) of the Act relate only to physical loss of, or damage to, goods. This is a short point on which I can only adopt the reasoning and conclusion of the learned judge. It is, perhaps, sufficient to say that there is nothing in s. 4 (1) or s. 4 (2) which expressly limits loss or damage to physical loss of or damage to the goods, and that s. 2 does not constrain me to put a narrower meaning on the words. There is no authority to the contrary which is binding on your Lordships, and, though I naturally give great weight to anything that falls from VISCOUNT MAUGHAM, his observation in *Joseph Constantine S.S. Line, Ltd.* v. *Imperial Smelting Corpn., Ltd.* (3) ([1941] 2 All E.R. 165 at p. 179) was obiter and doubtfully relevant to the point now under consideration.

My Lords, this has not been an easy case to decide. Of that the difference of opinion in the courts below of learned judges well versed in this branch of the law is proof enough. LORD BRAMWELL, in a phrase which the learned editors of SCRUTTON ON CHARTERPARTIES (16th Edn.), p. 186, have done well to preserve, described a certain class of case as

> " cases where no principle of law is involved but only the meaning of careless and slovenly documents."

This is such a case. No doubt there are rules or canons of construction applicable to careless and slovenly as to other documents. I have tried to apply them, resolute on the one hand to construe commercial agreements broadly and not to be astute to find defects in them or reject them as meaningless and, on the other, not to make a contract for the parties which they have not thought fit to make for themselves. Nor have I forgotten that it is only by sufficiently clear words that an exception to an obligation (whether arising at common law or under the contract itself) can be established: see *Glynn* v. *Margetson & Co.* (4) ([1893] A.C. 351), *Nelson Line* (*Liverpool*), *Ltd.* v. *Nelson & Sons, Ltd.* (5) ([1908] A.C. 16), *Hillas & Co., Ltd.* v. *Arcos, Ltd.* (6) ((1932), 38 Com. Cas. 23), *Petrofina S.A. of Brussels* v. *Compagnia Italiana Transporto Olii Minerali of Genoa* (7) ((1937), 42 Com. Cas. 286) and *Golodetz* v. *Kersten Hunik & Co.* (8) ((1926), 24 Lloyd's Rep. 374), the last named case being a particularly interesting example of the way in which the court will strive to give a sensible effect to a commercial document. These, no doubt, are the familiar principles applied by the Court of Appeal from whose conclusions I reluctantly differ. I think that the point of difference lies in this, that, looking at the documents as a whole and bearing in mind what the learned judge described ([1957] 1 All E.R. at p. 676) as " a general practice, well-known to those sitting and practising in this court ", I have no difficulty in seeing the broad purpose and intent of the parties. I must reject, if I can, the unattractive argument urged by the charterers through their counsel that the agreement to which they put their hands meant nothing at all. It is true that, at a certain stage, it was suggested that the Paramount Clause was intended to refer to bills of lading issued under the charterparty, but this suggestion has been rightly rejected for the conclusive reasons given by PARKER, L.J. ([1957] 2 All E.R. at p. 319). If it did not mean that, but did mean something, what did it mean? I think the parties intended, as I have already said, to introduce as a term governing their relationship as owners and charterers the limited measure of responsibility prescribed by the American Act. This seems to me so plain that I should properly be regarded as unduly astute if I turned my eye away from it. If this initial step is taken, it does not seem to me difficult to make commercial sense of the agreement, though I would not dissent from PARKER, L.J.'s description of it as a " jumble of provisions " (see [1957] 2 All E.R. at p. 320).

For the reasons that I have given I would answer the supplementary questions* of law put to the learned judge as follows:

(i) Yes. (ii) (a) Yes. (ii) (b) Yes. (iii) No.

It follows, I think, that the question of law† stated by the umpire in para. 56 of the Special Case, the opening words of which have been by agreement varied so as to run as follows:

> " Whether upon the facts as found and upon the true construction of the charterparty the owners are in breach of the charterparty and in so far as they are in breach are not protected from loss or damage of the kind claimed resulting therefrom ",

should be answered as follows:

(1) to (3) " No ".
(5) to (9) " No ".

The fourth head of the question relates to the period following the vessel's departure from Curaçao on Aug. 19, when (as it was found) she was not seaworthy in respect of her machinery and due diligence had not been exercised to make her seaworthy. The answer to (4) should, therefore, be " Yes ". The tenth head covers the voyage from Curaçao on Aug. 19. An unqualified negative cannot, therefore, be given. It must be qualified by the extent to which the failure in convenient dispatch was due to the admitted breach to which I have referred. The answer to (11) is " No ".

LORD MORTON OF HENRYTON: My Lords, I have reached the same conclusion as the Court of Appeal, although I have reached that conclusion by a

---

* These questions are stated at p. 727, letter I, ante.

† As stated in para. 56 of the Special Case, this was: " Whether upon the facts as found and upon the true construction of the charterparty the owners are in breach of the charterparty." For the questions, see p. 749, letter I, to p. 750, letter C, post.

A different line of reasoning. I find it convenient to refer to the appellants as "the owners" and to the respondents as "the charterers".

On May 25, 1950, the charterers chartered a tanker belonging to the owners, by a voyage charterparty, to remain in force for as many consecutive voyages as the vessel could perform within a period of about eighteen months. The first voyage began on July 27, 1950, when the vessel left Baltimore in ballast to load her first B cargo at Curaçao. On the way there, her machinery broke down and she had to be taken in tow to San Juan, where certain repairs were effected. Other similar incidents occurred at different stages of her service, and the result was that she lost in all 106 days. The charterers claimed damages which they estimated at over £80,000, the claim being for the difference between the charter and market rates of freight on cargo-carrying voyages which might have been performed C within the eighteen months if the vessel had been continuously fit for service. The claim went to arbitration, and the umpire has made a series of findings to the effect that the breakdown of the vessel's machinery was due to the incompetence of the engine-room staff, and that the vessel was unseaworthy at various stages of her voyages owing to such incompetence. He found, however, that due diligence had been exercised by the owners in the selection and appointment of D their staff.

No question as to the amount of damages arises on this appeal, but it is clear that the owners are liable in damages to the charterers unless they are protected by cl. 52 of the charterparty and a "Paramount Clause" which is thereby incorporated in the charterparty. These clauses are in the following terms:

> E "52. It is agreed that the Chamber of Shipping War Risks Clauses dated April, 1937, New Jason Clause, Paramount Clause, and Both to Blame Collision Clause, as attached, are to be incorporated in this charterparty.
>
> "*Paramount Clause*—This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved Apr. 16, 1936, which shall be deemed to be incorporated herein, and nothing F herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further."

Four questions of construction arise on these clauses, which were stated by G **DEVLIN, J.** ([1957] 1 All E.R. at p. 676) as follows:

> "(i) Whether the United States Carriage of Goods by Sea Act (hereinafter called 'the Act') affects the rights and liabilities of the parties under the charterparty.
>
> "(ii) If the answer to (i) is 'Yes', whether under the charterparty any material provisions of the Act affect the rights and liabilities of the parties H in connexion with (a) non-cargo-carrying voyages, (b) cargo-carrying voyages other than those to or from ports in the United States of America.
>
> "(iii) Do the words 'loss or damage' in s. 4 (1) and/or s. 4 (2) of the Act relate only to physical loss of or damage to goods?"

The learned judge answered these questions as follows:

I (i) Yes; (ii) (a) No; (ii) (b) Yes; (iii) No.

As the owners were claiming that the Act had the effect of exempting them from liability for the unseaworthiness of the ship, it is obvious that the answers to questions (i), (ii) (b), and (iii) were in favour of the owners, while the answer to (ii) (a) was in favour of the charterers. The Court of Appeal answered the first question in the negative, and, accordingly, the remaining questions did not arise. They held that the Paramount Clause could not sensibly be applied to this charterparty, since it was impossible to feel sure what provisions in the Act were to be treated as incorporated, and what was the effect of the incorporation.

My Lords, I must now approach the construction of the relevant documents, and endeavour to answer the four questions already stated. In approaching this task, I shall bear in mind, and strive to apply, three well-known principles of construction, to which reference was made in the course of the argument. The first principle is stated by Lord Wright in *Hillas & Co., Ltd.* v. *Arcos, Ltd.* (6) ((1932), 38 Com. Cas. 23 at p. 36), in words which have often been quoted:

> " Business men often record the most important agreements in crude and summary fashion: modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, verba ita sunt intelligenda ut res magis valeat quam pereat."

These observations were made in a case where the question was whether a contract had been made; but counsel for the owners submitted that they were equally applicable to the construction of a concluded contract, and I agree. Lord Wright then goes on to state the second well-known principle as follows (ibid.):

> " That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as for instance, the implication of what is just and reasonable to be ascertained by the court as matter of machinery where the contractual intention is clear but the contract is silent on some detail."

The third principle was stated by Lord Loreburn, L.C., in *Nelson Line (Liverpool), Ltd.* v. *Nelson & Sons, Ltd.* (5) ([1908] A.C. 16 at p. 19):

> " The law imposes on shipowners a duty to provide a seaworthy ship and to use reasonable care. They may contract themselves out of those duties, but unless they prove such a contract the duties remain; and such a contract is not proved by producing language which may mean that and may mean something different ";

and he added (ibid., at p. 20):

> " I am afraid it is useless to draw the attention of commercial men to the risks they run by using confused and perplexing language in their business documents. Courts of law have no duty except to construe them when a question arises; but it is often very difficult. And sometimes what the parties really intended fails to be carried out because ill-considered expressions find their way into a contract."

Approaching the first of the four questions already stated with these principles in mind, I answer it in the affirmative. The Paramount Clause is clearly incorporated in the charterparty, and I agree with Devlin, J., that the opening words of the Paramount Clause must be treated as corrected so as to read: " This charterparty shall have effect subject to ", etc. The Paramount Clause has, in fact, become one of the clauses of the charterparty, by virtue of cl. 52 thereof, and it does not make sense to begin a clause of a charterparty with the words " This bill of lading ". Turning to the provisions of the Act, I agree again with the learned judge that the words in s. 5, " The provisions of the Act shall not be applicable to charterparties ", must be rejected as being meaningless. The Clause Paramount says that the provisions of the Act shall be deemed to be incorporated in the charterparty, but it is meaningless to incorporate in the charterparty a provision that the Act shall not apply to charterparties.

I now turn to question (ii) (a). The only relevant voyage on which the vessel was not carrying cargo was the initial voyage from Baltimore to Curaçao, and

A the question is whether the material provisions of the Act apply to that voyage. My Lords, in agreement again with DEVLIN, J., I would answer that question in the negative. The provisions on which the owners particularly rely as exempting them from liability for the unseaworthiness of the vessel on that voyage are in s. 4 (1) and (2) of the Act. This section is headed " Rights and immunities ". Section 4 (1) is as follows:

B

> " Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which C goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of para. (1) of s. 3. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section."

The relevant part of sub-s. (2) is as follows:

> D " Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship . . ."

My Lords, it is clear, that, on the facts as found, these words would exempt E the owners from liability in the case of the initial voyage if they applied to that voyage; but, in my opinion, s. 4 only applies to a case in which the ship is being used for the carriage of goods. In order to make good this statement, I must refer to the earlier portions of the Act, which impose certain " responsibilities and liabilities " set out in s. 3, and grant the " rights and immunities " granted by s. 4. Section 1 and s. 2 are in the following terms:

> F " 1. When used in this Act—(a) The term ' carrier ' includes the owner or the charterer who enters into a contract of carriage with a shipper. (b) The term ' contract of carriage ' applies only to contracts of carriage covered by a bill of lading or any similar document of title, *insofar as such document relates to the carriage of goods by sea*, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charterparty G from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same. (c) The term ' goods ' includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried. (d) The term ' ship ' means any vessel *used for the carriage of goods by sea.* (e) The term H ' carriage of goods ' covers the period from the time when the goods are loaded on to the time when they are discharged from the ship."

Section 2 (Risks):

> " Subject to the provisions of s. 6 [which are immaterial for the present purpose] *under every contract of carriage of goods by sea*, the carrier *in relation to the loading, handling, stowage, carriage, custody, care, and discharge of* I *such goods*, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth."

By the Paramount Clause, the provisions just quoted are deemed to be incorporated in the charterparty. It is only by virtue of s. 2 that the rights and immunities on which the owners rely can come into operation, since it is s. 2 which confers these rights and immunities; and it is impossible to incorporate s. 4 in the charterparty without also incorporating the section which provides that the " carrier " shall be entitled to the rights and immunities set forth in s. 4.

A Applying s. 2 to the present charterparty, which is, of course, a contract for the carriage of goods by sea, the section only brings these rights and immunities into operation in regard to a period from the time when goods are loaded on to the time when they are discharged from the ship. That is the only period covered by the term " carriage of goods "—see s. 1 (e)—and it is only under a contract of carriage of goods by sea, and *in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods* that the rights and B immunities specified in s. 4 are conferred on the owner by s. 2. For these reasons, my Lords, in agreement with DEVLIN, J., I would answer question (ii) (a) in the negative, so that the owners are not protected in regard to the initial voyage from Baltimore to Curaçao. Counsel for the owners sought to rely on the decision of a Divisional Court in *Golodetz* v. *Kersten Hunik & Co.* (8) ((1926), 24 Lloyd's Rep. 374), but that case is of no assistance to him for reasons C which I shall state later. For the moment, I shall only point out that the words which I have quoted from s. 1 (e) and s. 2 are not " insensible " when applied to this charterparty, and they are not ambiguous words. They cannot be rewritten, because they may appear to have a somewhat capricious result in limiting the protection of the owners to cargo-carrying voyages.

D Question (ii) (b) gives rise to a more difficult question of construction, but, in my opinion, this question must also be answered against the owners. I turn to s. 13 of the Act, the relevant portion whereof is as follows:

> " This Act shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this Act the term ' United States ' includes its districts, territories, and possessions . . . E The term ' foreign trade ' means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this Act shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions . . ."

F Then follow some provisos which need not be set out. It will be observed that I have not referred to the preamble to the Act, either in considering question (ii) (a) or in considering the present question. Counsel for the charterers sought to gain assistance from the words of the preamble, which are as follows:

> " . . . every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this G Act."

I do not, however, think it is legitimate to limit the scope of the provisions of the Act by the words just quoted, since it is the " provisions of the Act ", and nothing but the provisions of the Act, which are incorporated in the charterparty now under consideration.

H Turning again to s. 13, it may be said, on behalf of the owners, that the opening sentence of the section does not expressly exclude contracts for carriage of goods by sea to and from ports outside the United States. That is so, but I think that the section, on its more natural construction, is, in fact, intended to limit the application of the Act to contracts for carriage of goods to and from ports of the United States. If it was not intended to have this effect, I it is difficult to see why it should appear in the Act at all. It is to be noted that the parties have not chosen to incorporate the Hague Rules, as they might have done. They have chosen to incorporate, by the Paramount Clause, the provisions of a United States Act. They must take these provisions as they find them, unless they are " insensible " if incorporated in the charterparty. An example of insensibility is provided by the words in s. 5 of the Act, already quoted: " The provisions of the Act shall not be applicable to charterparties ". But the words now under consideration are not insensible when read in conjunction with the provisions of the charterparty. The case might be otherwise if the only voyages permitted under the charterparty were voyages between, for instance, England and Abadan. This is not, however, the position, for the vessel started from Baltimore, U.S.A., and cl. 49 provides:

> " Charterers have the option of ordering the vessel to discharge at United States ports subject to owners securing United States Maritime Commission approval and owners undertake to do their utmost to secure this provision should charterers desire to exercise their option."

The present case is, therefore, entirely different from *Golodetz* v. *Kersten Hunik & Co.* (8), already mentioned. That case related to a bill of lading for the carriage of goods from Rotterdam to London. The parties had incorporated " all the terms provisions and conditions of the Carriage of Goods by Sea Act, 1924, and the Schedule thereto ", but that Act was limited to voyages which did not include a voyage from Rotterdam to London. The court was thus faced with the same position as arose in the present case in regard to the words already quoted from s. 5 of the Act, and all your Lordships are of opinion that these words must be rejected as insensible.

In answering question (ii) (b) in the negative, as I do, I am differing, for the first time, from the conclusions of DEVLIN, J. The learned judge points out that ([1957] 1 All E.R. at p. 678):

> " There is a wide range of ports in the charterparty and, if the immunity were to relate only to voyages to and from American ports, the effect of it would be considerably cut down."

That is quite true, but if the words used in the Act, and incorporated in the charterparty, mean that the immunity covers only voyages to and from United States ports, it is impossible either to strike them out or alter them. To do so would be to make a new contract for the parties.

Counsel for the owners relied on *Glynn* v. *Margetson & Co.* (4) ([1893] A.C. 351), and especially on the words of LORD HALSBURY (ibid., at p. 357):

> " Looking at the whole of the instrument, and seeing what one must regard, for a reason which I will give in a moment, as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract. The main purpose of the contract was to take on board at one port and to deliver at another port a perishable cargo."

LORD HERSCHELL, L.C., who delivered the only other speech in that case, did not express himself in such wide terms, but even if LORD HALSBURY'S words are given their full effect, they do not assist the owners in the present case, for three reasons. First, the provisions now under consideration are not " inconsistent with the main purpose of the contract ". They are only inconsistent with protection being given to the owner in the case of voyages to or from ports outside the United States. The main object of the contract is not to provide protection for the owners on any voyage or voyages; it is to provide for the carriage of goods by sea. Secondly, LORD HALSBURY said, immediately after the passage which I have already quoted (ibid.):

> " I do not think the learned counsel who argued this case on the part of the appellants gave sufficient effect in the argument which he addressed to your Lordships to the difference between the ordinary and formal parts of the document which are to be found in print and the written parts . . . "

In *Glynn* v. *Margetson & Co.* (4), this House, in effect, rejected some of the words in a printed clause which were quite inconsistent with the main purpose of the contract. In the present case, the words which are sought to be struck out were inserted into the contract by a special clause described as a " Paramount Clause ". Thirdly, their Lordships were clearly influenced by the consideration that the goods to be carried were perishable.

What, then, is the result of my answering question (ii) (a) and question (ii) (b) in the negative ? The only voyages under the charterparty which are relevant in the present case are (i) the voyage from Baltimore to Curaçao, which is not covered by the Act because it is not a cargo-carrying voyage; and (ii) other voyages which are not covered by the Act because they are not voyages to or from United States ports. The result is that the Paramount Clause, incorporating the Act, gives the owners no protection in the circumstances of the present case, and it becomes irrelevant to consider question (iii),

> " Do the words ' loss or damage ' in s. 4 (1) and/or s. 4 (2) of the Act relate only to physical loss of or damage to goods."

I would add this in regard to questions (ii) (a) and (ii) (b). It may be that the parties intended to incorporate in the charterparty only s. 3 and s. 4 of the Act, and to incorporate them without the limitations imposed by s. 1 (e), s. 2 and s. 13, so that they would apply to all voyages within the scope of the charterparty. If this was the result which they wished to achieve, I can think of more than one simple way in which they could have achieved it; but, to my mind, they have failed to achieve it by the Paramount Clause, and your Lordships cannot help the owners to achieve it by redrafting the Paramount Clause and the Act so as to make a new contract for the parties.

Even if it is possible so to read the Paramount Clause and the Act as to apply s. 3 and s. 4 to all voyages, I would pray in aid the words of LORD LOREBURN in *Nelson Line* (*Liverpool*), *Ltd.* v. *Nelson & Sons, Ltd.* (5), already quoted, and of LORD WRIGHT, M.R., in *Petrofina S.A. of Brussels* v. *Compagnia Italiana Transporto Olii Minerali of Genoa* (7) ((1937), 42 Com. Cas. 286 at p. 291):

> " If it is sought to effect a limitation of the overriding obligation to provide a seaworthy ship (whether that is express or implied for this purpose does not matter) by other express terms of the charterparty or contract of affreightment, that result can only be achieved if perfectly clear, effective and precise words are used expressly stating that limitation."

Can it be said, my Lords, that, in the present case, the Paramount Clause, incorporating the Act, limits the obligation to provide a seaworthy ship in words which are " perfectly clear " ? Or have the parties used language which (as LORD LOREBURN put it) " may mean that and may mean something different " ? If so, the owners must be held liable, even if your Lordships do not accept my construction of the relevant words.

For the reasons which I have stated, I would answer questions (1) to (9) in para. 56 of the Special Case in the affirmative, and would uphold the award of the umpire, in para. 57, that the owners are liable to the charterers. This is the conclusion at which the Court of Appeal arrived, for different reasons.

LORD REID: My Lords, cl. 52 of the charterparty provides:

> " It is agreed that the Chamber of Shipping War Risks Clauses dated April, 1937, New Jason Clause, Paramount Clause, and Both to Blame Collision Clause, as attached, are to be incorporated in this charterparty."

This case turns on the proper interpretation of the Paramount Clause which is thereby incorporated. The Paramount Clause begins: " This bill of lading shall have effect subject to . . .", and the first question is what is meant by " This bill of lading ".

As it stands, " This bill of lading " does not make sense, but no one suggests that the parties by mistake attached the wrong form of clause to the charterparty. They intended to attach this clause, and they must have intended it to mean something. It was argued that it was meant to be a clause which the respondents (hereinafter called " the charterers ") were to be bound to include in any bill of lading, and that it was not meant to affect the charterparty itself. I can find no ground for this argument—particularly when I find that in both the New Jason Clause and the Both to Blame Collision Clause there are provisions introduced by the words " The charterers shall procure that all bills of lading issued under this charterparty shall contain the following clause ". To give effect to this argument, it would be necessary to read in at the beginning of the Paramount Clause these or similar words. This could only be done if there was some clear indication elsewhere that it must be done and there is nothing anywhere to show that this was the intention.

If the Paramount Clause is to have any meaning or effect at all " This bill of lading " must be held to be a misnomer for " This charterparty ". I find nothing to raise any doubt that this was the intention, and the fact that cl. 52 directs that the Paramount Clause is to be " incorporated " in the charterparty appears to me to be a clear pointer that its initial words must be so read. So reading them, the Paramount Clause provides:

> " This charterparty shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States approved Apr. 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this charterparty be repugnant to said Act to any extent, such term shall be void to that extent, but no further."

This is a plain and unequivocal direction to incorporate in the charterparty " the provisions " of the United States Act so that, if any other term of the charterparty is to any extent repugnant " to said Act ", it shall be void to that extent but no further. I note that there must be repugnancy to the United States Act—not to some particular section of it.

The first difficulty arises from the provisions of s. 5 of the United States Act:

> " . . . The provisions of the Act shall not be applicable to charterparties; but if bills of lading are issued in the case of a ship under a charterparty, they shall comply with the terms of this Act . . ."

The Act only deals with bills of lading: it begins:

> " Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this Act."

This case appears to me to raise in an acute form the question how far a court is entitled to go in disregarding words in a contract in order to discover the intention of the parties. It is difficult to see how anyone who had given any thought to the provisions of the United States Act could have drafted this Paramount Clause for inclusion in a charterparty; it must have been drafted for inclusion in a bill of lading where it would be quite appropriate. But it appears that, for a considerable time, a clause in substantially this form has been included in a number of charterparties. We do not know how this practice originated, and we do not know, and are not entitled to guess, just what the parties had in mind when they agreed to incorporate the clause in this charterparty. The intention of the parties can only be inferred from the words which they have used. Undoubtedly the charterparty must be read as a whole, and any term in it must be read in light of the general nature of the contract, of the fact that the contracting parties were business men, and of all relevant facts known to the parties when it was made. But, in the end, we must take the words which the parties have used, and interpret them.

As the parties have chosen to incorporate in a charterparty provisions which are designed to apply, and only to apply, to bills of lading, one must, I think, infer that they intended these provisions to be incorporated mutatis mutandis;

and, in order to see what this involves, I would begin by trying to read references to bills of lading in the Act as if they were references to charterparties. That necessarily involves the rejection as insensible of the provisions of s. 5 of the Act that its provisions shall not be applicable to charterparties, and I find little difficulty in taking that step.

Then there are a number of provisions in the Act which, from their very nature, can only apply to bills of lading, and which become meaningless if one tries to make them apply to a charterparty. It probably does not matter much whether or not one regards them as incorporated in the charterparty. Some of them might throw some light on other provisions which must be incorporated, but I am content to take the case on the footing that they are not incorporated. There are also sections of the Act which permit parties to agree to vary statutory rights and liabilities in certain cases, and permit the Government of the United States to modify the terms of the Act in certain circumstances. These, too, are meaningless if incorporated in this charterparty, and I disregard them.

That leaves to be incorporated those parts of the Act which enact the rights and liabilities of carrier and shipper and which are capable of being applied to a charterparty, if one reads owner and charterer for carrier and shipper. That appears to me to be quite consistent with the second part of the Paramount Clause, which must mean that nothing in the charterparty shall be deemed a surrender by the carrier (the owner) of any of his rights or immunities, or an increase of any of his responsibilities or liabilities under the Act. The question is: What are the carrier's rights, immunities, responsibilities or liabilities under the Act which can apply to an owner vis-à-vis a charterer ? The purpose of the Paramount Clause is to preserve them—not to extend them.

The first part of the Act, which I have already quoted, shows, as one might expect, that the Act only applies where there is carriage of goods to or from a port of the United States; and this is confirmed by s. 13 which provides: "This Act shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade . . ." Accordingly, a carrier can have no rights or liabilities under the Act except in relation to a voyage to or from the United States, and, if this Paramount Clause had been incorporated in a bill of lading, a term in the bill of lading repugnant to the Hague Rules as embodied in the Act would not be repugnant to the Act if the goods were not being carried to or from the United States. One of the difficult questions in this case is whether a term of this charterparty, which is repugnant to a part of the Act capable of being applied to a charterparty, can be regarded as "repugnant to said Act" within the meaning of the Paramount Clause as regards a voyage which is neither to nor from a United States port. It must be borne in mind that the Paramount Clause expressly provides that, if any term of the charterparty is repugnant to the Act to any extent, it shall be void to that extent but no further. It was, therefore, expressly contemplated that a term in the charterparty might be invalidated to some extent, but yet remain valid when the circumstances were not within the scope of the Paramount Clause. There are terms in the charterparty which would, admittedly, prevent the appellants (hereinafter called "the owners") from succeeding unless they are excluded by the Paramount Clause in the circumstances of this case.

Then s. 2 of the Act provides, subject to an immaterial exception,

> "under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, storage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth":

and s. 7 provides:

> "Nothing contained in this Act shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption

A as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connexion with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea."

So it is plain that, under the Act, a carrier can have no rights or liabilities except in relation to a cargo-carrying voyage. A second difficult question in this case B is whether a term of this charterparty, which is repugnant to a part of the Act capable of being applied to a charterparty, can be regarded as "repugnant to said Act" within the meaning of the Paramount Clause as regards a voyage when no cargo is carried.

Section 3 and s. 4 of the Act set out respectively the responsibilities and liabilities and the rights and immunities of the carrier. Section 3 (1) provides: C

> "The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—(a) Make the ship seaworthy; (b) Properly man, equip, and supply the ship; (c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation."

D The other provisions of the sections are either from their nature incapable of application to a charterparty or difficult to apply to a charterparty without considerable modification. The owners admit that "at the beginning of the voyage", in s. 3 (1), must mean at the beginning of each voyage under this charterparty, and not at the beginning of the first voyage under it. Paragraph (c) of s. 3 (1) causes some difficulty for the owners because, if this sub-section E is to apply to voyages when no cargo is carried, it would seem unreasonable that para. (c) should apply to such voyages; on the other hand it would apply when cargo was to be carried.

Section 4 provides:

> "(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due F diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which the goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of para. (1) of s. 3. When loss or damage has resulted from unseaworthiness, the burden of proving the G exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.
>
> "(2) Neither the carrier nor the ship shall be responsible for loss or damage resulting from—(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship . . ."

H and a number of other matters most of which are readily applicable to a charterparty.

I do not think that I misrepresent the case for the owners in saying that it is that, in spite of the wording of the Paramount Clause, no part of the United States Act should be incorporated in this charterparty except those parts of s. 3 I and s. 4 of the Act which are readily applicable to a charterparty, and that then the provisions so incorporated should be read in their new context without paying regard to the limited extent of the rights which they confer in their original context in the Act. In that way these provisions can be made to apply to voyages which are neither to nor from a United States port and to voyages when no cargo is carried—voyages to which in their original setting in the Act these provisions could never have any possible application. The charterers, on the other hand, in addition to supporting the reasoning of the Court of Appeal, maintain that, if any part of the Act is to be incorporated, the Paramount Clause requires that every part of the Act which is capable of application to a charterparty must be incorporated, so that the provisions on which the owners rely will still be qualified by the other provisions of the Act to which I have referred and will, therefore, retain their original limited scope and not apply either to voyages which do not touch the United States or to voyages on which no cargo is carried.

The strength of the owners' case lies in the fact that the method of construction which I have sought to follow produces a result which is commercially unreasonable. It is not credible that, if the parties had really applied their minds to the matter, they would have agreed that the owners should have one standard of duty for cargo-carrying voyages to or from the United States and another for all other voyages. Indeed, I am prepared to assume that, if the defects of the Paramount Clause had been pointed out to the parties, they, or at least any reasonable business men in their position, would have agreed that the relevant provisions of the Hague Rules, as embodied in the United States Act, should apply to all voyages under this charterparty. But it is one thing to say that the parties would have agreed to this and another thing to say that they did agree to it.

We cannot tell what the parties had in mind and we may not inquire as to what was said in the course of negotiation. The parties may have intended—indeed they may have said —that the Hague Rules were to apply to all voyages under the charterparty; they may have chosen this ill-designed clause simply because it had been used before. But they may have been very vague in what they intended or what they said. In any case, we are not concerned with what they may have intended or said. We are only concerned with interpreting the words which they chose to use in their contract. I do not think that we are entitled to assume that they must have had a clear intention and that it must have been a reasonable intention, then to find that the only reasonable intention would have been to apply the Hague Rules to all voyages, and to hold that, even if the words which they have used will not bear that construction, that intention must prevail. A court is often entitled to add to a written contract by implying a term, if it is satisfied that any reasonable men in the position of the parties would have agreed to it if their attention had been directed to the point and that the term should be implied. But that is supplementing the words which the parties have used—not contradicting them. It might be the law that a court should be entitled to amend the parties' contract if satisfied that no reasonable men could have meant what it says and also satisfied as to what they must have intended to do if, being reasonable men, they had directed their attention to the point. Perhaps that should be the law. But, so far as I am aware, there is no authority for a court having that power. Here the parties made an express provision which is, in my view, incapable of bearing the construction for which the owners contend and, therefore, to give effect to that contention would involve contradicting what the parties have said in their contract and making a new contract for them.

There are many cases where a court must disregard words, including whole terms, which the parties have put in their contract. But those are cases where there is something in the contract itself which makes that course necessary. For example, the words may be inconsistent with the main object of the contract. In *Glynn* v. *Margetson & Co.* (4) ([1893] A.C. 351), a printed clause would have allowed the ship to proceed to and stay at any port within a very wide range in carrying oranges from Malaga to Liverpool. A deviation by the ship caused damage to this perishable cargo and the owners were held liable. Lord Halsbury said (ibid., at p. 357):

> ". . . one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract."

And Lord Herschell, L.C., said (ibid., at p. 355):

> " Where general words are used in a printed form which are obviously intended to apply, so far as they are applicable, to the circumstances of a particular contract, which particular contract is to be embodied in or introduced into that printed form, I think you are justified in looking at the main object and intent of the contract and in limiting the general words used, having in view that object and intent."

I do not think that this principle so applied helps either party. The object of the contract in *Glynn's* case (4) was obvious from the contract itself, but here, if a limited application is given to the Hague Rules, I can see no conflict with either the general object of the charterparty or any express term in it. The conflict is only with what one might have expected reasonable people to do. I should, perhaps, note that an explanation of *Glynn's* case (4) was given by JENKINS, L.J., and approved in this House in *G. H. Renton & Co., Ltd.* v. *Palmyra Trading Corpn. of Panama* (9) ([1956] 3 All E.R. 957).

Then there are numerous cases where two parts of a contract appear to contradict each other. I shall only cite two cases which seem to me to be relevant here. In *Elderslie S.S. Co.* v. *Borthwick* (10) ([1905] A.C. 93), LORD MACNAGHTEN said (ibid., at p. 96):

> " The clause which has been called the large print clause seems to me to be perfectly clear. The small print clause is equally clear. For my part I am unable to reconcile the two clauses. In such a case as this an ambiguous document is no protection. It is a wholesome rule that a shipowner who wishes to escape the liability which might attach to him for sending an unseaworthy vessel to sea must say so in plain words."

And in *Nelson Line (Liverpool), Ltd.* v. *Nelson & Sons, Ltd.* (5) ([1908] A.C. 16), LORD LOREBURN, L.C., said (ibid., at p. 19):

> ". . . I think the clause, taken as a whole, so ill thought out and expressed that it is not possible to feel sure what the parties intended to stipulate. The law imposes on shipowners a duty to provide a seaworthy ship and to use reasonable care. They may contract themselves out of those duties, but unless they prove such a contract the duties remain; and such a contract is not proved by producing language which may mean that and may mean something different. As LORD MACNAGHTEN said in *Elderslie S.S. Co.* v. *Borthwick* (10) ([1905] A.C. at p. 96), ' an ambiguous document is no protection '."

A third class of case is where a term is meaningless or so vague as to be insensible. In *G. Scammell & Nephew, Ltd.* v. *Ouston* (11) ([1941] 1 All E.R. 14), LORD WRIGHT said (ibid., at p. 25):

> " The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance, and not mere form. It will not be deterred by mere difficulties of interpretation. Difficulty is not synonymous with ambiguity, so long as any definite meaning can be extracted. The test of intention, however, is to be found in the words used. If these words, considered however broadly and technically, and with due regard to all the just implications, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract."

In *Nicolene, Ltd.* v. *Simmonds* (12) ([1953] 1 All E.R. 822), that principle was applied so as to strike out of a contract a term so vague or ambiguous that no ascertainable meaning could be given to it, and to leave the rest of the contract valid.

The Court of Appeal have followed the last class of case and have held that no effect at all should be given to the Paramount Clause. DENNING, L.J., said ([1957] 2 All E.R. at p. 318):

> "If we reject the obvious contradictions and inconsistencies, and seek to apply the rest of the Hague Rules in their ordinary meaning, we are left with such incongruous results that no one can suppose that the parties ever intended to produce them. If we reject the contradictions, inconsistencies and incongruities, and put something in their stead, we shall be making for the parties a contract which we may think is reasonable but to which they have never subscribed, because it would bear no relation to the written words. And I have good reason for thinking that we might differ from the judge, and between ourselves, as to what would be reasonable. This all leads me to the conclusion that this Paramount Clause cannot sensibly be applied to this charterparty. It must be rejected as insensible in this setting."

A

B

PARKER, L.J., said [1957] 2 All E.R. at p. 319):

C

> "What provisions are to be treated as incorporated? This charter is, as I have said, for successive charterparty voyages and world wide in its scope. It is clearly not possible to select those provisions which the court thinks reasonable to apply in all the circumstances. That would be to make a new contract between the parties. The only safe method of exclusion would be to reject only those provisions or parts of provisions which would be insensible. But, if this is done, one is left with such a jumble of provisions that it is, in my judgment, quite impossible to feel sure what the parties intended. Accordingly, I feel constrained to reject the whole of the Paramount Clause as insensible."

D

SELLERS, L.J., said (ibid., at p. 321):

E

> "On the other hand, to give the clause effect as the shipowners submit requires even more imagination and a drastic elimination or substitution of all words which offend against the applicability of the clause to a charterparty. It seems to me that this would be doing what the parties did not do themselves, and would be giving to provisions a certainty and a clarity which they do not possess. Where the court can be certain of the contractual intention, then matters which conflict with the intention may be disregarded as insensible, but if very little seems to fit in with the accepted provisions of a contract and a position of uncertainty and doubt arises—as I think it does here—it would be passing out of the realm of construction if one proceeded to cull or create contractual terms out of the muddled material."

F

G

I have sympathy with their view, particularly in view of the principle restated by LORD WRIGHT, M.R., in *Petrofina S.A. of Brussels* v. *Compagnia Italiana Transporto Olii Minerali of Genoa* (7) ((1937), 42 Com. Cas. 286 at p. 291):

> "If it is sought to effect a limitation of the overriding obligation to provide a seaworthy ship (whether that is expressed or implied for this purpose does not matter) by other express terms of the charterparty or contract of affreightment, that result can only be achieved if perfectly clear, effective and precise words are used expressly stating that limitation."

H

But I am unable to go all the way with them, because I think that, whatever be the position with regard to voyages not within the scope of the United States Act, the Paramount Clause has at least applied the Hague Rules with sufficient clarity to cargo-carrying voyages to or from the United States. There might well have been such voyages under this charterparty, and the charterers' claims might have arisen solely in respect of such voyages. If they had, I do not think that a court could have refused to the owners the protection of this clause on the ground that, in other circumstances which had not arisen, the clause might be insensible. But it so happens that no claim arises in this case in respect of a cargo-carrying voyage to or from the United States and, therefore, I reach the same result as the Court of Appeal but in a different way.

I

A It may appear to some to be "legalistic" to hold that a contract means something which no reasonable business man could have intended. But, if a court is precluded from remaking a contract and is only entitled to construe the words which the parties have used, and the parties choose to use such an ill-designed clause as this, a court may have to tell them that they have produced a very unreasonable result.

B I would dismiss this appeal.

LORD KEITH OF AVONHOLM: My Lords, it has been accepted, I think rightly, by all the learned judges who have considered this case, as also by your Lordships, that the words "This bill of lading" in the Paramount Clause must be read as "This charterparty". It would seem to follow that the United States C Carriage of Goods by Sea Act must be read for the purposes of this charterparty as if the words in s. 5, "The provisions of the Act shall not be applicable to charterparties" were deleted. The parties have incorporated the Act contractually into their contract of charterparty, and to say that the provisions of the Act shall not apply to their charterparty would render the incorporation nugatory and make no sense of what was intended to be a "Paramount Clause" in their D contract. It is, of course, possible to read a clause in a contract as senseless and read it out of the contract altogether, but, in commercial contracts, that is a course that the court should be slow to adopt. As stated by LORD WRIGHT in *Hillas & Co., Ltd.* v. *Arcos, Ltd.* (6) ((1932), 38 Com. Cas. 23 at p. 36), it is

> "the duty of the court to construe such documents fairly and broadly, E without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, verba ita sunt intelligenda ut res magis valeat quam pereat."

Turning to the document incorporated by the Paramount Clause, namely, the United States Act, one finds, as was to be expected, that it applies only to contracts of carriage of goods by sea covered by a bill of lading or similar document F of title, and the outlook of the various sections of the Act is necessarily on such contracts. To give any effect to the contractually incorporated document it must be construed, so far as possible, with reference to a charterparty and not a bill of lading. This is necessarily involved in the step that has already been taken of regarding as inapplicable the words "the provisions of the Act shall not be applicable to charterparties". The next step, in my opinion, is to G read "contract of carriage" as meaning a contract between a carrier and a charterer, and not one between a carrier and a shipper. A charterparty is one form of contract for the carriage of goods by sea. The proper approach in a case of this kind in construing an incorporated document has been laid down by this House in *Thomas & Co., Ltd.* v. *Portsea S.S. Co., Ltd.* (2) ([1912] A.C. 1), and in *Hamilton & Co.* v. *Mackie & Sons* (1) ((1889), 5 T.L.R. 677), approved in H the former case. There may be slight differences in the approach adopted by LORD ESHER, M.R., in *Hamilton & Co.* v. *Mackie & Sons* (1) (5 T.L.R. at p. 678) and that adopted by LORD GORELL and LORD ROBSON in *Thomas & Co., Ltd.* v. *Portsea S.S. Co., Ltd.* (2), but they come, I think, very much to the same thing and achieve the same result. LORD ESHER would read in the whole terms of the incorporated document and then treat any term which was inconsistent I with the incorporating document as insensible and to be disregarded. LORD GORELL and LORD ROBSON approach the matter, I think, from the standpoint of reading in so much of the incorporated document as is not inconsistent with the subject-matter of the incorporating document. LORD ROBSON states (ibid., at p. 10) the rule

> "that the terms of the charterparty when incorporated or written into the bill of lading shall not be insensible or inapplicable to the document in which they are inserted . . ."

In that case, it was held that an arbitration clause in a charterparty was not apt to be introduced into a bill of lading and, in spite of an incorporating clause in the bill of lading, should be rejected as inconsistent with the bill of lading. The same difference in approach will be found between LORD ESHER, M.R., and LOPES, L.J., in *Serraino & Sons* v. *Campbell* (13) ([1891] 1 Q.B. 283 at pp. 289 and 301). Here we have the converse case of deciding how much, or what, should be written in to a charterparty of terms that were intended for a bill of lading.

Taking s. 3 (1) and s. 4 (1) and (2) (a) by themselves, no difficulty would arise in giving them a literal and effective interpretation as between owner and charterer. Two points, however, are taken that these provisions do not apply to a ballast, or non-cargo carrying, voyage and apply only to a voyage to or from a United States port. On the first point, of course, the Act as drawn applied only to cargo voyages because it dealt wholly with contracts of carriage under bills of lading. But, ex hypothesi, that limitation has gone. The Act is now being applied to a charterparty. A charterparty is a contract for the purpose of the carriage of goods by sea, and I see no difficulty in saying that a voyage in ballast is all part and parcel of, and incidental to, that purpose. If a chartered ship proceeds to its port of loading it is, in my opinion, engaged in a voyage relating to the carriage of goods, though it is not actually carrying goods at the time. To exclude the carrier in such a case from the obligations and immunities of s. 3 and s. 4 is merely to assert that the Act applies to contracts for the carriage of goods by sea under bills of lading which are confined to the actual carriage of goods. Reference was made to s. 2, but that does not, in my opinion, advance the argument for exclusion of ballast voyages any further. Indeed, it might be said that a voyage under a charterparty in ballast is a voyage under the contract " in relation to " the loading, handling, stowage, carriage, etc., of goods. True, it does not cover the period from the time when the goods are loaded to the time when they are discharged as mentioned in s. 1 (e) of the Act, but that paragraph has no meaning in a charterparty, which covers a much greater scope of time, and may be rejected as inconsistent with the purpose of the charterparty. In this matter, I am reluctant to differ from the learned judge. He seems to attach considerable weight to para. (c) of s. 3 (1), which imposes the duty to make the holds, refrigerating and cooling chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation. That is, no doubt, directed to the carriage of goods, but so is a charterparty. And if a ship has not made this provision before she sails for her port of loading, she will have to do so before she takes on a cargo at the port of loading and on each voyage thereafter under the charterparty on which she carries goods. I am not prepared to hold that, because s. 3 (1) (c) is inapplicable to a ship on a ballast voyage, if that be so, the shipowner is, therefore, placed under greater liabilities than those imposed in other respects under s. 3.

The point that a claim to immunity is confined to voyages to or from United States ports is founded on the words in the enacting part of the statute that every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States in foreign trade shall have effect subject to the provisions of this Act, and on the words in s. 13 that " This Act shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade ". But, again, these words seem to me to have no relevance to the charterparty in this case. Very good reasons can be seen for the United States legislature limiting its Act to goods carried under a bill of lading to or from United States ports. They seem quite inapposite when the Act is introduced contractually into a charterparty covering a very wide range of ports outside the United States. Unless the charterers exercised their option under cl. 49 of the charterparty, and in that event the owners secured the approval of the United States Maritime Commission, the ship might never have touched at a United States port after leaving Baltimore

A on her first voyage. On this point, DEVLIN, J., arrived, I think, at the right conclusion.

As to the nature of the loss or damage for which immunity may be claimed, I see no reason for limiting this to physical loss of or damage to goods. Here, again, the force of the argument for such a limitation stems from the fact that the United States Act applied only to goods carried under bills of lading. Even in B such a case it does not follow that loss or damage is limited to physical loss of or damage to goods. Section 3 (8) shows that the loss or damage contemplated is " loss or damage to or in connexion with the goods ", and it has been held in this House that such loss or damage is not limited to physical loss or damage: *G. H. Renton & Co., Ltd.* v. *Palmyra Trading Corpn. of Panama* (9) ([1956] 3 All E.R. 957). I proceed, however, on the view that the subject-matter of the contract C here was voyages, and loss of voyages naturally falls under the words " loss or damage ".

On the view I have taken, the point as regards causation of the damage does not arise.

In the result, I would allow the appeal. I agree that the question of law should be answered in the manner proposed by my noble and learned friend on D the Woolsack.

LORD SOMERVELL OF HARROW: My Lords, this is an appeal from the order of the Court of Appeal allowing an appeal and dismissing a cross-appeal from an order of DEVLIN, J., on an interim award stated in the form of a Special Case under s. 14 and s. 21 (1) (b) of the Arbitration Act, 1950.

E The respondents were charterers of a tanker the Delaware Sun* owned by the appellants. The charter was dated May 25, 1950. The charter was for as many consecutive voyages as the vessel could perform within eighteen months. The charterers alleged in effect that, owing to the owners' breaches of contract, the ship was delayed by having to be repaired. As a result of the time lost, she was able to perform fewer voyages than would have been performed but F for the delay caused by the breaches alleged. DEVLIN, J., said ([1957] 1 All E.R. at p. 675):

> " The charterers claimed damages which they put at over £80,000, the claim being for the difference between the charter and market rates of freight on cargo-carrying voyages which might have been performed within the eighteen months if she had been continuously fit for service."

G The umpire, who was dealing only with liability, found that delay was caused by incompetence of the engine-room staff which amounted to unseaworthiness. Delay was also caused on one occasion, at Curaçao, by unseaworthiness in respect of machinery. The umpire found that the owners exercised due diligence in the selection and appointment of the engine-room staff. The owners maintain that was the extent of their liability and, therefore, they are not liable in respect H of delay due to that cause. The umpire found that due diligence had not been exercised in respect of the faulty machinery on the one occasion referred to and the owners admit their liability in respect of delay due to that cause. The learned umpire set out the questions of law in eleven questions as follows:

> " The question of law for the decision of the court is: Whether upon the facts as found and upon the true construction of the charterparty the owners I are in breach of the charterparty†:—
>
> " (1) In that the Saxon Star was not seaworthy when she sailed from Baltimore on July 27, 1950;
>
> " (2) In that the breakdown of the machinery of the vessel between Baltimore and San Juan was caused by the negligent acts or omissions of the engine-room staff;

---

* Re-named the Saxon Star.

† For the agreed variation, see p. 734, letter G, ante.

> "(3) In that the vessel was not maintained in seaworthy condition during the voyage from Baltimore to Curaçao; A
>
> "(4) In that the vessel was not seaworthy when she sailed from Curaçao on Aug. 19, 1950;
>
> "(5) In that the vessel was not maintained in seaworthy condition during the voyage from Curaçao to Recife;
>
> "(6) In that the breakdown of the machinery of the vessel between Curaçao and Recife was caused by the prior negligent acts or omissions of the engine-room staff; B
>
> "(7) In that the vessel was not seaworthy when she sailed from Buenos Aires on Oct. 5, 1950;
>
> "(8) In that the breakdowns of the machinery of the vessel between Buenos Aires and Curaçao (save only the breakdowns of the windlass) were caused by the negligent acts or omissions of the engine-room staff; C
>
> "(9) In that the vessel was not maintained in seaworthy condition during the voyage from Buenos Aires to Curaçao;
>
> "(10) In that the owners failed to ensure that the vessel performed her service under the charterparty with all convenient despatch; or
>
> "(11) On any other ground ?" D

Before the learned judge the parties agreed the following questions which elucidate and perhaps extend the issues lying behind the learned umpire's questions, namely, (i) Whether the United States Carriage of Goods by Sea Act (hereinafter called "the Act") affects the rights and liabilities of the parties in connexion with (a) non-carrying voyages, (b) cargo-carrying voyages other E than those to and from ports in the United States of America; (ii) Do the words "loss or damage" in s. 4 (1) or s. 4 (2) of the Act relate only to physical loss or damage ? On the last question, your Lordships were asked to consider whether the words "loss or damage" covered the damages as claimed in this case.

The charterparty starts with a printed form headed "Tank Vessel Voyage Charterparty" with, of course, typewritten insertions. Typewritten clauses F 24 to 52 are attached. Clause 52 is as follows:

> "It is agreed that the Chamber of Shipping War Risks Clauses dated April, 1937, New Jason Clause, Paramount Clause, and Both to Blame Collision Clause, as attached, are to be incorporated in this charterparty."

The clause headed "Paramount Clause" is as follows : G

> "This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved Apr. 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under H said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further."

It is, I think, relevant to set out quite shortly the history of the provisions embodied in this and other similar Acts. The object of the Brussels Convention which led to the Hague Rules which led to the Act, was to produce standard I provisions of liability as between shipowner or carrier and shipper. The desirability of standard terms for bills of lading which pass from hand to hand like negotiable instruments had long been felt. The provisions in relation to English law relieved the shipowner of his absolute obligation to provide a seaworthy ship. This was replaced by a duty to exercise due diligence to provide a seaworthy ship. The shipowner was placed under a duty to exercise due diligence in other matters connected with the carriage. He was allowed maximum exceptions to his liability which he could not increase.

A The rules did not apply to charterparties. Charterparties do not pass from hand to hand and parties were, therefore, left free to contract on what terms they chose. It was thought at one time that the rules might be left to be embodied by agreement, as was done with the York Antwerp Rules on General Average of 1890 (SCRUTTON ON CHARTERPARTIES (16th Edn.), p. 454). Later it was decided that countries should, if so minded, legislate. Our own Carriage B of Goods by Sea Act was passed in 1924 and the United States Act in 1936. The United States had led the way in this field by the Harter Act of 1893. Legislation embodying the rules with or without modification did not, of course, cover charterparties, and could not go beyond shipments which were or came within the jurisdiction of the legislating country. The United Kingdom Act applies to ships carrying goods from any port in Great Britain or Northern C Ireland. The United States Act applies (subject to exceptions which are not relevant here) to contracts for carriage of goods to or from ports of the United States. This short summary is, I hope, useful in emphasising how natural it was that parties concerned in the carriage of goods by sea should wish to embody this code of obligations, the product of much thought and experience, in contracts to which it would not be applicable by legislation. This would apply D to all charterparties and to bills of lading which were not within the geographical limits of any country's legislation.

One might have expected that in such cases the parties would embody the " Rules ". The practice clearly grew up at an early date of referring to one or other of the Acts as incorporated. On the issue which comes before your Lordships, I have been greatly influenced by the decision in *Golodetz* v. *Kersten* E *Hunik & Co.* (8) ((1926), 24 Lloyd's Rep. 374), and the fact that that decision has stood unchallenged for thirty years. The shipper in that case sued on a bill of lading for goods to be carried from Rotterdam to London. The clause to be construed was as follows:

> " All the terms, provisions and conditions of the Carriage of Goods by F Sea Act, 1924, and the schedule thereto, are to apply to the contract contained in this bill of lading, and the carriers are to be entitled to the benefits of all the privileges, rights and immunities contained in such Act, and the schedule thereto, as if the same were herein specifically set out . . ."

If the words " all the terms ", etc., are given their literal meaning, the Act G did not apply at all as the voyage was not one from a United Kingdom port. The provision would have been wholly ineffective. Stopping there in the clause, BANKES, L.J., was doubtful but said (ibid., at p. 375):

> " I am inclined to think that what they really intended was that, although this is an inward bill of lading, it should be treated as an outward bill of lading, and that the clauses, *so far as they are applicable* [my italics], should H be read into the contract."

He was fully satisfied as was the other member of the court, WARRINGTON, L.J., that this was the effect of the clause by the words which followed:—" If, or to the extent that, any term of this bill of lading is repugnant to or inconsistent with anything in such Act or schedule, it shall be void." Similar words occur I in the present clause.

I have no doubt that that decision gave effect to the intention of the parties as shown by the words used. It would have been better if they had referred to the rules scheduled to the Act rather than to the Act. Since that date, the incorporation of one or other " Acts " has, unfortunately, continued. DEVLIN, J., referred to it as very common.

The first point taken by the charterers is based on the opening words of the Paramount Clause: " This bill of lading . . . ". I agree with the learned judge that the answer to this point is an application of the principle falsa demonstratio non nocet. I have nothing I wish to add to his conclusion on this point. The opening words of the Paramount Clause are to be read as if they were: " This charterparty ".

I also agree with the learned judge on the second point based on the provision in s. 5 of the Act that the Act shall not be applicable to charterparties. He said ([1957] 1 All E.R. at p. 678):

> " Since the clause paramount says that this charterparty shall be subject to the Act, it is insensible to incorporate into the clause paramount a condition which says that the Act shall not apply to charterparties . . . "

The provisions of the Act are, therefore, to be incorporated as terms of the contract *as far as applicable*. This is to apply the principle laid down in *Golodetz* v. *Kersten Hunik & Co.* (8). The contract is one for shipment to or from a very wide range of ports. Although the vessel started from Baltimore, it might never again be ordered to a United States port. Further, once one has come to the conclusion that the " Act " is being incorporated in a contract to which it does not as an Act apply, one prima facie rejects the limitations which are imposed in these various Acts necessitated by the limits of the legislative jurisdiction of the country concerned. One takes the geographical limits from the contract. I have, therefore, little difficulty in holding that the Paramount Clause is not to be restricted to the first voyage—though this is also subject to the next point—and the off-chance of the ship being ordered to a United States port later.

The learned judge decided that the Paramount Clause had no application to ballast voyages. This would exclude the first voyage from Baltimore to the first port of loading. There is, of course, no difficulty in applying to a ballast voyage the " liabilities or immunities " of the carrier under what I may call the substantive provisions of the Act. It is, however, said, and with force, that the Act is dealing with cargo. On the other hand, its provisions, so far as applicable, have been incorporated into a charterparty where the contractual relations cover a period of voyages the first of which was and several of which might be ballast voyages. The Paramount Clause not only diminishes the shipowner's responsibility at common law but also the responsibility which he would have under the document to which the clause being considered is paramount. It would be a foolish consequence if the shipowner was under a greater liability when the ship was in ballast than when it was carrying cargo. It is natural, as I have said, that shipowners and cargo owners should intend to incorporate the code of obligations and immunities over the whole of the contractual period. The learned judge was, in the main, I think, influenced by the provision in s. 3 (1) (c) of the Act putting an obligation on the shipowner to use due diligence to make the holds, etc., fit for the reception of cargo. He said ([1957] 1 All E.R. at p. 679):

> " If this obligation attaches at the time when the ship leaves in ballast for the port of loading, it would in many cases, probably in most, impose an unreasonable and unnecessary burden on the owner."

Section 3* has now to be applied as embodied in a contract under which there will be cargo-carrying and non-cargo-carrying voyages. One has, therefore, to read " voyage ", in s. 3 (1), in the plural, and so doing it is, I think, natural to read s. 3 (1) (c) as applicable to the cargo-carrying voyages but not to the others. I have, therefore, come to the conclusion that the provisions of the Act as to the shipowners' obligations apply under the clause paramount to all voyages.

I agree with the learned judge that " loss or damage " in the Act is not limited to physical damage to the goods. I also agree that the loss or damage must arise in relation to the " loading, handling, stowage, carriage, custody, care, and discharge of such goods." The form of the claim here depends, of course, on the fact that the provisions of the Act have been incorporated into a charterparty for

---

* The relevant terms of s. 3 are at p. 729, letter F, ante.

A successive voyages. Under a contract with a particular shipper later to be evidenced by a bill of lading issued to him or under a "received for shipment" bill of lading, the shipper, or prospective shipper, might have a similar kind of claim; if, for example, the shipowner failed to ship the goods and freights had risen. The claim is, in my opinion, in relation to loading and carriage of goods and this point, therefore, also fails.

B The last point was stated in these words in the charterers' Case:

> "If the Act did not apply to the non-cargo-carrying voyage from Baltimore to Curaçao the owners are liable to the charterers because, in the findings in the award, all the damage flowed from the inital unseaworthiness at Baltimore consisting in an incompetent engine-room staff."

C As I have held that the "Act" did apply to the voyage from Baltimore, I need not elaborate my reasons for thinking that the submission, in my view, failed on the facts as found by the learned umpire.

We were referred to a number of authorities. They lay down familiar principles which I have endeavoured to apply. On the one hand, as LORD WRIGHT said in *Hillas & Co., Ltd.* v. *Arcos, Ltd.* (6) ((1932), 38 Com. Cas. 23 at p. 36), it is the D duty of the court to construe commercial contracts broadly, without being too astute or subtle in finding defects. On the other hand, as LORD WRIGHT stated in words which immediately follow, the court is not to make a contract for the parties. There is further the principle stated by LORD WRIGHT, M.R., in *Petrofina S.A. of Brussels* v. *Compagnia Italiana Transporto Olii Minerali of Genoa* (7) ((1937), 42 Com. Cas. 286 at p. 291) that exceptions to obligations must be in E clear words. These principles, as I have said, are familiar, the difficulty arises in their application. In the present case, I think the difficulty arises at the initial stage. Is the effect of the clause to incorporate in this charterparty the provisions as to the carrier's liability which are contained in the Act? This is a question of construction. Once this has been decided, the answers to the other questions follow with, I think, reasonable clearness.

F The Court of Appeal took the view that the problems raised were such that the whole clause fell under the principle that the court will disregard contradictory or obscure provisions (*Nelson Line* (*Liverpool*), *Ltd* v. *Nelson & Sons, Ltd.* (5), [1908] A.C. 16). It might have advanced clarity if the practice of incorporating an "Act" when the parties meant the provisions of the rules as applicable to the contract between the parties had been strangled at birth. As it has been G recognised in our own courts and in text-books, the problems that arise in this case do not seem to me to bring the case within the principle laid down in the case cited.

I agree that the questions of law should be answered as proposed by my noble and learned friend on the Woolsack.

I would, therefore, allow the appeal.

Appeal allowed.

Solicitors: *Constant & Constant* (for the appellants, the owners); *Waltons & Co.* (for the respondents, the charterers).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

GOUGH *v.* NATIONAL COAL BOARD.

[COURT OF APPEAL (Lord Goddard, C.J., Morris, L.J., and McNair, J.), February 11, 12, 13, 28, 1958.]

Coal Mining—Statutory duty—Breach—Security of working place—Fall of coal from coal face—Duty to make " secure " sides of a working place—Whether duty is applicable to coal face—Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5 *c.* 50), *s.* 49.

The plaintiff was employed by the defendants, the National Coal Board, as an underground worker in one of their coal mines. On Dec. 2, 1955, he was working on a coal face which was one hundred and fifty yards long and about six feet high, and which was being worked on the long-wall system. Until the accident the system was worked with three shifts. During the first shift, a cut by mechanical cutter was made into the face of the seam, to a depth of about four and a half feet, about six inches from the ground. The function of the second shift was " filling-off ", that is to say, their job was to win and get away the coal cut by the first shift. The third shift had the job of advancing the rails and the roof and generally clearing up after the second shift. The plaintiff, who was working as a ripper, was a member of the third shift. On the morning of Dec. 2, owing to a fault in the conveyor, the second shift had not completed the task of filling-off the coal, and it was necessary for the men of the third shift to take away coal before they could perform their normal tasks. The plaintiff was directed to go along the coal face and help fill-off the coal. When he had gone some fifty yards along the face, a piece of coal, about twelve feet long and two feet six inches thick, came away from the top of the coal face and he was partially buried under it. As a result of the accident the plaintiff was seriously injured. In an action for damages against the defendants, the plaintiff alleged that they were in breach of their statutory duty under s. 49* of the Coal Mines Act, 1911, in that they had failed to make secure the roof and sides of every travelling road and working place and had caused the plaintiff to walk along the coal face to get coal when the face had not been made secure. It was admitted by the defendants that the place where the plaintiff was struck was a working place, within the meaning of s. 49.

Held (MORRIS, L.J., dissenting): the defendants were not in breach of s. 49 of the Act of 1911, because the obligation imposed by that section to make secure the sides of a working place did not extend to the coal face, the whole object of the mining operation being to make the coal face insecure (see p. 763, letter H, and p. 764, letter C, post).

Elliot v. *National Coal Board* (1956 S.C. 484) and *Young* v. *National Coal Board* (1956) (unreported) followed; *Penny* v. *National Coal Board* (1955) (unreported) disapproved.

Decision of SALMON, J. ([1957] 3 All E.R. 368) affirmed.

[**Editorial Note.** The Coal Mines Act, 1911, was repealed (except as respects Northern Ireland) from Jan. 1, 1957, by the Mines and Quarries Act, 1954, s. 189, s. 194, s. 195 (2) and Sch. 5 (34 HALSBURY'S STATUTES (2nd Edn.) 646, 649 and 659), and the Mines and Quarries Act, 1954 (Commencement) Order, 1956 (S.I. 1956 No. 1530). The provisions of the Act of 1911 were superseded by those of the Act of 1954 or by regulations made under the latter Act. Section 49 of the Act of 1911 is replaced by s. 48 (1) of the Act of 1954, but the terms of the two enactments are somewhat different, although each deals with the duty to make " secure " the working places in a mine. Under s. 48 (1) of the Act of

---

* The terms of the section are printed at p. 757, letter C, post.

1954, for example, the duty of the manager of a mine includes taking "such steps by way of controlling movement of the strata in the mine . . . as may be necessary for keeping the . . . working place secure . . ."

For the Coal Mines Act, 1911, s. 49, see 16 HALSBURY'S STATUTES (2nd Edn.) 133; for the Mines and Quarries Act, 1954, see 34 HALSBURY'S STATUTES (2nd Edn.) 514.]

Cases referred to:

(1) *Walsh* v. *National Coal Board*, [1955] 3 All E.R. 632; [1956] 1 Q.B. 511; 3rd Digest Supp.
(2) *Edwards* v. *National Coal Board*, [1949] 1 All E.R. 743; [1949] 1 K.B. 704; 2nd Digest Supp.
(3) *Marshall* v. *Gotham Co., Ltd.*, [1954] 1 All E.R. 937; [1954] A.C. 360; 3rd Digest Supp.
(4) *Penny* v. *National Coal Board*, (Jan. 27, 1955), unreported.
(5) *Elliot* v. *National Coal Board*, 1956 S.C. 484.
(6) *Young* v. *National Coal Board*, (July 5, 1956), unreported.
(7) *Boyd* v. *National Coal Board*, (Dec. 14, 1954), unreported.
(8) *Green* v. *National Coal Board*, (Dec. 20, 1955), unreported.
(9) *Carney* v. *National Coal Board*, (Dec. 16, 1957), unreported.

Appeal.

The plaintiff, Richmond Gough, an underground worker employed by the defendants, the National Coal Board, appealed from a judgment of SALMON, J., dated June 21, 1957, and reported [1957] 3 All E.R. 368, in an action for damages for personal injuries suffered by the plaintiff on Dec. 2, 1955, when he was struck and partially buried by a piece of coal, about twelve feet long and two feet six inches thick, which came away from the top of the coal face. The plaintiff alleged that his injuries were due to breaches by the defendants of their statutory duty under s. 49 and s. 50 (2) of the Coal Mines Act, 1911, and to negligence on the part of the defendants. The particulars of the breach of statutory duty under s. 49 were that the defendants, in breach of the section,

> ". . . failed to make secure the roof and sides of every travelling road and working place and/or caused or permitted the plaintiff to walk along the said face for the purpose of getting coal therefrom when the same had not been made secure."

The learned judge held that the defendants were not in breach of their statutory duty under s. 49 of the Act of 1911 because the section did not apply to the coal face; that, on the evidence, the defendants were not in breach of s. 50 (2); and that there was no negligence on the part of the defendants. The plaintiff's appeal related to s. 49 of the Act of 1911 and to the allegation of negligence. The report is confined to the judgments on the question whether the defendants were in breach of s. 49.

Gerald Gardiner, Q.C., A. E. James and *I. J. Black* for the plaintiff.

John Thompson, Q.C., and *G. K. Mynett* for the defendants, the National Coal Board.

Cur. adv. vult.

Feb. 28. The following judgments were read.

MORRIS, L.J.: On Dec. 2, 1955, the plaintiff, who was an underground worker in the employment of the defendants, the National Coal Board, was a member of a shift that began work at 7 a.m. At about 7.45 a.m., while he was walking near to the coal face, a large piece of coal fell on him and he was injured. The piece of coal was about twelve feet in length and about two feet six inches thick. The falling coal apparently hit his shoulder and knocked him down. He was rendered unconscious and the coal fell on his legs, one of which was broken. He brought an action against the National Coal Board claiming damages for his injury. The case was heard before SALMON, J., who dismissed the claim, while assessing the damages in the sum of £600 had they been recoverable.

The claim of the plaintiff was put, first, on the basis of breach of statutory duty, and, secondly, of common law negligence. The plaintiff was employed at the Granville Colliery at Donnington. At the period of his accident work was proceeding at a coal face which was known as " B " panel double face. That face was being worked on the long-wall system. The face in question was about one hundred and fifty yards long and the seam of coal was approximately six feet in height. Mechanical coal cutting was in operation. The general system involved progressive winning of the coal from the whole one hundred and fifty yards length of the seam. This meant that by systematic working there was a gradual advance from day to day of the coal cutting machines and of the conveyors and also of the main gate road head and of the built-up packs. The system of working demanded three separate shifts. These shifts were operated in the following way. One shift worked from 3 p.m. until 10.30 p.m. That was the cutting shift. During that period mechanical cutting took place. The seam was cut approximately six inches from the ground. The cut was to a depth into the seam itself of about four feet six inches. When the coal in a seam is thus cut, some of it, then or soon afterwards, falls to the ground. Where it does not so fall, wedges are placed in position to support the undercut coal. These are known as " holing props ". If the coal is liable to fall from the outer side of the face, then supports are put in position. These are known as " sprags " and they are placed diagonally, where necessary, against the side of the face. The succeeding shift came on at 10.30 p.m. and worked until 7 a.m. That shift was known as the " filling " shift. The task of those on the filling shift was to win and get away the coal that could be extracted as a result of the previous cutting. Some of the coal would be on the ground and the remainder was extracted by appropriate means. It is manifest that, as such work proceeds, continuous and systematic supporting of the roof and sides is necessary. As the coal is obtained it is put on a conveyor which leads to the conveyor in the main gate or supply road. The next shift came on at 7 a.m. and worked until 3 p.m. The main normal task of those employed in that shift was to make all the necessary preparations for the next stage of advance into the coal face. The supply road had to be advanced and its roof and sides made secure. There might be a need to remove stone so as to give the necessary height of roof in the supply road. Packs would have to be built up at suitable intervals so as to support the roof in the space created by the extraction of coal. Stone secured in the process of raising the height of the supply road could be used for building up the packs. The necessary preparations would have to be made near to the then existing face of coal which, in the succeeding shifts, would be operated on by the cutters and the fillers. Hence rails would have to be advanced to new positions nearer to and parallel with the new coal face. At the end of the work done during such third shift, preparations would be complete to enable new cutting to be made at the coal face to a new further depth of four feet six inches so as to enable further coal to be secured. So the cycle of operations would continue. As the coal was extracted, so, from time to time and constantly, had support to be provided in place of the support previously given by the extracted coal. Under a system of long-wall coal mining some of the supports which are used must, in the nature of things, be in position for only a short time. As advance continues the places where men once worked are left behind in the area in the rear of the packs which is known as the " waste ". The supply roads are continually advancing. They

A will be in use so long as the seam is being worked. They require systematic and progressive attention so as to ensure that the newly added daily extensions are secure for their purpose.

The plaintiff was, as a ripper and packer, a member of the third shift to which I have referred. When he went to work on the morning of Dec. 2, he found that the previous shift had not been able to do all that they would normally have B done. There had been some trouble with a conveyor. As a result the coal had not been won and removed. Accordingly, it was necessary for the men on the third shift to take away coal before they could perform their normal and expected tasks. The plaintiff was directed to go to the coal face. He went along the supply road and then turned to his right and proceeded some fifty yards. He was intending to proceed further when the piece of coal fell on him. C He had passed a number of men on his shift who had already begun their work of " filling off " the coal.

It is provided by s. 49 of the Coal Mines Act, 1911, that:

> " The roof and sides of every travelling road and working place shall be made secure, and a person shall not, unless appointed for the purpose of D exploring or repairing, travel on or work in any travelling road or working place which is not so made secure."

It has not been in dispute that the plaintiff was at his " working place " at the time of the accident. In their defence in the action the defendants admitted that:

> E ". . . on the date and at the time and place alleged in the statement of claim a large lump of coal fell or slid from the coal face and struck the plaintiff. The place where he was struck was a working place within the meaning of s. 49 of the Coal Mines Act, 1911."

The question, therefore, arises whether the large piece of coal which fell on the plaintiff came from the side of a working place. If it did, it cannot be doubted F that the side had not been made secure. It is said, however, that the coal at the coal face itself should not be regarded as constituting either the roof or the sides of a working place. A question of much importance is here raised. It is one that has received judicial consideration in a number of cases. The learned judge held in this case that the defendants were not in any breach of their G statutory duty, for he held that s. 49 does not apply to the coal face itself. He thought that, since the whole object of mining is to take down the coal face, it should be held that the section is not applicable to men actually working at the coal face.

Although I am conscious that there is much judicial support (though not binding on this court) for the view of the learned judge, I do not find myself H able to share it. In my judgment, the section applies to every working place. The section is imperative. It creates an absolute obligation. I see no warrant for reading into the section any words of exclusion. In my judgment, it would be strange if the section were inapplicable to cover the place where the need to achieve security is most marked. The section is in that part (Part 2) of the Coal Mines Act, 1911, which contains provisions as to safety. It is implicit in the I work of extracting coal that some place or places will be made insecure. It is that very circumstance that makes it necessary to impose an obligation to make secure and also to have careful, elaborate and systematic rules in regard to safety and security. The whole operation of mining involves that there is a constantly changing situation. As insecurity is created, so new security must be provided. As the coal in a seam is taken away, so new support must be put in position to replace the support that has been removed. It is, I think, important to have in mind that the obligation is that the roof and sides of a working place

" shall be made secure ". This language involves that there is a state of insecurity that demands attention. The obligation is not to keep secure. Such an obligation might well be impossible of fulfilment in the course of coal mining operations. The very nature of coal mining brings it about that in the process of removing coal from its resting place, there will be a withdrawal of support with consequential temporary instability and insecurity. But in the interests of safety the risks must be minimised and, accordingly, there is an absolute duty to make secure.

Under s. 50* of the Act of 1911, as amended by the Coal Mines (Support of Roof and Sides) General Regulations, 1947 (S.R. & O. 1947 No. 973), certain rules have to be made; but the obligations under s. 50 do not supplant the general obligation imposed by s. 49. A consideration of s. 50 and of the rules made under it does, however, serve to illustrate that the roof and sides at the face itself are not excluded but are included. Section 50 (1) refers to the roof at the working place, and it is provided that:

> ". . . the roof under which any work of getting coal or filling tubs is carried on shall be systematically and adequately supported . . ."

The props or chocks used to support the roof must be set at such regular intervals and in such manner as may be specified in rules which are known as the " Support Rules "†. It seems to me that the roof is that which is above a man who is getting coal or filling tubs. The area of the roof may extend as work progresses but the roof must be, not only adequately, but " systematically " supported. It is provided by s. 50 (4), as amended, that the manager of a mine must make rules

> ". . . specifying in relation to each seam of the mine, particulars of the system or systems of controlling and supporting the roof and sides to be carried out in connexion with the face workings, the roadheads and the roads, respectively . . ."

If a man is working at the face, it seems to me that that which is above him is the roof and that the exposed surfaces which are about him are the sides. The peril to which he is exposed is the peril that something may fall on him either from the top or from the side. It is this very peril which he and all others must avert. That can only be done by the systematic and continuous erection of new supports in places where, as a result of the mining operation, they are newly needed. Accordingly, there must be compliance with the general obligation imposed by s. 49, and also with any specific or detailed ones imposed by s. 50. In the Support Rules which were made in reference to this working face, it was provided:

> " When the fall of roof or side involving the displacement or breakage of supports has occurred in any place where any person has to work or pass, any newly exposed roof or sides shall at once:—(1) be dressed, if necessary; and (2) be secured by supports before the work of clearing any debris other than such work as is necessary to set supports, is begun."

It would seem to me to be very strange if this did not cover a newly exposed roof or side consisting of coal at the working face. There will be a newly exposed side when coal is taken down. Those employed in the filling shift are each assigned a stint which consists of a certain number of yards of frontage of the coal face. A man may begin to extract coal from the centre part of his stint and may at first work inwards so that after a time he will have coal in front of him and on either side of him. As he progresses, so must he make the roof and sides secure. If a man's work involves that he is engaged in the very process of making secure, then (unless he has reason to complain of the conduct of anyone else) he cannot assert that the defendants are in breach of s. 49. The position then is that the defendants, through his instrumentality, are engaged on the actual operation of making secure so as to comply with s. 49: see *Walsh* v. *National Coal Board* (1) ([1955] 3 All E.R. 632).

---

* Section 50 of the Act of 1911 has been replaced, with amendments, by s. 49 and s. 54 of the Mines and Quarries Act, 1954 and the Coal and Other Mines (Support) Regulations, 1956 (S.I. 1956 No. 1763).

† The rules made under s. 50 (4), as amended.

Provision is made in the Act for inspections prior to the commencement of work. Section 64 (1)* is as follows:

> " The firemen, examiners, or deputies of a mine shall, within such time not exceeding two hours immediately before the commencement of work in a shift as may be fixed by the regulations of the mine, inspect every part of the mine situated beyond the station or each of the stations [as to which see s. 63], and in which workmen are to work or pass during that shift, and all working places in which work is temporarily stopped within any ventilating district in which the men have to work, and shall ascertain the condition thereof so far as the presence of gas, ventilation, roof and sides, and general safety are concerned."

I would think it very strange if such inspections of roof and sides of working places were not to include inspections of the actual face of the coal itself. That face, particularly if it has been undercut, may constitute a great source of peril for those who are sent there, if it is not made secure. It is further provided by s. 64 (3) that there must be a full and accurate report, not only in regard to gas, but also

> ". . . whether or not any, and, if any, what defects in roofs or sides and other sources of danger were observed . . ."

In the printed form which was used in this case to report after inspection, there is a heading " Condition of roof and sides ", followed by the words:

> " State actual condition of (a) working faces and (b) roads, with location of any unsafe place and action taken."

This serves to illustrate the way in which the system was operated. The construction of the Act must, however, be determined on a fair interpretation of the words which are used and of the context in which they are used.

In the present case, following the inspection made some time between 5 a.m. and 6.30 a.m., it was recorded that the condition of roof and sides was " safe ". The word used in s. 49 is " secure ", and no synonym or paraphrase of that word need be used. In its context it does not seem to me to denote an immutable or permanently static condition of affairs. What is required, in my judgment, is that, when a man is either on a travelling road or at a working place, that which is on top of him and that which is around him shall be made so that it does not fall on him. In the present case the plaintiff was at a point where the work of attacking the face of the coal had not, in his shift, yet begun. The coal face should, in my judgment, have been made secure to enable the men on the new shift to approach it or pass along it. The men on the last shift should have made it secure before they left. As the plaintiff proceeded along, he had the coal face on his left, and on his right he had, at intervals, a number of built-up packs. He was, admittedly, at a working place. I do not understand it to be doubted that,

---

* Section 64 of the Act of 1911 is re-enacted with modifications by the Coal and Other Mines (Managers and Officials) Order, 1956 (S.I. 1956 No. 1758).

if some stone from one of the packs had fallen on his right shoulder, the defendants A
would have been in breach of s. 49. It is said, however, that, because
the insecure thing that struck him on his left shoulder consisted of coal from the
face, there was no breach of s. 49. For the reasons which I have given, I cannot
agree with this submission. It would seem to me to be unfortunate if it were
held that the obligation to make secure the roof and sides of a working place
does not apply if the working place is at a coal face itself. That involves reading B
something into the statute. It would involve diminishing the scope of the
statutory obligation at the very place where, in the interests of safety, compliance
with it is most needed.

I have not thought it appropriate to refer to or to consider the Mines and
Quarries Act, 1954, the provisions of which are now in operation in the place of
those contained in the Coal Mines Act, 1911, now repealed. The Act of 1911 C
was in force at the times which are relevant in this case.

Although the obligation under s. 49 is absolute (see *Edwards* v. *National Coal Board* (2), [1949] 1 All E.R. 743), a measure of protection is given by s. 102 (8)*, which provides:

> " The owner of a mine shall not be liable to an action for damages as for D
> breach of statutory duty in respect of any contravention of or non-compliance
> with any of the provisions of this Act if it is shown that it was not
> reasonably practicable to avoid or prevent the breach."

As, in my judgment, it was shown that the defendants were in breach of s. 49,
the question arises whether they are protected from liability in this case on the
ground that it was not reasonably practicable to avoid or prevent the breach. E
As the learned judge was of opinion that there was no breach, it was not necessary
for him to express a conclusion in regard to this matter. Authoritative guidance
in regard to the considerations to be had in mind is to be found in *Marshall* v.
Gotham Co., Ltd. (3) ([1954] 1 All E.R. 937). If the view which I have formed in
regard to the statute is the correct view, then the question arises whether there
is sufficient or satisfactory material on which to reach a conclusion whether it F
was reasonably practicable to avoid or prevent the breach. This matter is to
some extent bound up with an issue which arises in regard to the common law
aspects of the case.

[His Lordship referred to the plaintiff's allegations that the defendants were
guilty of negligence and were also in breach of their statutory duty under s. 50 (2)
of the Act of 1911, as amended. After reviewing the evidence of the deputies, G
His Lordship referred to the findings of the judge that holing blocks were
inserted as required by the Support Rules, that any overhanging coal or stone
was supported by sprags, and that the deputies had tapped the surface in
accordance with mining practice, and His Lordship said that these findings
could not be challenged. His Lordship then referred to the evidence of Mr. H
Blower (who became manager of the mine on the day of the accident) that the
fall of coal which injured the plaintiff was due to a fault known as " slickenside ",
and that slickensides were quite frequent on this coal face. His Lordship
considered that, although Mr. Blower's evidence came at a late stage, it appeared
to contain a revelation of most significant circumstances, and, as the main
substance of the evidence was accepted, His Lordship would think it unsatisfactory I
without further investigation to reject that part of it which depended on
information obtained by the manager in his capacity as manager, although in
reference to an earlier period. His Lordship continued:] The conclusion
which I have reached is that it was shown that there was a breach of the obligation
imposed on the defendants by s. 49. In my judgment, it becomes necessary on

---

* Section 102 (8) of the Act of 1911 is replaced, with amendments, by s. 157 of the Mines and Quarries Act, 1954.

this basis to have a further hearing in order to decide whether the defendants are exculpated from liability on the basis of s. 102 (8), i.e., whether the defendants can show that it was not reasonably practicable to avoid or prevent their breach of duty in failing to make secure the roof and sides of the place where the plaintiff was when he was injured. I think also that, in regard to the common law claim, there should be a further hearing on the issue whether, in the light of what the defendants knew, or ought to have known, in regard to the coal seam in question, they failed to take reasonable care to avoid exposing the plaintiff to unnecessary risks. There should be no reopening of the other issues which were decided by the learned judge in the ways that I have mentioned. For the reasons which I have given, I would allow the appeal and, to the extent which I have indicated, order a further hearing.

McNAIR, J., stated the facts and said that he accepted the learned judge's conclusion that the accident was due to a fault, known as slickenside, which, in the present case, was for all practical purposes undetectable. After reviewing the evidence of Mr. Blower, HIS LORDSHIP said that the evaluation of that evidence was essentially a matter for the learned judge, that the judge's appreciation of that evidence was correct, and that HIS LORDSHIP would, accordingly, dismiss the appeal in so far as it was based on an allegation of negligence. HIS LORDSHIP continued: I now turn to the second point raised in the appeal, namely, whether it is established that the defendants committed, in respect of the place from which the coal fell, a breach of the statutory duty imposed by s. 49 of the Coal Mines Act, 1911. The section, which is included in Part 2 containing " Provisions as to Safety ", provides:

> " The roof and sides of every travelling road and working place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel on or work in any travelling road or working place which is not so made secure."

It is conceded that the obligation imposed on the owner of a mine by this section is an absolute obligation qualified only by s. 102 (8), which provides:

> " The owner of a mine shall not be liable to an action for damages as for breach of statutory duty in respect of any contravention of or non-compliance with any of the provisions of this Act if it is shown that it was not reasonably practicable to avoid or prevent the breach."

The argument for the plaintiff on this branch of the case can be stated in the simplest form as follows: (i) The defendants, by para. 2 of the defence, admit that the place where the plaintiff was struck was a working place within the meaning of s. 49; (ii) as he walked along the coal face to the place where he was struck, he had on his left hand side the coal face which was a side of this working place; (iii) the fact that the coal which struck him fell from the coal face established that the face had not been made secure. The learned judge rejected the argument in a short passage of his judgment which reads ([1957] 3 All E.R. at p. 370):

> " The main point, however, remains that s. 49 of the Act of 1911 cannot be intended to apply to the coal face because the whole object of mining is to take down the coal face, and, therefore, a section which refers to an obligation to make secure the sides of a working place, and prohibits anyone from working in such a place which has not been so made secure, cannot, in my judgment, be intended to apply to the coal face itself."

After stating this conclusion, the learned judge said that, if the word " safe " had been substituted for the word " secure ", he would have decided the point A the other way. Although I agree with the learned judge that " secure " here does not mean " safe " but means a physical condition of stability which will ordinarily result in safety, I do not, for my part, feel that the substitution of the word " safe " would affect the problem.

The question whether a coal face or a ripping face is the side of a working place, within the meaning of s. 49 of the Act of 1911, had, before the decision of B SALMON, J., been considered by three judges of the Queen's Bench Division on circuit and two Scottish judges of the Outer House, and since the present decision a similar but not identical point has been considered by myself, also on circuit; and, with one possible exception (an unreported decision of BYRNE, J., in *Penny* v. *National Coal Board* (4), Jan. 27, 1955), those decisions have been consistent in holding that the coal face is not such a side. The most fully reasoned judgment C on this point is to be found in the opinion of LORD CAMERON (Lord Ordinary) in *Elliot* v. *National Coal Board* (5) (1956 S.C. 484), which was followed by LORD WHEATLEY, in *Young* v. *National Coal Board* (6) ((July 5, 1956), unreported). Neither of these decisions has, we were informed, been considered by the Inner House.

In *Elliot* v. *National Coal Board* (5) the pursuer was undoubtedly injured by a D fall of mineral substance of some kind which occurred while he was working in a working place. The pursuer alleged that it was a heavy fall of stone from the opencast above the coal face, but in his judgment (1956 S.C. at p. 485) LORD CAMERON said that it was by no means clear on the evidence from what precise portion of the area of the opencast the fall came, and, in particular, whether it was proved to have come from the face of the opencast; but, in view of the fact that E the case proceeded on the basis of unchallenged fact that whatever fell on the pursuer fell from the face in the area of the opencast, LORD CAMERON held (ibid., at p. 486) that the critical issue was " whether the face of this opencast is comprehended within the statutory words ' sides of . . . a working place '." LORD CAMERON observed (ibid.) that

F

> ". . . the whole purpose of the long-wall method of mining is to cut coal by advancing the face and to do so by progressive destruction and removal of the face itself, a process which is the complete antithesis of supporting and making the face secure and . . . consequently the condition as well as the function of the face in long-wall working is totally different from that of the sides proper or the rear or waste of the working place." G

After making that observation, LORD CAMERON turned to the precise construction of s. 49, and said (ibid., at p. 487):

> " Now the Act does not define roof or sides, but it is plain enough that at least in one important particular they can be differentiated from the face, because, once a roof or what is indisputably a side of a working place H or a travelling road is in existence, it will not be subject to interference or deliberate destruction for the purpose of winning coal from it, and therefore measures already taken for its security may be expected to have a certain quality of permanence. Therefore I think that in the circumstances the effect of specific reference to portions of a working which, in the sense I have mentioned, are markedly different from the face itself is to suggest that the I face from which the coal is won may have been deliberately excluded from the requirement of this peremptory and penal section and is not comprehended sub silentio in the word ' sides '."

After referring to the provisions of s. 50, and, in particular, those referring to the Support Rules relating to the support of roof and sides of face workings, and to the absence of any requirement that the face itself should be supported, LORD CAMERON came to the conclusion (ibid., at p. 488) that

A

> "... by limiting the application of s. 49 to the roof and sides of travelling roads and working places the legislature excluded from the scope of the obligation of security imposed by that section the face of the working place itself."

In *Young* v. *National Coal Board* (6) LORD WHEATLEY expressed his view as follows: B

> "The purpose of the section is manifestly to secure that where a person has to traverse a road or work at a working place, his surroundings will be made secure to prevent a fall of material, whether it be coal or stone or dirt or anything else which might endanger his safety. There is thus envisaged the taking of precautions to provide a permanent security to prevent the C occurrence of such an event, but I cannot see how that can be extended to embrace the coal face when the whole purpose of this mining operation is systematically and continuously to strip the face and bring down from the face the very materials against which the workman has otherwise to be protected. From that point of view it would make nonsense of the section to include the face in the expression 'sides', and in my opinion the section D cannot be deemed to provide for such an inclusion."

Turning now to the English cases, JONES, J., in *Boyd* v. *National Coal Board* (7) ((Dec. 14, 1954), unreported), observed that s. 49 did not apply to a fall from the face itself. In *Green* v. *National Coal Board* (8) ((Dec. 20, 1955), unreported), OLIVER, J., stating that it was perfectly obvious that it would be impossible to E maintain that the working face should be made secure when the whole object of the work was to knock it to pieces, held that a man injured by the fall of a stone from the face was not protected by s. 49. BYRNE, J., in *Penny* v. *National Coal Board* (4), after holding that a cutter man employed at the coal face was entitled to recover at common law in respect of injuries which he suffered when an overhanging stone fell from the ripping face, on the ground that the de-F fendants knew of the danger of the overhanging stone but took no steps to ensure that the place was rendered safe, also held that the plaintiff was entitled to recover under s. 49 on the ground that the face was a side of a working place, stating that, if any other construction were to be put on this section, it would follow that, so far as the coal face of any mine was concerned, the coal face could be left without any support of any kind without committing a breach of the G statute. With respect, I consider this reasoning is fallacious, since it overlooks the protection given by the Support Rules under s. 50 (2). I refrain from commenting on my own decision in *Carney* v. *National Coal Board* (9) (unreported), given at the Autumn Assizes at Manchester on Dec. 16, 1957.

In view of the decisions of the Scottish courts and the desirability of consistent decisions in both jurisdictions, it would, in my judgment, be wrong for this H court to arrive at a contrary decision on this matter of construction, unless those decisions and the reasoning on which they are based are, in the view of this court, plainly erroneous. In my judgment, so far from being plainly erroneous, they are correct. It seems to me to be wholly unrealistic and artificial to say that, when a man is employed to bring down a face of coal in front of him, that face of coal is the side of a working place which has to be made secure, when the whole I object of the operation is to make it insecure. The fallacy in the plaintiff's argument seems to me to lie in the false assumption that every working place underground has a roof and four sides. In truth, the coal face on which he is operating is part of his working place itself and does not cease to be part of his working place if, in the process of breaking in, he makes a hole in the face and then proceeds to work either way to the boundaries of his stint. No doubt, in the progress of his work at the face, he will, according to prudent mining practice, insert props and sprags to provide temporary security from the risks of falls from above him or from his sides, but such props or sprags would not be put up in discharge of the defendants' obligation to make the roof and sides of the working place secure. The cutter who makes the initial cut in the face, thus rendering the face insecure, his mate who inserts the holing props under the undercut coal, the shot-firer who in cases of necessity still further reduces the stability of the face, are all working in a working place, but it would be absurd, as I see it, to hold that the statute imposes on the defendants in all these cases the absolute obligation of making the face secure. Indeed, on the evidence in this case, it is plain that on this particular seam, after the cutter has done its work, the face, in many places at least, would not even have the characteristic of a side, namely, a vertical plain surface, since a substantial portion of the face—put by one witness as eighty per cent.—" rates off " or falls down as soon as the cutter passes and lies with the gummings made by the cutter on the floor. In my judgment, accordingly, the appeal should be dismissed.

LORD GODDARD, C.J. (read by Morris, L. J.): I agree with the judgment of McNair, J., and would dismiss this appeal. The point of general importance in the case is the true construction of s. 49 of the Coal Mines Act, 1911, which hitherto has not been the subject of a decision by an appellate court, either in England or Scotland. Considering how long the section has been in force, it is remarkable that the question whether the coal face could itself constitute the side of a working place does not appear ever to have been raised until December, 1954, when it was rejected by Jones, J., in *Boyd* v. *National Coal Board* (7) ((Dec. 14, 1954), unreported). To the same effect were the judgment of Oliver, J., in *Green* v. *National Coal Board* (8) ((Dec. 20, 1955), unreported) and that of McNair, J., in *Carney* v. *National Coal Board* (9) ((Dec. 16, 1957), unreported), of which we were furnished with transcripts, although a contrary view was taken by Byrne, J., in *Penny* v. *National Coal Board* (4) ((Jan. 27, 1955), unreported). In 1956 there were two decisions in the Outer House of the Court of Session, first by Lord Cameron in *Elliot* v. *National Coal Board* (5) (1956 S.C. 484), and then by Lord Wheatley to the same effect in *Young* v. *National Coal Board* (6) ((July 5, 1956), unreported), of which we have a transcript. I find the judgment of Lord Cameron entirely convincing, as did Lord Wheatley, and can add nothing to it. I cannot think that the coal face which is being worked can properly be described as the side of the working place.

[His Lordship then dealt with the allegation of negligence and said that he saw no reason for reversing the learned judge's decision that no claim at common law had been established.]

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Stafford Clark & Co.*, agents for *Hooper & Fairbairn*, Dudley (for the plaintiff); *F. W. Dawson*, Dudley (for the defendants).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

Re GRIMTHORPE'S (BARON) WILL TRUSTS.

[CHANCERY DIVISION (Danckwerts, J.), March 4, 1958.]

Trust and Trustee—Trustee—Costs—Amount to be allowed—R.S.C., Ord. 65, *r.* 27 (29).

On Apr. 23, 1956, an originating summons was taken out by trustees to obtain directions enabling them to invest trust moneys in a wider range of investments than was authorised by the trust instrument. On June 4, 1956, the summons came before the judge in chambers and after about an hour's hearing it was adjourned sine die. On Oct. 29, 1956, the summons was restored and heard in chambers for about twelve minutes, when it was adjourned on a question being raised by the judge as to his jurisdiction. In November, 1956, an opinion of counsel was taken, and on May 13, 1957, the summons came on for further hearing which lasted ten minutes and an order was made, including an order for costs in the form prescribed by the Practice Note of Oct. 27, 1953 ([1953] 2 All E.R. 1159), i.e., directing taxation of the trustees' " costs and expenses of and incident to this action ". At the last hearing, counsel previously instructed on behalf of the trustees did not appear for them, and different counsel was instructed and appeared. The bill of costs included the following fees to counsel all of which had been paid by the trustees—£16 5s. in respect of the hearing on June 4, 1956, £11 in respect of the hearing on Oct. 29, 1956, £11 for the opinion given in November, 1956, and £16 5s. in respect of the final hearing. The taxing master taxed these fees down respectively to £11, £5 10s., £5 10s. and £5 10s., acting under R.S.C., Ord. 65, r. 27 (29), which provided that no costs should be allowed, save as against the party who incurred the same, which appeared to the taxing master to have been incurred or increased by payment of special fees to counsel.

Held: the only difference between a person paying his own counsel and solicitor and trustees paying theirs was that trustees were under a duty to use their judgment so as to avoid unnecessary expense; these fees were expenses of the trust properly incurred by the trustees and ought to be allowed on taxation in full, so that the trustees should be reimbursed from the trust fund.

[**Editorial Note.** *Re Mercury Model Aircraft Supplies, Ltd.* ([1956] 2 All E.R. 885 at p. 888, letter D), emphasises the distinction drawn in R.S.C., Ord. 65, r. 27 (29), between what is allowed on a taxation between solicitor and own client and what is allowed on other taxations (i.e., in taxation of the costs of proceedings in the Supreme Court).

On other taxations the taxing master must tax according to the provisions laid down in R.S.C., Ord. 65, r. 27 (29), but on taxation of trustees' costs, charges and expenses, the second branch of R.S.C., Ord. 65, r. 27 (29) would appear not to apply, the standard being whether such costs, charges and expenses were properly and not improperly incurred (see p. 769, letter G, post).

The present case shows a similarity on taxation of the position where the clients are trustees acting as such and where the client is not in a fiduciary capacity, with the exception that any person interested in any property out of which the trustees' costs are paid may, if so advised, attain taxation of the trustees' costs under s. 7 (2) of the Solicitors Act, 1957.

As to excessive or unnecessary costs incurred by a trustee, see 33 HALSBURY'S LAWS (2nd Edn.) 315, para. 547; and for cases on the subject, see 43 DIGEST 762, 763, *2051-2059*.]

Cases referred to:

(1) *Re Robertson, Public Trustee* v. *Robertson*, [1949] 1 All E.R. 1042; 2nd Digest Supp.

(2) *Re Dargie, Miller* v. *Thornton-Jones*, [1953] 2 All E.R. 577; [1954] Ch. 16; 3rd Digest Supp.

(3) *Cavendish* v. *Strutt*, [1904] 1 Ch. 524; 73 L.J.Ch. 247; 90 L.T. 500; Digest (Practice) 936, *4755*.

Adjourned Summons.

By this summons the trustees of the will of the Right Honourable Edmund Baron Grimthorpe, deceased, applied for an order that the objections made by them to the taxation of costs under an order made in the action on May 13, 1957, be allowed and that it might be referred back to the taxing master to vary his certificate accordingly.

John Pennycuick, Q.C., and *J. L. Arnold* for the applicants.
Denys B. Buckley for the respondents.

DANCKWERTS, J.: This is a matter which has arisen on the taxation of trustees' costs under a Practice Direction, which was issued on Oct. 27, 1953 ([1953] 2 All E.R. 1159). That Practice Direction says:

> "In cases in which trustees are parties in their capacity as such and in which it is appropriate that they should be indemnified as to their proper costs and expenses of the proceedings, the order as to the costs of the trustees should direct taxation of their 'costs and expenses of and incident to this action . . .' without the addition of the words 'as between solicitor and client'. On such a direction all costs and expenses properly incurred by the trustees will be allowed by the taxing master. The costs of other parties to the proceedings will, as hitherto, be ordered either (a) 'to be taxed' (i.e., as between party and party) or (b) 'to be taxed as between solicitor and client'."

The reason for a direction of that kind was the fact that it had been realised that a taxation on the basis of solicitor and client was merely on a slightly more generous scale than taxation on the basis of party and party, and that it did not restore to the person whose costs were being taxed amounts which, in many cases, had been paid out quite properly by the person in question and in the ordinary course of the duties of a trustee.

A long series of cases had established the position in regard to a taxation between solicitor and client, and it is not necessary for me to go through them. This direction was explained subsequently by VAISEY, J., in another Practice Direction ([1953] 2 All E.R. 1408), which reads:

> "At the sitting of the court on Nov. 3, VAISEY, J., made a reference to the Practice Direction with regard to trustees' costs [the Practice Direction which I have just read.] In the course of his observations HIS LORDSHIP said: For years, ever since I can remember, it has been the practice on a summons by trustees for such a purpose as the construction of a will to direct that the costs of all parties should be taxed as between solicitor and client. That has continued, as I say, ever since I can remember, and has been the normal practice. It has recently been realised that, under a solicitor and client taxation, the trustees may not get the whole of what they are entitled to. A solicitor and client taxation is on a lower basis, not a higher basis, than the basis which is appropriate when trustees' costs are being dealt with. The matter arose in a very plain form in *Re Robertson, Public Trustee* v. *Robertson* (1) ([1949] 1 All E.R. 1042), where the Public Trustee, who had his costs taxed as between solicitor and client, was disallowed the sum of £2 1s. in respect of a payment made for taking a shorthand note and for a copy of the transcript. That case came before me, and in point of fact I felt able to vary the taxing master's certificate and to allow that sum of £2 1s. One thing is perfectly plain, and it is important that the profession should understand it. If a trustee submits to having his costs taxed as between solicitor and client, he is entitled to his costs as so taxed and nothing more. He is not entitled to take the taxing master

> A through his bill, and then, when the taxing master disallows certain items, to go away and say: 'That does not matter. I know I have wasted the taxing master's time, but I do not care about that. I do not care what he taxes off. I will help myself to whatever he has disallowed'. That is wrong, and, hoping that I could help to resolve that difficulty in which trustees have found themselves, I, with the assistance of the Chief Registrar B and the Chief Taxing Master and with the approval of all the judges of the Chancery Division, came to the conclusion that a form of words should be used which would give trustees more than solicitor and client costs, that is to say, give them all the costs to which they are entitled. The form of words which was adopted for that purpose is taken from s. 60 of the Trustee Act, 1925, which relates to orders appointing new trustees and is in these C words . . ."

After reading the words of s. 60, VAISEY, J., goes on:

> "It is, I think, plain that those words 'the costs and expenses of and incident to any application' are intended to cover the whole of the costs that the trustees were entitled to, and mean almost the same as costs on an D indemnity basis, or costs as between solicitor and own client. It seemed appropriate to use the words of the statute. Any suggestion that trustees are being deprived of costs, and that this would be a more hostile taxation than there has been under the old solicitor and client taxation is absolutely wrong. The whole point of making this change was to give the trustees more, to give them a wider range, and to make sure that all costs and E expenses which had been properly incurred would be allowed on the taxation. It is an attempt to get the taxation on a better, juster and higher basis than the old taxation, which, in the judgment of myself and my brother judges, did not always give the trustees that to which they were entitled."

There is, of course, the word "almost" which VAISEY, J., used and which may F be of some importance. I shall deal presently with that.

There is another case, *Re Dargie, Miller* v. *Thornton-Jones* (2) ([1953] 2 All E.R. 577), in which VAISEY, J., held that, where WYNN-PARRY, J., had ordered that the trustees should get their costs on a solicitor and client basis on taxation, they were not entitled to pay themselves other expenses out of the trust funds, because there the costs which they were to receive had been delineated by the G judge in that way.

I must now turn to the facts in the present case. On Apr. 23, 1956, an originating summons was taken out by the trustees to obtain directions enabling them to invest the moneys which were subject to trust in a wider manner than that in which, strictly, a trustee invests. It was a matter which had been subject to some doubt and consideration by counsel and the judge in the Chancery H Division. The Attorney-General, as representing the charity, was the only respondent. The summons came first before ROXBURGH, J., in chambers, on June 4, 1956, and, after about an hour's hearing, the judge took an adverse view. On Oct. 29, 1956, the matter came before VAISEY, J., again in chambers, and he also was inclined to take an adverse view. On that occasion the matter only took about twelve minutes. Then an opinion of Mr. Newsom was obtained in I November, 1956, and finally, on May 13, 1957, the matter reached a hearing in court (although, in fact, it was heard in chambers) before WYNN-PARRY, J., and an order was obtained in which a direction for taxation of the trustees' costs was given in the form of the Practice Note of Oct. 27, 1953.

The result of the taxation before the taxing master was that the fee of £16 5s., which the trustees had paid to counsel in respect of the first hearing, before ROXBURGH, J., was taxed down to £11; the fee of £11 paid to counsel in respect of the second hearing was taxed down to £5 10s.; the fee paid for the opinion of counsel was taxed down from £11 to £5 10s.; and the fee of £16 5s. paid in respect of the final hearing before Wynn-Parry, J. (this fee being paid to different counsel, as Mr. Newsom had taken silk more than a year before) was taxed down to £5 10s.

Objections were taken on behalf of the trustees, and those objections are as follows:

> " (i) The order of Wynn-Parry, J., dated May 13, 1957, provided for the costs and expenses of the applicants of and incident to their application to be taxed by the taxing master. (ii) Having regard to the provisions of s. 30 (2)* of the Trustee Act, 1925, and to the Practice Direction of Oct. 27, 1953, and the observations made thereon by Vaisey, J., on Nov. 3, 1953 ([1953] 2 All E.R. 1408), this form of order requires the taxing master to allow to the applicants all the expenses properly incurred by them in relation to these proceedings and no item should be disallowed except on the basis of a finding that it was improperly incurred. (iii) None of the items disallowed was improperly incurred."

The taxing master, in his Answers to Objections, referred to the Practice Direction of Oct. 27, 1953, laying down " a new standard for the taxation of the costs of trustees ", and he then proceeded in this way:

> " It [the Practice Direction] provides a more generous taxation than as between solicitor and client payable out of a common fund, giving the trustee all the costs which he is entitled to recover from the trust fund, and as stated by the learned judge ([1953] 2 All E.R. at p. 1408, letter G) this means ' almost the same as costs on an indemnity basis '. The word ' almost ' presumably means that a trustee or his solicitor should not have an entirely free hand to incur expenses out of the trust fund, nor should the discretion of the taxing officer as to allowance or disallowance of items, or as to the quantum of costs incurred, be fettered. The basis upon which all costs are to be allowed by the taxing master is set out in R.S.C., Ord. 65, r. 27 (29), as being what shall appear to him to have been necessary and proper, and no costs shall be allowed, save as against the party who incurred the same, which appear to the taxing master to have been incurred or increased (inter alia) ' by payment of special fees to counsel '. Although the case was on a somewhat different point, the words ' special fees ' were interpreted by Buckley, J., in *Cavendish* v. *Strutt* (3) ([1904] 1 Ch. 524 at p. 531), as meaning ' unusual or extraordinary or generous fees '.
>
> " The order under which the plaintiff's costs have been taxed related to an application by trustees of a charity fund (inter alia) to vary the investment clause of the trust. It was decided at an early stage not to proceed under paragraphs 2 and 3 of the originating summons, and the matter came before the judge in chambers on June 4, 1956, when after one hour's argument it was adjourned sine die, in view of the Trustee Investment Bill which was then before Parliament. This bill was subsequently withdrawn and the case restored and further heard by the judge in chambers on Oct. 29, 1956. After twelve minutes' argument the judge raised a question of jurisdiction and adjourned the case into court for further argument. The further hearing took place in chambers (by arrangement not in court) on May 13, 1957, and the judge after reading a decision in a similar case made his order. This hearing lasted ten minutes. The total time covered by all three hearings was one hour twenty-two minutes and but for the fact that the hearings took place in different terms no further fees in addition to the original brief fee would be allowed. I have however taken into consideration the basis upon which these costs should be taxed as mentioned above in the two opening paragraphs of this answer, and in view of all the facts

---

* Section 30 (2) reads: " A trustee may reimburse himself or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers ".

> have allowed a fee of ten guineas on the brief and further fees of five and ten guineas respectively on the further hearings making a total of twenty-five guineas. Another factor I have taken into account is the change of counsel during the course of the proceedings. I am of the opinion that it would be wrong to allow higher fees than those I have allowed to be paid out on this trust fund, and that those allowed by me are fair and reasonable in all the circumstances, and that the total fees of forty guineas charged are excessive and are not therefore properly incurred. They should, under Ord. 65, r. 27 (29) only be paid, if at all, by the party who has incurred them, namely the trustees personally and not out of the trust fund."

That last observation seems to me to show a very strange appreciation of the position of a trustee. Then the taxing master refers to the fee charged by counsel for the Attorney-General, which appears to me to be irrelevant; then he makes a remark about the third fee, which I do not mention.

It is a commonplace that trustees, who take the onerous and sometimes dangerous duty of being trustees, are not expected to do any of the work at their own expense; they are entitled to be indemnified against the costs and expenses which they incur in the course of their office; that necessarily means that such costs and expenses are properly incurred and not improperly incurred. The general rule is quite plain: they are entitled to be paid back all that they have had to pay out. It seems to me that the whole intention of the practice as laid down in the earlier Practice Direction ([1953] 2 All E.R. 1159) is to secure that result; the only doubt arises perhaps on the word " almost ", used by VAISEY, J., in his explanation ([1953] 2 All E.R. 1408) of the earlier Practice Direction, in which he refers to its being " almost the same as costs on an indemnity basis, or costs as between solicitor and own client ".

Counsel for the trustees has contended, and I think that he is right in saying, that the distinction in this respect between a person instructing his own counsel and solicitor and a trustee instructing advisers is that a person instructing his own counsel and solicitor may pay whatever he likes; but in the case of a trustee, he must use his judgment to try to save the estate money which need not be paid out. It seems to me quite wrong to say that one should look at the event afterwards and say that, counsel's fees having been incurred, counsel has been paid too much. It would undo the whole effect which was intended by the Practice Direction if the master were entitled to tax fees to counsel which had been paid in good faith by the trustees, and which they could not avoid paying, merely because the master thinks that counsel might have been paid a somewhat smaller sum. It seems to me to be wrong to adopt the standard laid down by R.S.C., Ord. 65, r. 27 (29), which does not really apply in this case at all; it is not a case of undue generosity—the standard is whether it is proper or improper. The remarks about " generous fees " and so on have really no application to trustees, who have had to pay the fees to counsel as being the proper fees payable to them. In those circumstances, therefore, it seems to me quite plain that in the present case the taxing master went wrong in principle, and that the taxation must be set aside in respect of these items. The items actually paid by the trustees in good faith must be allowed.

Order accordingly.

Solicitors: *Lee, Bolton & Lee* (for the applicants); *Treasury Solicitor* (for the respondents).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

A

BOWEN *v.* BOWEN.

[Probate, Divorce and Admiralty Division (Lord Merriman, P., and Wrangham, J.), February 4, 5, 1958.]

Magistrates—Husband and wife—Jurisdiction—Maintenance order in favour of wife—Complaint by husband to reduce amount of order—Revocation of B *order by justices—Magistrates' Courts Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 55), *s.* 53.

Magistrates—Husband and wife—Maintenance order—Discharge—Revival of discharged or revoked order—Magistrates' Courts Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 55), *s.* 53.

The parties were married in 1950 and separated in February, 1952. On C May 3, 1952, an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, was made in the wife's favour on the ground that the husband had been guilty of wilful neglect to provide reasonable maintenance for her and the husband was ordered to pay her £2 a week as maintenance. On May 28, 1957, the wife was granted a decree absolute of divorce on the ground of the husband's adultery. The wife did not apply for D maintenance in her divorce proceedings. On Sept. 27, 1957, the husband applied by complaint to the justices to vary the order of May 3, 1952, by reducing the amount of maintenance on the grounds that his means were reduced, that the wife's means were sufficient without the weekly sum of £2 and that the parties had been divorced. The justices revoked the order of May 3, 1952, and in their reasons stated, inter alia, that if the wife's circum- E stances altered and deteriorated she could apply again to the court. On appeal by the wife,

Held: the justices had no jurisdiction to revoke (or to discharge) the order of May 3, 1952, since the husband's complaint was merely to vary that order (*Trathan* v. *Trathan*, [1955] 2 All E.R. 701, applied); and, in the circumstances, the amount payable under the order would be reduced to a F nominal sum so that the order should be kept alive.

Quaere whether a maintenance order that has been revoked and against which there has been no appeal can be revived merely on complaint asking that it should be revived (see p. 775, letter E, post).

Pratt v. *Pratt* ((1927), 96 L.J.P. 123) and *Markham* v. *Markham* ([1946] 2 All E.R. 737) considered. G

Appeal allowed.

[**Editorial Note.** In *Trathan* v. *Trathan* ([1955] 2 All E.R. 701) where there was before the justices only a complaint by the wife to vary a maintenance order by increasing the amount, the husband attempted, without having made a complaint, to have the order discharged. In the present case the husband had preferred a complaint but by that complaint he merely applied to vary, and H not to revoke or discharge, the maintenance order. The Divisional Court also, in the present case, make it clear that there is no distinction between revocation and discharge of an order (see p. 772, letter F, post).

As to discharging order where there is no complaint, see 12 Halsbury's Laws (3rd Edn.) 492, para. 1091, note (i).

As to power to revive order, see ibid., note (f); and for cases on the subject, I see 27 Digest (Repl.) 726, 727, *6938*, *6939*.

For the Summary Jurisdiction (Married Women) Act, 1895, s. 7, see 11 Halsbury's Statutes (2nd Edn.) 852.

For the Magistrates' Courts Act, 1952, s. 53, see 32 Halsbury's Statutes (2nd Edn.) 463.]

Cases referred to:

(1) *Trathan* v. *Trathan*, [1955] 2 All E.R. 701; 119 J.P. 451; 3rd Digest Supp.

A (2) *Bragg* v. *Bragg*, [1925] P. 20; 94 L.J.P. 11; 132 L.T. 346; 27 Digest (Repl.) 722, *6907*.

(3) *Wood* v. *Wood*, [1957] 2 All E.R. 14; [1957] P. 254; 121 J.P. 302.

(4) *Starkie* v. *Starkie* (*No. 2*), [1953] 2 All E.R. 1519; 118 J.P. 59; 3rd Digest Supp.

(5) *Pratt* v. *Pratt*, (1927), 96 L.J.P. 123; 137 L.T. 491; 27 Digest (Repl.) 726, *6938*. B

(6) *Markham* v. *Markham*, [1946] 2 All E.R. 737; 176 L.T. 19; 111 J.P. 29; 27 Digest (Repl.) 727, *6939*.

(7) *Re D.* (*an infant*), [1953] 2 All E.R. 1318; 118 J.P. 25; sub nom. *Re Dankbars*, [1954] Ch. 98; 3rd Digest Supp.

(8) *Thompson* v. *Thompson*, [1957] 1 All E.R. 161; [1957] P. 19.

C (9) *Hudson* v. *Hudson*, [1948] 1 All E.R. 773; [1948] P. 292; [1948] L.J.R. 907; 27 Digest (Repl.) 517, *4603*.

Appeal.

The wife appealed against an order of the Hereford county justices dated Oct. 12, 1957, whereby they revoked an order made in the wife's favour on May 3, 1952.

D The parties were married on Sept. 30, 1950, and there were no children. In about February, 1952, the wife left the matrimonial home. On May 3, 1952, the justices made an order in the wife's favour under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, on the ground that the husband had wilfully neglected to provide reasonable maintenance for her and ordered him to pay her the sum of £2 a week as maintenance. On May 28, E 1957, the wife was granted in the Divorce Court a decree absolute on the ground of the husband's adultery. The wife did not apply in the divorce proceedings for maintenance. On Sept. 27, 1957, the husband made a complaint to the justices applying

> " for the order of May 3, 1952 to be varied by an order requiring that F the weekly payment of £2 be reduced on the grounds that the husband's means are reduced and the wife's means are sufficient without the weekly sum of £2 . . . and the marriage between the parties having been dissolved by a decree absolute dated May 28, 1957 ",

and a summons was issued on Oct. 3, 1957. On Oct. 5, 1957, the wife made a complaint to the justices applying to vary the order of May 3, 1952, by increasing G the amount of maintenance, and a summons was issued on the same date. On Oct. 12, 1957, the justices heard both complaints; in respect of the husband's complaint the justices adjudged that " the complaint is true, and cause being shown upon fresh evidence to the satisfaction of the court " it was ordered that the order of May 3, 1952, be revoked. In respect of the wife's complaint the justices adjudged that that complaint was not true and ordered that the order H of May 3, 1952, be revoked.

In their reasons the justices stated, inter alia:

> " The magistrates bore in mind that if the wife's circumstances altered and deteriorated she could then apply to the court again. But that at present no order was justified or at the most a token allotment, which they felt was not justified . . . "

I The wife appealed against the revocation of the order of May 3, 1952, and then appealed against both the order made on the husband's complaint and the order made on the wife's complaint.

A. T. Hoolahan for the wife.

P. E. Underwood for the husband.

LORD MERRIMAN, P.: Having regard to the fact that the justices' order requires variation in what may or may not be an important particular as a matter of substance, but does raise an important question as a matter of principle, I propose to say quite shortly with what we are and with what we are not dealing. The first thing at which to look in the present case is the complaint, and I may say at once that I do not, as at present advised, withdraw one word of what I am reported as having said about the importance of the complaint as the foundation of magistrates' jurisdiction in *Trathan* v. *Trathan* (1) ([1955] 2 All E.R. 701). In my judgment, with which DAVIES, J., agreed, I developed (ibid., at p. 703) my use of the word " cardinal " to show that this court regarded the form of the complaint as a vital matter, because it is on that and that alone that justices are empowered to exercise their jurisdiction.

In the present case the husband's complaint was made on Sept. 27, and the summons was issued thereon, reciting the order of May 3, 1952, and following that with these words:

> " and the complainant [husband] now applies for the said order to be varied by an order requiring that the weekly payment of £2 be reduced, on the grounds that the husband's means are reduced and the wife's means are sufficient without the weekly sum of £2 or a large part thereof, and the marriage between the parties having been dissolved by a decree absolute dated May 28, 1957."

It is perfectly clear that this complaint came under the head of a complaint to vary by reducing, stating those two grounds. I am fully aware, and it has been mentioned in this argument, that under s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, the same petty sessional division may

> " on the application of the married woman or of her husband, and upon cause being shown . . . to the satisfaction of the court at any time, alter, vary, or discharge any such order [under the Act]."

I leave out for the moment the words " upon fresh evidence ". I do not make any distinction whatever between " discharge " and " revoke ", for they have been used interchangeably both in judgments* and in the Act of Parliament, to which I do not think it is necessary to refer specifically, though both words have been contrasted (and this may be of importance in considering one authority) with a mere " cessation to have effect ". That contrast occurs, as will be recognised, in the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 2 (2), whereby a resumption of cohabitation brings about the " cessation " of effect, just as the fact that the parties are living together at the time when the order is made prevents the order from coming into effect†. Now, with regard to that combination of words, if I may, for the purpose of brevity, quote my judgment in *Trathan* v. *Trathan* (1), where, after I had pointed out that there was a distinction, quoad amount, between discharge, which almost certainly requires fresh evidence, and alteration or variation of amount which does not, by reason of a subsequent enactment‡ which is now embodied in the Magistrates' Courts Act, 1952, I said ([1955] 2 All E.R. at p. 707):

> " It is plain on the face of s. 7 itself that separate issues would be raised, and under the Magistrates' Courts Act, 1952, s. 43, as under the Summary Jurisdiction Act, 1848, s. 1, there must be a complaint which alleges that there should be an alteration and on what ground; or alleges that there should be a variation and on what ground; or alleges that there should be a discharge, and again on what ground, though in that case at least the ground must be based ' upon fresh evidence'."

I stand by those words, and for the purposes of the present case they are, as things stand, decisive, because there was before these magistrates no complaint for a discharge or a revocation, but merely a complaint for a variation. The order is quite explicit, in my opinion. The order perfectly accurately recites the terms of the husband's complaint, and the adjudication is that

---

* See, e.g., per the EARL OF READING, C.J., in *Dodd* v. *Dodd* ([1920] 1 K.B. at p. 75).

† See s. 1 (4) of the Act of 1925.

‡ The Money Payments (Justices Procedure) Act, 1935, s. 9: 14 HALSBURY'S STATUTES (2nd Edn.) 985.

> "the complaint is true, and cause being shown upon fresh evidence to the satisfaction of the court, it is hereby ordered that the [order of May 3, 1952] be revoked."

In my opinion, although "fresh evidence" was not necessary to a pure question of amount, i.e., a reduction of amount, it was necessary and appropriate to the ground which is recited in the order, that the marriage had been dissolved; for, of course, it goes without saying that the dissolution of a marriage after the making of an order comes within the well-known definition of "fresh evidence", as being something which has manifestly occurred since the order was made. At the same time it was adjudged that the wife's complaint for an increase was not true, and it was ordered that the order of May 3, 1952, be revoked. I withhold any comment on the inclusion of that in reference to the wife's complaint; it does not matter, because the order is obviously made, in fact, on the husband's complaint. That is the formal order.

That brings me to what the magistrates said—what they really intended to do. If I may be allowed to say so they went into a very careful and close examination of the figures, with the result that on the merits as disclosed by the figures they came to a conclusion from which I am not prepared to dissent. Their conclusion was that on the figures the wife was left with £2 5s. 6d., rather more than her husband was left with. I am not suggesting that that is a conclusive circumstance; far from it. They could ignore that if they chose, but they have chosen to act on it and to revoke the order altogether. They go into the question of there being no children; they go into the question of the parties being divorced and being, as they put it, "now again two ordinary young members of the community both earning good money" and "that the wife had more money to spend on herself after paying essential outgoings than the husband." They then went into an attempt to assess what, if anything, the wife had lost by this short and most unsatisfactory marriage, and whether any money should at this stage be paid by the husband to add to the wife's expendable income, as in no circumstances could she be described as being in want. I ought perhaps to add that one of the husband's weekly expenses was a voluntary allowance of £1 a week to his aged mother. The magistrates' conclusion is as follows:

> "The magistrates decided that as this childless couple were divorced and each in receipt of good wages and in no want whatsoever, it would be inequitable to take money from the husband (and possibly thus from his aged mother) and give it to the former wife, and considered that this couple should be treated as two individuals who had made an unfortunate matrimonial attempt, but were now again just two members of the public in good employ and bore in mind many cases of a similar nature when they had to order allocations out of an income of £7 or £8 per week to maintain three or more children."

I am bound to say that I think that is a somewhat irrelevant introduction. Then finally they say:

> "The magistrates bore in mind that if the wife's circumstances altered and deteriorated she could then apply again to the court. But that at present no order was justified or at the most a token allotment, which they felt was not justified for the above reasons."

I have already dealt with the fact that they arrived at a revocation on a complaint which asked for no more than a variation, and there, I think, they were wrong. Again I think they were wrong in their allusion to the divorce.

It has been well settled for many years in this court by the decision in *Bragg* v. *Bragg* (2) ([1925] P. 20), which has been repeatedly followed here, and has been recently followed by the Court of Appeal in *Wood* v. *Wood* (3) ([1957] 2 All E.R. 14), where (ibid., at p. 29) it is shown to be well settled that though there has been a divorce it is a matter of discretion whether to allow an order to stand or to discharge it. As all judges of this Division well know, and all practitioners well know, it is the commonest thing in the world in a divorce case, whether undefended or defended, to allow a maintenance order to stand whether or not it also includes an order for the custody and maintenance of children—none of which could be allowed if divorce per se was decisive to get rid of an order. It is very convenient that that should be so, for it has the merit of saving costs in the Divorce Court. The mere fact that these parties had been divorced is nothing but a discretionary ground, and although, no doubt, it may be important in connexion with the question of amount, it certainly does not necessarily lead to the conclusion that there must be a revocation.

It is said, however, that the magistrates have not revoked the order at all; that all that they have done is, as it were, to suspend the money payments, and to leave them, in spite of the use of the word revocation, to be revived at any time under the terms of the Magistrates' Courts Act, 1952, s. 53, which reads as follows:

> "Revocation, variation, etc., of orders for periodical payment.—Where a magistrates' court has made an order for periodical payment of money, the court may, by order on complaint, revoke, revive or vary the order."

I have already indicated that there are cases in which variation is proper. And there are cases in which, I think, reviver is proper; for instance, the case which I have mentioned in passing where an order ceases to be of effect because the parties have temporarily resumed cohabitation—the order still remains, but it ceases to have the effect of enforceability as regards amount. As to revocation, which, as I have already said, would be equivalent to a total discharge of the order ("discharge" being the word used in s. 7 of the Act of 1895) I do not resile at all from what I said in the passage which I quoted just now in *Trathan* v. *Trathan* (1), and I do not hesitate to add that in terms of s. 53 of the Act of 1952, reviver, like the other two things falls to be decided separately on whatever are the grounds of the appropriate complaint. I am not prepared, however, as at present advised, to assume that because of that section it is inapt to make an order for a nominal payment for the purpose of keeping an order alive, for which there is ample precedent in decisions of this court, reported or unreported. I can think of one which is reported (viz., *Starkie* v. *Starkie* (*No. 2*) (4), [1953] 2 All E.R. 1519), though it has no other relevance to this case than that we did make an order in that form in order to keep a wife's rights alive.

In my opinion the whole of this argument turns on the decision in *Pratt* v. *Pratt* (5) ((1927), 137 L.T. 491). That was a very remarkable case, and the substance of it was this. The wife's order had been revoked, or discharged, under s. 7 of the Act of 1895, because it was found that she had committed adultery, and it will be remembered that under s. 7 if she commits an act of adultery "such order shall on proof thereof be discharged." The provision is mandatory. There was no appeal against the discharge of the original order, but there was a divorce suit in which precisely the same issue of her alleged adultery came up for decision, and a judge of the High Court decided that she had not committed adultery. Thereupon, on the fresh evidence made available by the decision of the High Court judge, there was a complaint to restore or revive the original order. The simplest course (which has to my knowledge been adopted either on common-sense grounds or in oblivion of this decision in *Pratt* v. *Pratt* (5)) would have been to extend the time to appeal against the revocation by the magistrates and to deal with the thing then and there on that basis. Instead of which this court treated this decision of the

High Court as being fresh evidence, as, of course, it was, and without more restored the original order.

On that foundation it is said that however definitely a court may discharge or revoke an order, it is open under this section for the wife to come back at any time and say " Now I want that order revived," of course, on fresh evidence to the satisfaction of the court. When it is necessary to decide that as being the only way in which the case may be decided, one way or the other, I shall have to face that issue. I say in passing, however, that we did, with obvious reluctance, follow *Pratt* v. *Pratt* (5) in *Markham* v. *Markham* (6) ([1946] 2 All E.R. 737). That was a case to which I have already alluded in passing, where the order ceased to have effect owing to a resumption of cohabitation, and with regard to that, at any rate, I feel no doubt that reviver is a proper term. However, we appear to have based our judgment on the authority of *Pratt* v. *Pratt* (5). Both cases are of respectable antiquity, and both were decided before the Magistrates' Courts Act, 1952, and the draftsmen, of course, as they always do, are taken to know all the law.

It is only right to say, however, that in *Re D.* (*an infant*) (7) ([1953] 2 All E.R. 1318), which was a guardianship of infants case in the Court of Appeal, SIR RAYMOND EVERSHED, M.R., expressly refrained (ibid., at p. 1323), because they were not cases under the Guardianship of Infants Acts, 1886 and 1925, from expressing any definite opinion about the validity of *Pratt* v. *Pratt* (5) or *Markham* v. *Markham* (6), and I say no more about it than that there may come a time when some court will have to decide what the law is about this matter, whether it is really true that an order which has been revoked can be revived without more than a mere complaint saying " Now I want this order revived ", when there has been no appeal against the revocation. I will add, as I must call attention to it, that during the adjournment of this case at mid-day we discovered that *Pratt* v. *Pratt* (5) had been referred to incidentally in another judgment of the Court of Appeal in *Thompson* v. *Thompson* (8) ([1957] 1 All E.R. 161). DENNING, L.J., referred to it (ibid., at p. 166) for the purpose only of basing the proposition that

> " where the previous proceedings were before the magistrates for maintenance, the court usually thinks it right to inquire into the matter afresh [that is on the question of estoppel per rem judicatam] in which case it allows the accused party to defend himself for the second time: see *Pratt* v. *Pratt* (5) and *Hudson* v. *Hudson* (9) ([1948] 1 All E.R. 773)."

There I leave it, and now return to where I began.

In spite of our criticism that the revocation was out of order because it was not based on a complaint, and in spite of the fact that the magistrates, I think, paid more attention than they should have done in the circumstances of this case to the fact that the parties had been divorced, and do not seem to have been referred by anybody to cases like *Bragg* v. *Bragg* (2) which point out exactly how the matter stands to enable magistrates to deal at their own discretion with that particular circumstance, I come back to what I think should have happened, for we are entitled to draw any inference which the court below should have drawn. It is particularly easy for us to do that in the present case because it happens to be an order which has been welcomed, with moderate enthusiasm at any rate, by both sides, and, also, it happens in effect to be what the magistrates themselves really wanted, and that is, to vary this order for £2 weekly by reducing it, as the complaint invited them to do, to a nominal order which will keep the matter alive, but not by reducing it to nothing by discharging or revoking it. That is plainly what the magistrates thought they were doing. I do not think that they achieved the purpose, but we can achieve that purpose by that particular variation of the original amount, and I propose that we should allow the appeal to that extent, while accepting the magistrates' findings about the figures.

WRANGHAM, J.: I agree. The case for the wife in this matter was put on two grounds: (i) that the magistrates had no jurisdiction to revoke their previous maintenance order because there was not in existence any complaint asking them to revoke it, and (ii) that the reasons which the magistrates have given show that they misunderstood the law, in that they thought that if the wife's circumstances altered and deteriorated she could then apply again to the court, despite the revocation of the order.

The question whether the magistrates were indeed in error in thinking that that was the law is, as LORD MERRIMAN, P., has indicated, a very difficult question, on which *Pratt* v. *Pratt* (5) ((1927), 137 L.T. 491) is a directly relevant authority; and, as we are not deciding that question, I desire to say nothing whatever about it. On the other argument presented on behalf of the wife, the matter seems to me to be as plain as it could be. It is clear, first of all, that it results from the law laid down in *Trathan* v. *Trathan* (1) ([1955] 2 All E.R. 701), that an order revoking a previous maintenance order cannot be made unless there is a complaint applying for that revocation and not applying for something quite different; and, secondly, that the magistrates, despite the absence of such a complaint, did in fact revoke the order. In those circumstances it seems to me that what the magistrates did was done without jurisdiction, and I agree, therefore, with the consequence which my Lord has indicated.

LORD MERRIMAN, P.: The result will be that the appeal will be allowed by varying the order made by the magistrates on the husband's complaint by substituting for the revocation of the order an order that the original order be varied by the reduction from £2 a week to 1s. a month. So far we have dealt with the order made in favour of the husband, that is, the revocation order. We dismiss the wife's appeal against the dismissal of her complaint, and we will order that all the words after " it is hereby adjudged the said complaint is not true " be struck out and the words " and is hereby dismissed " be inserted.

Order accordingly.

Solicitors: *Kinch & Richardson*, agents for *T. A. Matthews & Co.*, Hereford (for the wife); *Corner & Wadsworth*, Hereford (for the husband).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

MARGULIES BROTHERS, LTD. *v.* DAFNIS THOMAIDES & CO. (U.K.), LTD.

[QUEEN'S BENCH DIVISION (Diplock, J.), February 26, 27, 1958.]

Arbitration—Award—Remission—Award for the payment of money—Award not specifying sum to be paid and therefore not enforceable as judgment—Remission sought for purpose of calculating sum—Jurisdiction of court to remit—Counterclaim—Arbitration Act, 1950 (14 *Geo.* 6 *c.* 27), *s.* 26.

An arbitration award relating to six contracts between the same parties for the sale or purchase of quantities of cocoa, described in each contract as of " about " a specified quantity " three per cent. more or less ", provided that three of the contracts (which were for purchase) should be applied against the other three (which were for sale) and that the resultant differences plus interest at eight per cent. per annum from Dec. 14, 1957, to the date of payment should be paid by the respondents to the applicants. Each of the contracts contained a similar arbitration clause. The award did not specify the sum to be paid, although the method of calculating it was thus indicated and was not in dispute. The applicants applied for the award to be remitted to the arbitrator, so that the amount to be paid to them could be computed and the award might be amended so as to become enforceable as a judgment under s. 26 of the Arbitration Act, 1950. The respondents contended that the court had not jurisdiction to remit the award and also alleged that they had a counterclaim, which arose out of transactions closely connected with the six contracts and would reduce substantially the amount payable under the award, which should not, therefore, be remitted, even if there were jurisdiction to remit it.

Held: the award would be remitted for the amount due to the applicants to be calculated for the following reasons—

(i) on the face of the award it was uncertain and, therefore, bad within the first ground for remission of an award approved in *Montgomery, Jones & Co.* v. *Liebenthal & Co.* ((1898), 78 L.T. 406); or

(ii) it was an implied term of the agreement for arbitration that the award should be in such a form that it would be capable of being enforced as a judgment under s. 26 of the Arbitration Act, 1950, and, as this award was not in such a form, there was a breach of the implied term constituting " misconduct " on the part of the arbitrator (*London Export Corpn., Ltd.* v. *Jubilee Coffee Roasting Co., Ltd.*, ante, p. 494, applied) within the second ground of remission approved in *Montgomery, Jones & Co.* v. *Liebenthal & Co.*, supra; or

(iii) the award should be remitted so that it could be amended to a form in which it could be enforced as a judgment, thus extending, if necessary, the grounds for remission approved in *Montgomery, Jones & Co.* v. *Liebenthal & Co.*, supra; and

(iv) if the award were enforceable by action, that fact was no ground for refusing to remit it, nor, if the respondents had in fact a valid counterclaim, would the existence of the counterclaim be a ground for refusing to remit the award with a view to its being amended and enforced.

[As to the grounds for remitting an award, see 2 HALSBURY'S LAWS (3rd Edn.) 56, 57, para. 121; as to misconduct, see ibid., p. 57, para. 126; and as to enforcing awards as judgments, see ibid., pp. 50, 51, paras. 110, 111.

For cases on remitting an award, see 2 DIGEST 561-565, *1938-1959*; and for cases on the enforcement of an award, see ibid., pp. 571-575, *2031-2057*.

For the Arbitration Act, 1950, s. 26, see 29 HALSBURY'S STATUTES (2nd Edn.) 112.]

Cases referred to: A

(1) *Montgomery, Jones & Co.* v. *Liebenthal & Co.*, (1898), 78 L.T. 406; 2 Digest 456, *1036*.

(2) *Re Keighley, Maxsted & Co. & Durant & Co.*, [1893] 1 Q.B. 405; 62 L.J.Q.B. 105; sub nom. *Re Maxted, Keighley & Co. & Bryan Durant & Co.*, 68 L.T. 61; 2 Digest 563, *1949*.

(3) *Re Baxters & Midland Ry. Co.*, (1906), 95 L.T. 20; 70 J.P. 445; 2 Digest 525, *1624*. B

(4) *Wohlenberg* v. *Lageman*, (1815), 6 Taunt. 251; 128 E.R. 1031; 2 Digest 488, *1307*.

(5) *Higgins* v. *Willes*, (1828), 3 Man. & Ry. K.B. 382; 2 Digest 487, *1299*.

(6) *London Export Corpn., Ltd.* v. *Jubilee Coffee Roasting Co., Ltd.*, ante, p. 494. C

Motion.

This was a motion under s. 22 of the Arbitration Act, 1950, to remit an award to the board of appeal of the Cocoa Association of London, Ltd., which was made by them on Jan. 24, 1958, the purpose of the remission being the calculation of the sum of money which, by the terms of the award, Dafnis Thomaides & Co. (U.K.), Ltd., the respondents to the motion, were to pay to Margulies Brothers, Ltd., the applicants. The grounds of the motion to remit were that the board of appeal, having stated in the award the method of calculating the sum, had omitted to calculate it and to incorporate the result of the calculation in the award, and therefore the applicants were unable to enforce payment of the money due to them. D

On Nov. 8, 18, and Dec. 12, 1957, the applicants entered into contracts with the respondents, which were numbered respectively 2184, 2207, 2265, for the sale of G. F. Ghana cocoa to the respondents; on Sept. 19, and Nov. 4, 6, 1957, the applicants entered into contracts with the respondents, which were numbered respectively 2101, 2168, 2174, for the purchase of G. F. Ghana cocoa from the respondents. All the above-mentioned contracts contained a provision that disputes arising out of the contracts should be settled by arbitration in London as provided for by the rules, regulations and bye-laws of the Cocoa Association of London, Ltd. A dispute arose on the contracts which was duly referred to arbitration, and on Dec. 30, 1957, an award was made which provided that the applicants were not entitled to immediate settlement of the differences arising out of the contracts, and that the respondents were responsible for complete fulfilment of all existing open contracts. The applicants appealed against that award to the board of appeal of the Cocoa Association of London, Ltd., and on Jan. 24, 1958, the board of appeal decided: E F G

> "The board of appeal elected to hear the appeal presented by [the applicants] against the award . . . dated Dec. 30, 1957, in respect of six parcels of fifty tons, twenty-five tons, and twenty-five tons respectively G. F. Ghana cocoa . . . sold under contracts dated Sept. 19, Nov. 4, 6, 8 and 18, and Dec. 12, 1957 having considered the case do hereby decide that the original award be varied and that contracts nos. 2101, 2168, 2174 shall be applied against contracts nos. 2184, 2207 and 2265 respectively and the resultant differences plus interest at eight per cent. per annum from Dec. 14, 1957, to date of payment shall be paid by [the respondents] to [the applicants] within seven days and we further award that the fees and expenses of the original arbitration be paid by [the respondents]." H I

The appeal award, while thus setting out the manner in which the sum ordered to be paid was to be calculated, did not specify the actual sum which the respondents were to pay to the applicants, although the respondents and the applicants were agreed on the method of calculating the sum. The respondents, however, alleged that they had a counterclaim for damages against the applicants, arising out of transactions which were closely connected with the six contracts, the subject of the award, which would reduce the sum payable by them to the applicants under the appeal award.

R. H. Bernstein for the applicants.

C. P. Harvey, Q.C., and *J. F. Donaldson* for the respondents.

DIPLOCK, J., having read the terms of the award made by the board of appeal of the Cocoa Association of London, Ltd., continued: This award does not purport to be a mere declaratory award; but, although it is one for the payment of money, it does not specify the actual sum to be paid but sets out the manner in which the sum ordered to be paid is to be calculated.

It was determined by the Court of Appeal on Feb. 24, 1958*, that an award in this form cannot be enforced in the same manner as a judgment under s. 26 of the Arbitration Act, 1950; and the purpose of the present application is to get the award amended to a form in which it can be so enforced. The application is resisted on two grounds: first, that the award is complete and valid on its face and the circumstances disclosed give me no jurisdiction to remit it, or, perhaps, more accurately, the authorities show that it would be an unjudicial exercise of my discretion if I were to do so; secondly, that in the particular circumstances of this case I ought not to exercise my jurisdiction to remit the award, since the applicants' proper remedy, even if the award were amended, would be to bring an action on the award, and this they can do with the award in its present form.

Counsel for the respondents argues that the jurisdiction of the court to remit an award is limited to four grounds: (1) that the award is bad on the face of it; (2) that there has been misconduct on the part of the arbitrator; (3) that there has been an admitted mistake and the arbitrator asks that the matter be remitted; and (4) where additional evidence has been discovered after the making of the award. He cites as authority for that proposition *Montgomery, Jones & Co.* v. *Liebenthal & Co.* (1) ((1898), 78 L.T. 406). The statement on which he relies is a submission which was made by counsel in the argument in that case (ibid., at p. 407). It was approved by SMITH, L.J.; and CHITTY, L.J., expressed approval, but found it unnecessary to decide whether the list was exhaustive. The approval of SMITH, L.J. (78 L.T. at p. 408), as well as that of CHITTY, L.J. (ibid., at p. 408), was obiter, since the only question was whether an award could be set aside for a mistake of law not apparent on its face when the arbitrator did not request remission. Furthermore, although SMITH, L.J., treats the law as having been so laid down in *Re Keighley, Maxsted & Co. & Durant & Co.* (2) ([1893] 1 Q.B. 405), the statement which he approved in fact extends the law as laid down in that case, which referred not to "misconduct" of the arbitrator in general as a good ground for remission, but only to fraud, corruption and excess of jurisdiction. To the opposite effect of the dicta to which I have referred is the dictum of MOULTON, L.J., in *Re Baxters & Midland Ry. Co.* (3) ((1906), 95 L.T. 20 at pp. 22, 23), which is in the following terms:

> "Counsel for the railway company seemed to me to treat the authorities they relied upon as though they cut down the jurisdiction of the court. The jurisdiction of the court is statutory, and cannot be increased or cut down in that way. The reported decisions of the court only show the principles which have guided the court from time to time in exercising its jurisdiction, and, though they may afford a valuable guidance they do not restrict either the jurisdiction of the court in deciding other cases or the duty of the court to look at the facts in each particular case. When the facts of any particular case before the court are the same as the facts in the cases cited no doubt the court will follow those cases. But it must not be supposed that reported decisions prevent the court from deciding whether in the interests of justice it ought to send the matter back to the arbitrator."

---

* See footnote p. 781, post.

I do not think that I am limited by authority to the four grounds for remitting awards approved in *Montgomery, Jones & Co.* v. *Liebenthal & Co.* (1), although I should naturally hesitate before exercising my discretion to remit in a case which does not come within any one of the four categories there approved. Of those categories, the first is the only relevant one: Is the award good on the face of it? Looked at by itself, it is not merely uncertain but unintelligible. The respondents submit that I am entitled to look at the documents referred to in the appeal award—that is to say, the original award appealed against and the contracts. If I do so, I find that the contracts are three contracts of sale of Ghana cocoa c.i.f. Hamburg January/February/March shipment by the respondents to the applicants at certain prices, and three corresponding contracts of sale of the same quantities of cocoa c.i.f. Hamburg January/February/March shipment by the applicants to the respondents at higher prices. It then becomes apparent that the resultant differences from applying one contract against another are the differences in the purchase price of each of the corresponding pairs of contracts of purchase and sale. The amount awarded, say the respondents, is therefore a matter of mere arithmetic from the award, and the documents referred to in it, and the award is sufficiently certain on the maxim id certum est quod certum reddi potest. In support of that proposition counsel for the respondents relied on two ancient cases: *Wohlenberg* v. *Lageman* (4) ((1815), 6 Taunt. 251), and *Higgins* v. *Willes* (5) ((1828), 3 Man. & Ry. K.B. 382). If I were to shut my eyes to evidence extraneous to the award, and the documents referred to in it, which asserts that none of these contracts was a genuine contract of sale of goods but that they were all in combination mere gambling in differences, I should have considerable doubt whether the award was certain; and since the time for the performance of none of the six contracts had expired any breach by the respondents must have been anticipatory. The contracts are not for fixed quantities of cocoa but for " about " the specified quantities—" (three per cent. more or less) "—and could have been performed with least loss to the respondents so far as their sales were concerned by delivery of three per cent. less than the specified quantities. The award (and the documents referred to in it) does not, I think, in the absence of extraneous evidence, define what quantity of cocoa within three per cent. each way is to be taken into account for the purposes of the calculation. On its face, therefore, I think that there is a good deal to be said for the view that it is uncertain.

Counsel for the respondents argues that, even if there were uncertainty on the face of the award and the documents referred to in it, the parties are agreed as to the method of calculation. The applicants have stated their views as to the method of calculation in an affidavit, and counsel for the respondents agrees with it. This is a matter (he says) like the shares in the ship in *Wohlenberg* v. *Lageman* (4), which is not in dispute between the parties. It is quite true that the point that the award was uncertain was first raised by me and not by counsel for the applicants. Indeed, the whole basis of his unsuccessful application to enforce the award in the same manner as a judgment which went to the Court of Appeal must, I think, have been that it was certain. But counsel for the applicants is naturally not unwilling to avail himself of the point, even at the eleventh hour, if he can; and I see nothing to estop him from doing so if he wants to. I think that this award on its face is uncertain and comes within the first category approved in *Montgomery, Jones & Co.* v. *Liebenthal & Co.* (1) in which awards can be remitted to the arbitrator.

Even if I am wrong in thinking that the award is uncertain on its face, I still think that I have jurisdiction to set it aside. It is, in my view, an implied term of an arbitration agreement made since 1889 (when the provision for enforcing an award in the same manner as a judgment was first introduced)* that an award for the payment of money—as contrasted with a mere declaratory award—shall be in a form which is capable of being enforced in the same manner as a judgment. That this remedy should be available is one of the main purposes of an arbitration agreement, and I have no hesitation in holding that I have jurisdiction to remit an award for the payment of money so that it may be amended to put it in a form in which it will be so enforceable. If this extends the categories in which cases can be remitted to the arbitrator which was approved in *Montgomery, Jones & Co.* v. *Liebenthal & Co.* (1), I will cheerfully, encouraged by MOULTON, L.J., in *Re Baxters & Midland Ry. Co.* (3), so extend them: but if I be right in my recent decision in *London Export Corpn., Ltd.* v. *Jubilee Coffee Roasting Co., Ltd.* (6) (ante, p. 494), that in arbitration law "misconduct" of an arbitrator includes any failure by the arbitrator to comply with the terms, express or implied, of the arbitration agreement, the case falls within the second category approved in *Montgomery, Jones & Co.* v. *Liebenthal & Co.* (1), namely, that there has been misconduct on the part of the arbitrator in failing to comply with the implied term that the award for the payment of money shall be in a form which is capable of being enforced in the same manner as a judgment.

---

* See s. 12 of the Arbitration Act, 1889, which is reproduced in s. 26 of the Arbitration Act, 1950.

I hold, therefore, that I have jurisdiction to remit the case to the board of appeal to calculate the sum of money due to the applicants, and that it would not be an unjudicial exercise of my discretion if I were to do so. I have, however, still to deal with counsel for the respondents' second submission, that in the particular circumstances of the case I ought not to remit the award since the proper remedy of the applicants is to bring an action on the award.

If I am right in thinking that the award is uncertain, the dispute has not been settled and decided by arbitration, and, accordingly, by r. 10 of the Market Rules of the Association, which are incorporated in the contracts, no action can be brought. The applicants would therefore be left without any remedy unless the award were remitted. If, however, I am wrong as to this and the award is enforceable in its present form by action, why should I refuse to the applicants the right to put themselves in a position to enforce it directly in the same manner as a judgment? What counsel for the respondents is really saying is that, even if the award were in a form in which it could be enforced as a judgment, the court, in the exercise of its discretion under s. 26 of the Arbitration Act, 1950, ought to refuse leave so to enforce it, and leave the applicants to their remedy by an action on the award. The grounds on which he says so did not commend themselves to HAVERS, J.*: they do not commend themselves to me; but it is probably some consolation to him that, even if my order in this case is upheld by the Court of Appeal, he will have a third chance before yet another judge when the applicants apply to enforce the amended award.

In those circumstances, I can give my reasons for rejecting the second submission briefly. An affidavit has been put in on behalf of the respondents alleging, first, that these were not intended to be genuine contracts of sale but were gambling transactions in differences, sales being married against purchases of similar quantities; secondly, that an oral agreement was made on Nov. 8, 1957, that in consideration of the respondents continuing to deal in cocoa with the applicants for December, 1957/February, 1958, January, 1958/March, 1958, and February, 1958/April, 1958, deliveries, the applicants would make no request to the respondents to put up the margin; thirdly, that the applicants broke the oral agreement by refusing to accept orders given in December, 1957, by the respondents for cocoa for delivery in January/March, 1958, and February/April, 1958; fourthly, that the respondents, as they were entitled to, accepted

---

* On Feb. 11, 1958, HAVERS, J., dismissed an appeal by the respondents against an order of Master GRUNDY, dated Feb. 6, 1958, ordering that the appeal award be enforced pursuant to s. 26 of the Arbitration Act, 1950; the respondents then appealed against the order of HAVERS, J., to the Court of Appeal on the ground that the appeal award was not capable of enforcement under s. 26 of the Act of 1950 and the appeal was allowed on Feb. 24, 1958.

such breach as a wrongful repudiation of the oral agreement; and, fifthly, A
that they have a large counterclaim for damages for such repudiation which will reduce their total indebtedness to the applicants to between £1,850 and £3,350.

It is not suggested in the affidavit that there is any claim for rectification of the agreements which are the subject-matter of the award; but all that the affidavit amounts to is that the respondents allege that they have a counterclaim arising out of transactions closely connected with those which are the B
subject-matter of the award. No authority has been cited to me in which the existence of a counterclaim has been held to be a good reason for refusing to allow an award to be enforced as a judgment. I do not think that the existence of a counterclaim is a good reason. It would be contrary to the purpose of s. 26 of the Arbitration Act, 1950, if, in a case where the validity of the award and the right to proceed on it is beyond doubt, it should be given less effect than a C
judgment. I think that the cases in which an award will not be enforced as a judgment are correctly set out in RUSSELL ON ARBITRATION (16th Edn.) at pp. 269 to 271, and that the existence of a prima facie counterclaim is not one of them. Even, therefore, if I thought that a prima facie counterclaim were established, I should not regard it as good ground for refusing to allow the applicants to enforce the award in the same manner as a judgment, and a fortiori as good D
ground for refusing to remit the award to the board of appeal so that it may be amended to a form in which the applicants can apply to some other judge for leave to enforce it in that manner.

As the respondents have already issued a writ in respect of their counterclaim it is desirable that I should not appear to prejudge it. There may be evidence to support it additional to that which appears in the affidavit and exhibits E
before me; but I have to exercise my discretion on the only evidence which is before me, and limiting myself to that evidence it is right to say—for it is a further reason for the exercise of my discretion—that I think the alleged counterclaim implausible.

The applicants are, accordingly, entitled to an order remitting the award to the appeal board for the purposes indicated. F

Order accordingly.

Solicitors: *Dubovie, Freeman & Co.* (for the applicants); *E. F. Turner & Sons* (for the respondents).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

A

Re S. (an infant).

[CHANCERY DIVISION (Roxburgh, J.), February 28, 1958.]

Justices—Custody—Change of custody—Stay pending appeal—Circumstances in which stay should be granted.

B *Infant—Guardianship of Infants Acts—Custody—Stay of transfer of custody pending appeal—Magistrates' order transferring custody from mother to father—Principles regulating grant of stay pending appeal.*

When magistrates order the transfer of the custody of a child from one parent to another, it is not normally in the interests of the child, where C there is no urgency for the change of custody, to refuse a stay of it pending appeal, if the magistrates are satisfied that there is a genuine intention to appeal. Furthermore, if the magistrates consider that they ought to refuse a stay, then, unless there is considerable urgency for the change of custody, the order should not be made so that the change is to take effect instantly, but so that it should take effect in, say, seven days, so as to allow sufficient D time for the party concerned, if he so wishes, to apply to the Chancery Division to have the order of the magistrates stayed pending an appeal.

A boy, born in October, 1953, the son of parents who were married, was in the custody of his mother, but had not lived with his father since Easter, 1956, when the parents separated. On the father's application magistrates made an order in February, 1958, giving custody of the boy to the father E with access for the mother between 2 p.m. and 5 p.m. on Sundays. The order was to take effect at once. Application for a stay pending an appeal was made by the mother and was refused. Some disturbance ensued outside the court and the mother did not in fact transfer custody of the boy. She gave instructions for, and intended to proceed with, an appeal. On motion F by the mother for an order that she should have custody of the boy pending appeal,

Held: there being no special reasons of urgency for effecting the change of custody in the circumstances of this case, the court would order that the boy should remain in his mother's custody pending the hearing of an appeal.

[As to appeals to the High Court from an order relating to custody made G under the Guardianship of Infants Acts, 1886 and 1925 by a magistrates' court, see 21 HALSBURY'S LAWS (3rd Edn.) 215, para. 476.]

Motion.

This was an application by the mother for an order that the custody of an infant remain with her, pending the hearing of her appeal from an order of the H Bedford justices that the custody be given to the father.

T. A. C. Burgess for the mother.
W. A. B. Forbes for the father.

ROXBURGH, J.: I am hearing this case in open court because it raises a matter of great public importance and one which often causes me a good deal I of embarrassment when I hear appeals from magistrates about the custody of infants. It is common knowledge that it is not a good thing for a child of tender years to be bandied about between contending and conflicting parents. I often feel when I hear appeals that one reason why I ought not to vary an order is that, the order having been carried out by the transfer of the care or control of the infant, if I reverse the order the child must be returned to the former care and control, and that is exactly the process that I think everybody concerned with the welfare of infants deprecates. I often ask counsel who appear before me, " Why did you not ask for a stay from the magistrates ? It would have been much easier for you to have succeeded on this appeal if you had, because there would not then have been this bandying about of the infant ". Some counsel have indicated that it is not easy to get a stay. If this case is at all typical, that must be overwhelmingly true and, as I think the lamentable events which did, in fact, follow the refusal of the magistrates to grant the stay must really be attributed to that refusal which, in my judgment, was not justified, this is a very good occasion on which to point out why it is desirable in cases where the magistrates' order involves a change of custody that they should grant a stay, if there is a genuine intention to appeal. I want to make it clear, however, that I do recognise that there are cases in which it would be quite right to refuse a stay even though there is to be a change of custody and even though there is a genuine intention to appeal. There are cases where even a day's delay might prejudice the welfare of the infant; but this case, quite obviously, is not in that category, as the facts to which I shall refer make plain. I know that magistrates do not order a stay pending an appeal when they think that the emergency is too great. I can hardly believe that this case was in that category, but if it seemed to them to be in that category they could at least have said that the order should not take effect for four days; that is to say, they could have made the transfer of care and control take effect four days after the decision. Again, there might be a case of extreme urgency in which that might be the wrong thing to do, but normally that would not be so, and then the unseemly events which have happened in this case would not have occurred. It is for those reasons, not with any desire to make a public display of what has happened in this case, that I have dealt with this in public.

In this case, the father and the mother are married. The child was born on Oct. 16, 1953 (a boy) and is, therefore, under five. The wife left her husband at Easter, 1956, with the child, and the child has always been under her care and control down to today, and is still under her care and control and will, for some time at any rate, continue so to be. On Feb. 24, 1958, the Bedford justices heard a complaint by the father that he and the mother were separated and living apart, and alleging that he was better fitted to have the legal custody of the child. The order which they drew up gave custody of the infant to the father with access to the mother between 2 p.m. and 5 p.m. on Sundays. On the making of that order the justices gave no reason for their decision. Counsel on behalf of the mother at once applied for a stay of the order pending an appeal, but the justices refused the application and gave no reason. For my own part, I cannot think of any reason for refusing the stay, and the justices even now have not given me their reasons for refusing a stay—I do not blame them, because they had no obligation to do so. The order was for the immediate transfer of a small child of under five from the custody of the mother (who had had custody ever since the child was born) to the father, a person with whom the child had not lived. I believe the father had some access, but the child had never lived with the father since Easter, 1956.

In his affidavit the solicitor for the mother stated:

> " After the hearing the father made an attempt forcibly to take the infant from the mother, but she refused to part with the infant and there was, in my presence, some disturbance among the persons present when, in my view, the father assaulted the mother's sister. I am informed by the mother and verily believe that when the father attempted to take the infant away from the mother the infant clung to her and commenced screaming and said ' Don't let him take me. Take me home mummy '. I am also informed by the mother and verily believe that when the father and his sister and the mother and her sister together with the infant were in the waiting room before the hearing of the summons the infant inquired ' who that man ' was, indicating the father."

That is one side of the story of the scuffle, but I ought to read the other side of the story in case it should be thought that I am necessarily accepting one view rather than the other. I do not mind who was responsible for the scuffle; my point is that it was a most unseemly and improper event and, as I see it, almost the natural consequence of the refusal of a stay in this particular case.

The other side of the story is told by a woman police officer. She says that she was on duty on this occasion, and I think she quite clearly confirms the account which I have given of what took place so far as the magistrates are concerned. She says in her affidavit:

> " . . . The magistrates returned at about 12.55 and the chairman . . . announced that an order for custody of the child would be made in favour of the father, the mother to have certain rights of access. A legal argument then took place respecting an appeal and a stay of the order. Whilst this was going on, I went and stood near [the mother]. I heard the chairman say that the order would take effect at once. The court then rose and I opened the door to allow [the mother] to leave. Her sister was standing outside the door with the child. [The mother] then went out of the door, picked up the child and carried it hurriedly along the landing towards the stairs. Her sister followed her. When [the mother] got to the stairs, she started to run down them still carrying the child. Her sister followed at the same speed. I ran after them, as I thought [the mother] was taking the child away in breach of the order of the court. I tried to overtake [her sister] but was prevented from doing so as she had her hand on the bannisters. She may have been trying to stop me, but I cannot be sure. When we reached the bottom of the stairs, I said to [the mother] ' You can't take the child away ', and she said ' You try and stop me '. She was still holding the child. I then asked her to go into the waiting room at the foot of the stairs, which she and her sister did, taking the child with them. [The father] and his sister, . . . had followed me downstairs and were behind me when [the mother] said ' You are not going to take him '. She then tried to leave the waiting room and [the father] and I restrained her. There was then a lot of shouting and the child began to scream and appeared to be very frightened. At this stage, I telephoned Horne Lane Police Station for assistance. When I returned, I saw [the mother's sister] give [the father] a violent push in the chest and he then hit her on the arm with his hand. She did not fall but backed into the table which slid across the room. At this time [the] solicitor for [the father] had arrived and come into the waiting room, which was then rather crowded. [The mother] then hit [the solicitor] quite a spiteful blow with her hand on the left of his face. [The solicitor] then came out of the waiting room and did not retaliate. A general melee then took place between all concerned . . ."

That is the description of what happened in the precincts of the local court. As I say, I am not concerned to choose between those two stories. I give them with complete impartiality, and if there are summonses for assault, I have said nothing in favour of anybody, or against anybody, except that it was a most unseemly procedure.

That was not all the father and his adviser did. His solicitor knew full well that the mother had instructed her solicitor to appeal. In his affidavit the father's solicitor stated:

> " On the following morning I telephoned the mother's solicitors and inquired if the mother was then willing to deliver the said infant to the father, but was unable to obtain any information except that the said solicitors had instructions to proceed with an appeal to this honourable court."

That is why I say, and it is his own admission, that he knew perfectly well that they had instructions to proceed with the appeal.

> "I informed the solicitors that if I could not be assured that custody would be given, a complaint would be made to the justices in accordance with the advice of counsel to that effect. No such assurance was given to me."

Then he said that he could not readily find her, but that she was still in Bedford. He seems to think this to be rather a point against the mother, but I do not. He goes on:

> "Having regard to the matters referred to in . . . this affidavit, I laid a complaint on behalf of the father before the justices and requested the clerk of the court to expedite the issue service and hearing of the relevant proceedings. I informed the clerk of the court that I had seen the mother and the said infant in [a certain] shop [in Bedford]. I then wrote a letter in the name of my firm to the mother's solicitors, which was delivered to the office of the said solicitors at or about 1 p.m. . . . "

I will read that letter:

> "We enclose herewith copy order made yesterday by the court on the hearing of the summons for custody. We understand that your client persists in her refusal to comply with the terms of the order. Furthermore, we have ascertained that she has not today sent her child to the nursery school to which she referred in her evidence before the court, but that, on the contrary, she has him with her at the shop in which she works. This, of course, is totally unsatisfactory and entirely contrary to the interests of the child. We are therefore arranging for the immediate issue of a summons for the committal of your client pending compliance with the order."

I point out that they knew she had instructed her solicitors to appeal. The summons was issued, but the mother applied to me ex parte by motion, but with no affidavit, and I was so astonished that the magistrates had not allowed even sufficient time for the mother to apply to me for a stay of execution before insisting on the change of custody that I took what is a most unusual step: I granted an ex parte order (notwithstanding the absence of an affidavit) that the infant do remain in the custody of the mother until after today, and I gave leave to serve notice of motion.

As I have already said, there can be, and I dare say that there quite often are, cases in which it is quite right to refuse any stay of an order transferring the custody of a child from one parent to the other, and I am going to look to see whether this is, by any possible criterion, such a case; but I do wish to say that where there is no urgency for the transfer—and I emphasise those words "where there is no urgency for the transfer"—it is not normally in the interests of an infant to refuse a reasonable stay pending appeal if the magistrates are satisfied that there is a genuine intention to appeal. Further, if they think that they ought to refuse a stay, then, unless there is an even greater sense of urgency, they ought not to make the order to take effect instanter as distinct from, say, seven days hence, so as to enable the aggrieved party (that is to say, the party aggrieved by their refusal to grant a stay) to apply, as that party is quite entitled to do, to this court to ask for a stay.

I propose now to consider whether there was any conceivable justification in this case for refusing a stay. I must be careful to remember that I am not hearing the appeal. I must be particularly careful about that because the reasons which the justices did not give are now before me in fact. I do not know whether I ought to have looked at them, but counsel for the father was anxious that I should, and I have looked at them, and I take no objection to them. I only say this: the prima facie rule (which is now quite clearly settled) is that, other things being equal, children of this tender age should be with

A their mother, and where a court gives the custody of a child of this tender age to the father it is incumbent on it to make sure that there really are sufficient reasons to exclude the prima facie rule. I go no further than that. It would be wrong for me at this moment to say, whether, in my judgment, there are sufficient reasons in this case for excluding the prima facie rule. Two things are, however, inescapable. The first is that if there are sufficient reasons, B they are much weaker than would be the position in a normal case in which care and control is given to the father of a child of such tender years as this child. The second is that nobody can deny that the mother has a reasonable chance of success on this appeal. In those circumstances, I am sure that one must look for some ground of urgency to justify an immediate order for the transfer of possession of the child to the father. The child has never suffered C any injury from being with the mother, and there is no suggestion that he will suffer any injury. I cannot believe that a matter of a few weeks would make the slightest difference one way or the other to the welfare of the child. I have studied the reasons which the magistrates have given for their decision to find in them any inkling of urgency, and I can find absolutely none. I therefore order that the infant do remain in the custody of the mother until the hearing D of the appeal.

Application allowed.

Solicitors: *Waterhouse & Co.*, agents for *Burgess & Chesher*, Bedford (for the mother); *J. D. Langton & Passmore*, agents for *Mellows & Sons*, Bedford (for the father).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

E

F

PORT LINE, LTD. *v.* BEN LINE STEAMERS, LTD.

[QUEEN'S BENCH DIVISION (Diplock, J.), March 3, 4, 5, 6, 7, 10, 1958.]

Requisition—Compensation—Ship—Purchase of ship subject to time charterparty —Whether charterer entitled to compensation paid to purchaser—Compensation (Defence) Act, 1939 (2 *&* 3 *Geo.* 6 *c.* 75), *s.* 4, *s.* 15.

G *Shipping—Charterparty—Purchase of ship with notice of charterparty—Ship subsequently requisitioned—Whether purchaser bound by charterparty—Whether owners received compensation as trustees for charterers—Compensation (Defence) Act,* 1939 (2 *&* 3 *Geo.* 6 *c.* 75), *s.* 4, *s.* 15.

The difficulty in ascertaining the ratio decidendi of the decision in *Lord Strathcona S.S. Co.* v. *Dominion Coal Co.* ([1926] A.C. 108) and of reconciling H the decision with well-established principles of law, as well as the problems which the decision raises, lead to the conclusion that it was wrongly decided (see p. 797, letter H, post); if it was not wrongly decided, it should not be extended beyond what it purported to decide, viz., that a charterer's right against a purchaser of the vessel with knowledge of the terms of the charterparty is the negative right to prevent the vessel being used by the purchaser I in violation of the charterparty, and no more (see p. 797, letter I, and p. 799, letter I, to p. 800, letter A, post).

On Nov. 5, 1954, Port Line, Ltd., the plaintiffs, entered into a time charter with Silver Line, Ltd., the owners of the vessel for a period of thirty months from Mar. 9, 1955. On Feb. 8, 1956, the vessel was sold, with the plaintiffs' consent, to Ben Line Steamers, Ltd., the defendants. The sale was subject to a bareboat charter to Silver Line, Ltd., which enabled them to carry out the terms of their time charter with the plaintiffs and was "for the balance of the period of the charterparty dated Nov. 5, 1954, between Silver Line and Port Line; expected to terminate about September, 1957". Clause 12 of the bareboat charter stated that "if the ship be requisitioned, this charterparty shall thereupon expire". There was no such clause in the time charter between the plaintiffs and Silver Line, Ltd. The defendants had notice of the existence of the time charter between the plaintiffs and Silver Line, Ltd., but not of its terms; and the plaintiffs had notice of the bareboat charter between the defendants and Silver Line, Ltd., but not of its terms. On Aug. 22, 1956, the defendants were notified by the Ministry of Transport and Civil Aviation that the vessel was requisitioned; and on the same day the defendants informed Silver Line, Ltd., of the termination of the bareboat charter by reason of cl. 12 of the charterparty. The plaintiffs were also informed of the requisition. The vessel was delivered to the Ministry on Aug. 29, 1956, and was re-delivered to the defendants on Nov. 28, 1956. The defendants had entered into a pro forma charterparty on Sept. 10 with the Ministry of Transport and Civil Aviation, which fixed the terms of hire and management during the period of requisition. During the three months that the vessel was requisitioned, the plaintiffs continued to pay hire under their charterparty to Silver Line, Ltd., who accepted it without prejudice to their contention that the time charterparty had been frustrated by the requisition. The defendants received compensation from the Crown in respect of the use of the vessel while under requisition. The plaintiffs claimed that, by virtue of their charterparty with Silver Line, Ltd., they were entitled as against the defendants to have the vessel used for the carriage of their goods and therefore were persons entitled under s. 4 (3) of the Compensation (Defence) Act, 1939*, to part, or the whole, of the compensation received by the defendants.

Held: the plaintiffs were not entitled to recover from the defendants any part of the compensation received by the defendants for the following reasons—

(i) although the charterparty was not frustrated, it conferred no right of property in the vessel but only rights to services and for carriage of goods (see p. 794, letters G to I, post).

(ii) the fact that the defendants as buyers of the vessel, had notice of the charterparty at the time of their purchase did not entitle the plaintiffs, as against the defendants, to have the vessel used for the carriage of goods in accordance with the charterparty (see p. 798, letter B, post).

Lord Strathcona S.S. Co. v. *Dominion Coal Co.* ([1926] A.C. 108), not followed.

De Mattos v. *Gibson* ((1858), 4 De G. & J. 276) considered.

(iii) immediately after the requisition (which was the material point of time for the purposes of s. 4 (3) of the Compensation (Defence) Act, 1939) the bareboat charter to Silver Line, Ltd., no longer entitled Silver Line, Ltd. to the use of the vessel and thus could no longer support any right of the plaintiffs under their time charterparty with Silver Line, Ltd., to the use of the vessel (see p. 799, letters F to H, post).

(iv) therefore, by reason either of (ii) or of (iii), ante, the plaintiffs were not persons entitled "to use the vessel . . . but for the requisition" within s. 4 (3) and the defendants were not deemed to have received the compensation as trustees for the plaintiffs under that enactment.

[As to rights and liabilities of strangers to a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 66, 67, paras. 110, 111.

---

* The relevant terms of the Compensation (Defence) Act, 1939, s. 4 (3), are printed at p. 799, letter B, post.

As to frustration applied to charterparties, see 8 Halsbury's Laws (3rd Edn.) 188, para. 322; and for cases on the subject, see 12 Digest (Repl.) 438-444, *3339-3369*.

For the Compensation (Defence) Act, 1939, s. 4 and s. 15, see 3 Halsbury's Statutes (2nd Edn.) 995 and 1004.]

Cases referred to:

(1) *Lord Strathcona S.S. Co.* v. *Dominion Coal Co.*, [1926] A.C. 108; 95 L.J.P.C. 71; 134 L.T. 227; 41 Digest 321, *1800*.

(2) *F. A. Tamplin S.S. Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397; 85 L.J.K.B. 1389; sub nom. *Re F. A. Tamplin S.S. Co., Ltd. & Anglo-Mexican Petroleum Products Co., Ltd.*, 115 L.T. 315; 12 Digest (Repl.) 442, *3361*.

(3) *Chinese Mining & Engineering Co., Ltd.* v. *Sale & Co.*, [1917] 2 K.B. 599 86 L.J.K.B. 1465; 117 L.T. 32; 41 Digest 366, *2131*.

(4) *Davis Contractors, Ltd.* v. *Fareham U.D.C.*, [1956] 2 All E.R. 145; [1956] A.C. 696; 3rd Digest Supp.

(5) *Metropolitan Water Board* v. *Dick, Kerr & Co.*, [1918] A.C. 119; 87 L.J.K.B. 370; 117 L.T. 766; 82 J.P. 61; 12 Digest (Repl.) 456, *3410*.

(6) *Bank Line, Ltd.* v. *Capel (A.) & Co.*, [1919] A.C. 435; 88 L.J.K.B. 211; 120 L.T. 129; 12 Digest (Repl.) 443, *3365*.

(7) *Southern Foundries (1926), Ltd.* v. *Shirlaw*, [1940] 2 All E.R. 445; [1940] A.C. 701; 109 L.J.K.B. 461; 164 L.T. 251; *affg.* sub nom. *Shirlaw* v. *Southern Foundries (1926), Ltd.*, [1939] 2 All E.R. 113; [1939] 2 K.B. 206; 9 Digest (Repl.) 557, *3689*.

(8) *Re an Arbitration between Sea & Land Securities, Ltd., & Dickinson & Co., Ltd., The Alresford*, [1942] 1 All E.R. 503; sub nom. *Sea & Land Securities, Ltd.* v. *Dickinson & Co., Ltd.*, [1942] 2 K.B. 65; 111 L.J.K.B. 698; 167 L.T. 173; 2nd Digest Supp.

(9) *De Mattos* v. *Gibson*, (1858), 4 De G. & J. 276; 28 L.J.Ch. 165; 32 L.T.O.S. 268; 45 E.R. 108; 41 Digest 186, *265*.

(10) *Tulk* v. *Moxhay*, (1848), 2 Ph. 774; 18 L.J.Ch. 83; 13 L.T.O.S. 21; 41 E.R. 1143; 40 Digest 313, *2667*.

(11) *Lumley* v. *Gye*, (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 118 E.R. 749; 17 Digest (Repl.) 116, *285*.

(12) *Messageries Imperiales* v. *Baines*, (1863), 7 L.T. 763; 1 Mar. L.C. 285; 41 Digest 319, *1785*.

(13) *London County Council* v. *Allen*, [1914] 3 K.B. 642; 83 L.J.K.B. 1695; 111 L.T. 610; 78 J.P. 449; 40 Digest 302, *2602*.

(14) *Barker* v. *Stickney*, [1919] 1 K.B. 121; 88 L.J.K.B. 315; 120 L.T. 172; 32 Digest 295, *704*.

(15) *Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge & Co., Ltd.*, [1915] A.C. 847; 84 L.J.K.B. 1680; 113 L.T. 386; 12 Digest (Repl.) 234, *1754*.

(16) *Manchester Trust* v. *Furness*, [1895] 2 Q.B. 539; 73 L.T. 110; sub nom. *Manchester Trust, Ltd.* v. *Turner, Withy & Co., Ltd.*, 64 L.J.Q.B. 766; 41 Digest 200, *384*.

(17) *Clore* v. *Theatrical Properties, Ltd., & Westby & Co., Ltd.*, [1936] 3 All E.R. 483; 30 Digest (Repl.) 535, *1703*.

(18) *Greenhalgh* v. *Mallard*, [1943] 2 All E.R. 234; 2nd Digest Supp.

(19) *Bendall* v. *McWhirter*, [1952] 1 All E.R. 1307; [1952] 2 Q.B. 466; 3rd Digest Supp.

(20) *Lumley* v. *Wagner*, (1852), 1 De G.M. & G. 604; *affg. on other grounds*, 5 De G. & Sm. 485; 19 L.T.O.S. 127; 64 E.R. 1209; 11 Digest (Repl.) 439, *814*.

(21) *The Broadmayne*, [1916] P. 64; 85 L.J.P. 153; 114 L.T. 891; 41 Digest 814, *6753*.

(22) *A.-G.* v. *De Keyser's Royal Hotel*, [1920] A.C. 508; 89 L.J.Ch. 417; 122 L.T. 691; 17 Digest (Repl.) 437, *91*.

Action.

The plaintiffs, Port Line, Ltd., were the charterers of a vessel then called Silveroak, later Port Stephens, and now Benvannoch, under a time charter due to expire in September, 1957. At the time when the plaintiffs entered into the charterparty the owners were Silver Line, Ltd., but the vessel was sold to the defendants, Ben Line Steamers, Ltd., by Silver Line, Ltd., with the plaintiffs' permission, in February, 1956. The sale was subject to a bareboat charter to Silver Line, Ltd., to enable them to carry out the terms of their time charter with the plaintiffs and the bareboat charter contained a clause that "if the ship be requisitioned, this charterparty shall thereupon expire". The time charter to the plaintiffs contained no such clause. The plaintiffs were aware of the existence of the bareboat charter but not of its provisions and the defendants had notice of the time charter but not of its provisions. The vessel was requisitioned from Aug. 29, 1956, to Nov. 28, 1956, by Her Majesty and the plaintiffs claimed from the defendants the amount of compensation paid to them by the Ministry of Transport and Civil Aviation during that time, which, they contended, the defendants held as trustees for the plaintiffs by reason of the plaintiffs' time charter with Silver Line, Ltd. The defendants argued that the time charter was frustrated by the requisition and the compensation was received by them by virtue of a charterparty between themselves and the Ministry of Transport and Civil Aviation entered into in September, 1956. The facts are fully set out in the judgment.

Eustace Roskill, Q.C., and *B. J. Brooke-Smith* for the plaintiffs.

A. A. Mocatta, Q.C., *M. R. E. Kerr* and *P. R. Oliver* for the defendants.

Cur. adv. vult.

Mar. 10. **DIPLOCK, J.**, read the following judgment: In this case the plaintiffs claim to recover from the defendants the whole or part of the compensation received by the defendants from the Crown in respect of the requisition by the Crown at the time of the Suez crisis of a vessel now known as the Benvannoch.

This vessel, then known as the Silveroak, was chartered to the plaintiffs by its then owners, Silver Line, Ltd., on a gross time charter dated Nov. 5, 1954, for a period of about thirty months from February/March, 1955, at 26s. per deadweight ton per month. The charter was in the form approved by the New York Produce Exchange, and it is only necessary to note that by cl. 1 the owners were to provide and pay for provisions, master and crew, and by cl. 26 that nothing contained in the time charter was to be construed as a demise of the vessel to the plaintiffs. There was no provision for substituting another vessel and the off-hire clause (cl. 15) did not include time lost by requisition. Delivery of the vessel took place on Mar. 9, 1955, and re-delivery was accordingly not due until about Sept. 9, 1957.

In January, 1956, negotiations took place between Silver Line and the defendants for the sale of the vessel, by then named Port Stephens, to the defendants. As at that date the plaintiffs' time charter had still some twenty-one months to run, the original intention of Silver Line and the defendants was that the defendants should demise the vessel back to Silver Line for the period of the remainder of the plaintiffs' existing gross time charter from Silver Line, and that the approval of the plaintiffs to the arrangements for carrying out the balance of their time charter should be obtained by Silver Line. The method of carrying this out, although there is no suggestion of bad faith on anyone's part, was in the result unfortunate. On Jan. 30, 1956, Silver Line sent to the defendants a draft of the agreement for sale of the vessel. This draft and the final agreement for sale as executed contained the two following clauses:

> "11. The vendors having committed the vessel on time charter to Port Line, Ltd., of London, for a period of 2½ years commencing Mar. 9,

> 1955, and estimated to terminate about September, 1957, it is hereby agreed that purchasers shall charter the vessel to the vendors for the remaining period of the aforesaid time charter upon the terms and conditions of the charterparty attached thereto such charter to commence immediately on transfer of the vessel to purchasers under this agreement.
>
> " 13. This agreement is subject to vendors obtaining the approval of Port Line, Ltd. to the transfer of ownership of the vessel to the purchasers and the arrangements herein provided for the carrying out of this balance of the time charter to Port Line, Ltd."

The draft of the bareboat charter referred to in cl. 11 was being prepared by the defendants, and had not yet been submitted to Silver Line, but on Feb. 2, 1956, Silver Line wrote to the plaintiffs a letter in the following terms:

> " Dear Sirs, M.V. Port Stephens. We wish to advise you that we have agreed, subject to your approval, to sell the above vessel to Ben Line Steamers, Ltd. A condition of the sale is that the vessel will immediately be chartered by demise to us for the balance of her time charter with you. Under this arrangement the management of the vessel will, of course, remain entirely in our hands, and we would greatly appreciate your formal confirmation that you are agreeable to this arrangement. Yours faithfully, Silver Line, Ltd."

To this the plaintiffs replied on Feb. 8 as follows:

> " Dear Sirs, M.V. Port Stephens. We have your letter of Feb. 2 and are very interested to learn that you have agreed to sell this vessel to Ben Line Steamers, Ltd. We note that you have arranged that she will be chartered on demise from Ben Line for the balance of our time charter and we appreciate that as far as we are concerned we shall still be dealing with yourselves, as disponent owners, since the management of Port Stephens will remain entirely in your hands. We would confirm that we have no objection to the sale of this vessel. Yours faithfully, Port Line, Ltd."

In the meantime on Feb. 6, two days before the date of the plaintiffs' letter to Silver Line, the defendants, who had not either at this or any stage seen the terms of the plaintiffs' time charter, sent to Silver Line, Ltd. a proposed draft of the bareboat charter drawn up on the basis of a Ministry of Transport document. This draft contained a clause giving to the defendants a right by notice in writing to terminate the bareboat charter if the defendants

> " shall at any time require the ship for any purpose for which British ships registered in the United Kingdom may at that time be requisitioned."

Correspondence followed between Silver Line, Ltd. and the defendants and in particular on Feb. 9, 1956, Silver Line proposed a number of minor alterations, some of which were stated to be to bring the bareboat charter in line with the plaintiffs' gross time charter. Among the alterations suggested by Silver Line (although not expressed to be to bring the bareboat charter in line with the plaintiffs' charter) was an amendment to the requisition clause to make it read as follows: " If the ship be requisitioned this charter shall thereupon expire ". This amendment was accepted by the defendants on Feb. 10 and on Feb. 13 Silver Line, Ltd., in a letter which suggested some further amendments to the bareboat charter to bring it into line with the plaintiffs' time charter, forwarded to the defendants the plaintiffs' letter of Feb. 8 consenting to the transfer of ownership. The agreement of sale and the bareboat charter were finally signed on Feb. 15 although backdated to Feb. 8.

It is to be observed that the requisitioning clause in the bareboat charter as a result of the amendment proposed by Silver Line, Ltd., had the effect of automatically terminating the bareboat charter in the event of requisition of the vessel, although the plaintiffs' gross time charter contained no provision for termination in that event. It is not, however, suggested that the defendants were aware of this difference in the possible duration of the bareboat charter and the plaintiffs' time charter. They never saw or asked to see the plaintiffs' time charter, and it is, I think, plain from the correspondence that they relied on Silver Line to see that the bareboat charter was in terms which would enable Silver Line to fulfil its obligations to the plaintiffs under the plaintiffs' time charter.

Counsel for the plaintiffs has suggested that a careful examination of the plaintiffs' letter of Feb. 8 would have shown the defendants that, although it bore a date two days after the draft bareboat charter had been submitted to Silver Line, the reference in that letter to Silver Line's letter of Feb. 2 should have aroused the defendants' suspicions that the plaintiffs had not in fact seen the proposed terms of the bareboat charter. I should be sorry to hold that commercial men had to read commercial correspondence so meticulously either in the modern sense of that adverb, or in the sense preferred by FOWLER.*

No doubt in February, 1956, it was not expected by any of the parties that the question of requisitioning would arise during the remaining period of the plaintiffs' gross time charter; but unfortunately in August the Suez crisis arose, and by a telegram dated Aug. 22 addressed to the defendants the Ministry of Transport requisitioned the vessel and required her to be put at the Crown's disposal on completion of discharge. She was in fact put at the Crown's disposal at noon on Aug. 29, 1956. It was at all times contemplated that she should be managed under requisition by the defendants, the owners, and accordingly on requisition the then crew of the vessel provided by Silver Line, Ltd., were discharged and a fresh crew obtained by the defendants. Silver Line, Ltd. had crewed the vessel with lascars; the crew quarters were not regarded as suitable for a European crew, and the defendants provided her with a Chinese crew whom they obtained from Hong Kong at a cost of £11,724. Their reasons for so doing were partly that the defendants' officers were accustomed to Chinese crews and not to lascars, and partly because they thought that in view of the attitude adopted by India and Pakistan in the Suez crisis it would be undesirable to have a crew who were either Moslems or Indians. I find (in case it may be relevant if this action goes further) that in all the circumstances this was a reasonable course to adopt. On Sept. 10 the defendants, in common with all other shipowners whose vessels were requisitioned, entered into an agreement on terms contained in a pro forma charterparty with the Ministry of Transport providing for the rates of hire and management of the vessel by the defendants during the period of requisition. Requisition in fact continued until Nov. 28, 1956, when the vessel was released to the defendants. This was a little over three months from Aug. 22 when notice of requisitioning was given, and it is also agreed by the parties that on Aug. 22 a reasonable estimate of the probable duration of the requisition was a period of three to four calendar months. During the period of requisition the plaintiffs continued to pay the charter hire to Silver Line despite the latter's contention that the plaintiffs' time charter with them was frustrated. Negotiations ensued between the plaintiffs and defendants as a result of which agreement was reached as to the future employment of the vessel without prejudice to their respective rights in respect of the period of requisition. It is with this period alone, therefore, that this action is concerned.

---

* In a Dictionary of Modern English Usage by H. W. Fowler there occurs this passage in relation to the word " meticulous "—" It is the word for the timid hare or the man who is gibbering with fear (Nullus est hoc meticulosus aeque . . . Perii, pruriunt dentes—Was ever man in such a funk? Lord, how my teeth chatter !). That meaning . . . ' meticulous ' had some centuries ago; but the word died out. When it was resuscitated in the nineteenth century, it was by literary critics with a new sense for which it was not in the least needed, ' scrupulous ' and ' punctilious ' being amply sufficient; but literary critics are given to gallicizing, and méticuleux appeared in the French Academy dictionary in 1835, i.e., had lately become fashionable in France ".

A settlement has also been reached between the plaintiffs and Silver Line, Ltd. with the result that I am not today concerned with any claims by the plaintiffs against Silver Line, Ltd. for breach of the plaintiffs' gross time charter with that company. The only issue which I have to determine is that of the respective rights of the plaintiffs and the defendants to the compensation or requisition hire which the defendants have received from the Crown in respect of the use of the vessel from Aug. 29 to Nov. 28, 1956.

The plaintiffs contend: (1) That throughout the relevant period they had a valid and subsisting contract with Silver Line, Ltd.; (2) that by the virtue of that contract they were entitled, as against the defendants, on the principle laid down in *Lord Strathcona S.S. Co.* v. *Dominion Coal Co.* (1) ([1926] A.C. 108) to have the vessel used for the carriage of their goods; (3) that they are entitled to recover from the defendants (a) under the Compensation (Defence) Act, 1939, if it applies, the whole compensation, or alternatively the bareboat element of the compensation received by the defendants in respect of the requisition, or (b) if the Compensation (Defence) Act does not apply, a portion of the compensation, such portion being ascertained in accordance with the principles laid down by Lord Parker of Waddington in *F. A. Tamplin S.S. Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.* (2) ([1916] 2 A.C. 397), and applied in *Chinese Mining & Engineering Co., Ltd.* v. *Sale & Co.* (3) ([1917] 2 K.B. 599) and other cases; or (c), as an alternative to (a) and (b), the profits made by the defendants out of the requisition of the vessel.

The defendants challenge these contentions to the polls and to the array. The plaintiffs' contract with Silver Line, Ltd., they say, was frustrated by the requisition; the *Strathcona* case (1) was wrongly decided; even if rightly decided it applies only where the subsequent purchaser has express notice of the terms of a subsisting charterparty; in any event it lays down no principle which entitles the plaintiffs to have the vessel used for the carriage of their goods, and it imposes no obligation on the defendants to account as constructive trustees; the Compensation (Defence) Act, 1939, applies, but gives no rights to the plaintiffs. The *Tamplin* case (2) apportionment is excluded by the Compensation (Defence) Act, 1939, and in any event does not apply. It is conceded that if the defendants are right as to the plaintiffs' gross time charter being frustrated by the requisition, the plaintiffs' claim must fail.

The requisition in this case took place not under any statutory powers, but under the prerogative power of the Crown*, a fact which is not without some relevance on the question of frustration since the Crown's powers to retain possession of a ship under the prerogative extends only for such period as possession is needed for the defence of the realm, although of this the Crown is no doubt, in the absence of mala fides, the sole judge. A requisition under the prerogative power is, therefore, necessarily a temporary taking of possession although the period of possession may be lengthy. It is, however, agreed in this case that on Aug. 22 it would have been reasonably expected that the requisition would last three to four calendar months, as in fact it did. No proclamation or Order in Council is required to entitle the Crown to exercise its prerogative power of requisition, and none had been published by Aug. 22 when notice of requisition of the vesssel was given to the defendants. In fact, however, an Order in Council regulating the requisition of ships had been made on Aug. 3, but was not published until Aug. 28, when it appeared in the Gazette. I shall have to look at its terms later to see what provision it makes for compensation.

Those being the circumstances, the question poses itself neatly: Is a time charter for thirty months of which a little over seventeen months have expired and a little under thirteen months remain to be fulfilled frustrated by a requisition which would be expected to, and does in fact, last three to four months, and accordingly leaves about ten months at the end of the requisition when the vessel will be available for use in performing services under the charter? It would appear to be the fate of frustration cases when they reach the highest tribunals that either there should be agreement as to the principle but differences as to its application, or differences as to the principle but agreement as to its application. I do not propose to add to what, according to Lord Radcliffe in *Davis Contractors, Ltd.* v. *Fareham U.D.C.* (4) ([1956] 2 All E.R. 145 at p. 159) had already become by 1919 an anthology of phrases by venturing on any restatement of the principle myself. Lest it be thought, however, that I do not remain an unrepentant adherent of the " implied term " theory of frustration, I would add that I have carefully considered the terms of the plaintiffs' charter, including in particular the " off-hire clause ", and have borne in mind that at the time the charter was entered into the Compensation (Defence) Act, 1939—at which I shall have to look later—was in force, and provided in effect for the apportionment between the owner and time charterer of compensation payable by the Crown in respect of requisition. I think, however, that whichever of the many suggested tests are applied, the result in this case is the same. Whether one applies the practical test favoured by Earl Loreburn in *Tamplin's* case (2) that in the case of a time charter, if the requisition is likely to last for substantially less than the remaining period of the charterparty, the contract is not frustrated, or whether one asks oneself with Lord Dunedin in *Metropolitan Water Board* v. *Dick, Kerr & Co.* (5) ([1918] A.C. 119 at p. 128): Was the interruption one which was likely to be so long as to destroy the identity of the work or service, when resumed, with the work or service interrupted?—which was Lord Sumner's favourite of his anthology in *Bank Line, Ltd.* v. *A. Capel & Co.* (6) ([1919] A.C. 435), the answer in this case must, I think, be that this charterparty was not frustrated. It is also the answer which MacKinnon, L.J.'s " officious bystander " (see *Shirlaw* v. *Southern Foundries (1926), Ltd.* (7), [1939] 2 All E.R. 113 at p. 124) would, I think, have received at the time the contract was made had he posed the question to Silver Line and Port Line, or to two disembodied and unincorporated reasonable shipowners (see per Lord Radcliffe in *Davis Contractors, Ltd.* v. *Fareham U.D.C.* (4), [1956] 2 All E.R. at p. 160) entering into a contract in similar terms. Finally, if however reluctantly I had to ask myself the metaphorical question: " Was the basis of the contract overthrown " by the requisition (see per Lord Reid in *Davis Contractors, Ltd.* v. *Fareham U.D.C.* (4), ibid., at p. 152) or, less metaphorically, is the contract not wide enough to apply to the new situation (Lord Reid, ibid., at p. 154) my answer still would be No; and the law accordingly did not step in to terminate the contract when the vessel was requisitioned, or at any time during the requisition.

---

* See, as regards this prerogative power, 7 Halsbury's Laws (3rd Edn.) 292, text and note (m).

In the result I hold that at all material times there was a valid and subsisting contract between Silver Line and the plaintiffs for breach of which (if there was any breach during the period of requisition) the plaintiffs could recover damages from Silver Line. That is a claim with which I am not concerned; but what is said is that by virtue of that contract the plaintiffs were entitled as against the defendants to have the vessel used for the carriage of their goods.

The plaintiffs' charterparty with Silver Line was a gross time charter, not one by demise. It gave the plaintiffs no right of property in or to possession of the vessel. It was one by which Silver Line agreed with the plaintiffs that for thirty months from Mar. 9, 1955, they would render services by their servants and crew to carry the goods which were put on the vessel by the plaintiffs (see per MacKinnon, L.J., in *Re an Arbitration between Sea & Land Securities, Ltd. & Dickinson & Co., Ltd., The Alresford* (8), [1942] 1 All E.R. 503 at p. 504). By parting with their property in the vessel on Feb. 8, 1956, and retaining a right to possession and use which terminated on its requisition, Silver Line put it out of their power to continue to perform their contractual services after the vessel was requisitioned. It is true that during the period of requisition (which is the only period with which I am concerned) Silver Line could not have performed their contractual services to the plaintiffs anyway, but the plaintiffs would have been entitled under s. 4 (3) of the Compensation (Defence) Act, 1939, to the bareboat element of any compensation received by Silver Line from the Crown, and would have had to pay to Silver Line a rather larger sum by way of hire under the charterparty. It would seem, therefore, that so far as the period of requisition itself is concerned, the plaintiffs would have gained rather than lost by any breach of the contract by Silver Line which relieved the plaintiffs from paying to Silver Line the chartered hire. This, however, is a matter between Silver Line and the plaintiffs with which I am not called on to deal except in so far (if at all) as it may be relevant to the determination of the plaintiffs' rights against the defendants. There was no privity of contract between the plaintiffs and the defendants. On what ground, therefore, can they assert against the defendants all or any of the contractual rights they had against Silver Line, or any statutory rights which they would have had against Silver Line by virtue of the existence of such contractual rights?

It is contended that the plaintiffs' rights against the defendants stem from the principle laid down by KNIGHT BRUCE, L.J., in *De Mattos* v. *Gibson* (9) ((1858), 4 De G. & J. 276 at p. 282), as approved by the Privy Council in the *Strathcona* case (1). The principle laid down by KNIGHT BRUCE, L.J., in *De Mattos* v. *Gibson* (9) in granting on appeal an interlocutory injunction to restrain a mortgagee of a ship who had acquired his mortgage with knowledge of the plaintiffs' subsisting charterparty from interfering with the performance of a subsisting voyage-charter was in the following oft-quoted terms (ibid., at p. 282):

> "Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller." See Cleveland Petroleum v. Dartstone (19

In 1858 this was new law. In *Tulk* v. *Moxhay* (10) ((1848), 2 Ph. 774) decided ten years before, on which KNIGHT BRUCE, L.J.'s statement has been assumed to be based, LORD COTTENHAM'S ratio decidendi was based on the retention by the covenantee of land the value of which would be diminished by breach of the covenant. TURNER, L.J., who sat with KNIGHT BRUCE, L.J., in the interlocutory appeal in *De Mattos* v. *Gibson* (9) gave a separate judgment which was subsequently treated as correctly propounding the questions to be determined at the trial, and expressed no concurrence with KNIGHT BRUCE, L.J.'s reasons. When the action came for trial before the Lord Chancellor, LORD CHELMSFORD did not grant an injunction. It would appear on analysis of his judgment that he treated the right to an injunction as depending on the same principle as the right to damages in *Lumley* v. *Gye* (11) ((1853), 2 E. &. B. 216) decided five years before, namely, that it is a tort knowingly to procure a breach of contract by another person.

De Mattos v. *Gibson* (9) was followed five years later with expressed reluctance by WOOD, V.-C. in *Messageries Imperiales* v. *Baines* (12) ((1863), 7 L.T. 763), but I am inclined to think on the principle laid down by LORD CHELMSFORD rather than that laid down by KNIGHT BRUCE, L.J. The broad principle as laid down by KNIGHT BRUCE, L.J., applies to all species of property—real property, chattels and choses in action alike. It was applied (or at any rate treated as correct) in a number of cases relating to each of those species up to the turn of the century, but as a doctrine dependent on notice alone was finally discredited in *London County Council* v. *Allen* (13) ([1914] 3 K.B. 642). SCRUTTON, L.J., there shed a tear over its demise as respects real property, but five years later in *Barker* v. *Stickney* (14) ([1919] 1 K.B. 121) he regarded the period of mourning as over, and his judgment conveniently lists (and so saves me from citing) the cases which he considered had buried it as respects each class of property. In 1926, however, it rose from the grave in the *Strathcona* case (1) which, being a decision of the Privy Council, is not binding on me, but being one of a Board which included Lords Haldane, Wrenbury and Blanesburgh, in addition to Lord Shaw, is (so far as it deals with questions of equity) entitled to respect which, in a common lawyer, borders on awe.

It may be relevant to note that in the *Strathcona* case (1) the buyers of the vessel subject to the time charter in favour of the plaintiffs had express notice of the terms of the charter, and had covenanted with the sellers to perform and accept all responsibilities under it. It was, as the Board said ([1926] A.C. at p. 116), not a mere case of notice of the existence of a covenant affecting the use of the property sold, but a case of acceptance of the property expressly sub conditione. The initial emphasis on this, and the reference at a later stage to the possibility that a shipowner might declare himself a trustee of his obligations under a charterparty so as to bind his assignee might suggest as a possible ratio decidendi that the *Strathcona* case (1) was one where either the purchaser used expressions which amounted to a declaration of trust in favour of the charterers, or the vendor himself accepted the benefit of the covenant as trustee for the charterers. But an examination of Lord Shaw's opinion as a whole seems to indicate that the Board accepted the full doctrine of Knight Bruce, L.J., as respects chattels, namely, that mere notice does give rise to the equity, the only qualification that the Board imposed (ibid., at p. 122) being that

> " . . . an interest must remain [sc. in the person seeking the remedy] in the subject-matter of the covenant before a right can be conceded to an injunction against the violation by another of the covenant in question."

The only remedy which the Board in terms recognised is a remedy by injunction against the use of the ship by the purchaser inconsistent with the charterparty, but they said (ibid., at p. 125)—a passage on which counsel for the plaintiffs strongly relies—that the purchaser

> " . . . appears to be plainly in the position of a constructive trustee with obligations which a court of equity will not permit him to violate."

These passages pose several problems. (1) If, as the Board state ([1926] A.C. at p. 123), the ship is the "subject-matter" of the covenant of which the violation by another is to be restrained, it is difficult to see in what sense a charterer under a gross time charter has an interest in that subject-matter except in the broad sense that it is to his commercial advantage that his covenantor should continue to use the ship to perform the services which he has covenanted to perform. But the time charter is a contract for services. The time charterer has no proprietary or possessory rights in the ship, and if the covenantee's commercial advantage in the observance of the covenant is sufficient to constitute an "interest" in the chattel to which the covenant relates, it is difficult to see why the principle does not apply to price-fixing cases such as *Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge & Co., Ltd.* (15) ([1915] A.C. 847). The Board ([1926] A.C. at p. 121) explain *Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge & Co., Ltd.* (15) which had been cited to them, as a case where the plaintiff had no interest in the subject-matter of the covenant.* They say ([1926] A.C. at p. 123) that the charterer has and will have during the continuance of the charterparty a plain interest (in the ship) "so long as she is fit to go to sea".

---

* The report of *Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge & Co., Ltd.*, supra, is not itself mentioned by the Board in this passage, but the decision was cited in argument (see [1926] A.C. at p. 110) and is covered at the passage referred to by the words "A perusal of the numerous decisions on this branch of the law shows . . ." which introduces the explanation.

Plain though it may be, if the expression " interest " is used colloquially, the Board nowhere explain what the legal nature of that interest is. (2) Whether the reference to the subsequent purchaser with notice as being, also " plainly ", in the position of a constructive trustee imports that equity provides other remedies against him by his cestui que trust, such as the right to an account, the making of a vesting order or the appointment of a new trustee is nowhere discussed in the *Strathcona* case (1); but the whole trend of the opinion, the actual order made and the observation of LORD SHAW (ibid., at p. 125), " It is incredible that the owners will lay up the vessel rather than permit its use under the contract . . .", all strongly suggest that the only remedy in the view of the Board that the charterer acquired against the subsequent purchaser was the purely negative remedy, namely, to restrain a user of the vessel inconsistent with the terms of his charter with the former owner, and the obligations of the purchaser which a court of equity will not allow him to violate are the negative obligation not to make such inconsistent user of the vessel. As a " constructive trustee " the subsequent purchaser seems to be one sui generis, and I should hesitate as a common lawyer to seek to devise other remedies against him which did not apparently occur to the Board. (3) The Board in the *Strathcona* case (1), beyond saying that that case was not one of " mere notice ", did not discuss what kind of notice to the purchaser of the charterer's rights gives rise to the equity, for example, whether at the time of his acquisition of his interest in the vessel he must have actual knowledge of the charterer's rights against the seller, the violation of which it is sought to restrain, or whether " constructive notice " will suffice. " Reason and justice "—the sole though weighty grounds on which KNIGHT BRUCE, L.J., based the equity—do not seem to me to prescribe the introduction into commercial matters, such as the sale of a ship, of the doctrine of constructive notice. I respectfully agree with LINDLEY, L.J.'s observations in *Manchester Trust* v. *Furness* (16) ([1895] 2 Q.B. 539 at p. 545). Furthermore, as between vendor and purchaser of real property, where the doctrine has been developed, constructive notice—like estoppel in less esoteric matters—is a shield not a weapon of offence. It protects an already existing equitable interest from being defeated by a purchaser for value without notice. It is not itself the source of an equitable interest.

The *Strathcona* case (1), although decided over thirty years ago, has never been followed in the English courts, and has never come up for direct consideration. In *Clore* v. *Theatrical Properties, Ltd. & Westby & Co., Ltd.* (17) ([1936] 3 All E.R. 483 at p. 490) LORD WRIGHT, M.R., suggested in passing that it might be peculiar to ships, but no such suggestion is to be found in the *Strathcona* case (1) itself. In *Greenhalgh* v. *Mallard* (18) ([1943] 2 All E.R. 234) LORD GREENE, M.R., in a judgment concurred in by LUXMOORE, L.J., and GODDARD, L.J., was clearly of opinion that it was wrongly decided, although it is only fair to add that as recently as 1952 DENNING, L.J., gave it a not unfriendly passing glance in *Bendall* v. *McWhirter* (19) ([1952] 1 All E.R. 1307 at p. 1314). It seems, therefore, that it is in this case for the first time after more than thirty years that an English court has to grapple with the problem of what principle was really laid down in the *Strathcona* case (1), and whether that case was rightly decided. The difficulty that I have found in ascertaining its ratio decidendi, the impossibility which I find of reconciling the actual decision with well-established principles of law, the unsolved and to me insoluble problems which that decision raises combine to satisfy me that it was wrongly decided. I do not propose to follow it. I naturally express this opinion with great diffidence, but having reached a clear conclusion it is my duty to express it.

If I am wrong in my view that the case was wrongly decided, I am certainly averse from extending one iota beyond that which, as I understand it, it purported to decide. In particular I do not think that it purported to decide (1) that anything short of actual knowledge by the subsequent purchaser at the time of the purchase of the charterer's rights, the violation of which it is sought to restrain, is sufficient to give rise to the equity; (2) that the charterer has any remedy against the subsequent purchaser with notice except a right to restrain the use of the vessel by such purchaser in a manner inconsistent with the terms of the charter; (3) that the charterer has any positive right against the subsequent purchaser to have the vessel used in accordance with the terms of his charter. The third proposition follows from the second; ubi jus, ibi remedium. For failure by the subsequent purchaser to use the vessel in accordance with the terms of the charter entered into by his seller there is no remedy by specific performance as was held in the *Strathcona* case (1) itself. There is equally no remedy in damages, a consideration which distinguishes the *Strathcona* case (1) from such cases as *Lumley* v. *Wagner* (20) ((1852), 1 De G.M. & G. 604) and *Lumley* v. *Gye* (11). The charterer's only right is co-terminous with his remedy, namely, not to have the ship used by the purchaser in violation of his charter.

I must, however, still deal with the third step in the plaintiffs' contentions since, as formulated by their counsel, they are not exclusively dependent on the correctness of the decision in the *Strathcona* case (1). The defendants received requisition hire under the terms of the requisition charterparty entered into with the Crown. It is not now contended by the defendants that on their entering into the pro forma (whatever that may mean) charterparty with the Crown, the vessel ceased to be under requisition (see *The Broadmayne* (21), [1916] P. 64). Curiously enough, the Order in Council of Aug. 3, regulating the requisition provides that the " owner " of the requisitioned vessel shall receive such payment and compensation

> " as may be provided by any enactment relating to payment or compensation in respect of the exercise of powers conferred by this order and, in the absence of such an enactment, such payment or compensation as may be agreed . . . or, failing such agreement, as may be determined by arbitration."

Except for the reference to an enactment, this bears a close similarity to the similar clause in the Proclamation of 1914, and in this context the expression " owner " would appear to include any charterer (see per LORD PARKER OF WADDINGTON in *Tamplin's* case (2), [1916] 2 A.C. at p. 428). Since, however, Her Majesty has not yet by Order in Council* declared that the original emergency which was the occasion of the passing of the Compensation (Defence) Act, 1939, has come to an end, it would appear from s. 1 of that Act that it remains in force, and from the definition of emergency powers to include " any power exercisable by virtue of the prerogative of the Crown " that the Act covers the requisition of the Port Stephens, and that by the terms of the Order in Council regulating the requisition and by s. 15 of the Act, as well as under the principle in *A.-G.* v. *De Keyser's Royal Hotel* (22) ([1920] A.C. 508), compensation is payable by the Crown in accordance with the Act, and not otherwise.

Section 4 of the Act, which deals with compensation in respect of requisition or requisition of vessels splits the compensation into various elements of which the first in para. (a) may be conveniently described as the bareboat hire, the second in para. (b) the expenses of management if undertaken by the owner or by the person who but for the requisition would be entitled to possession of the vessel, and the fifth in para. (e) the expenses reasonably incurred for the purpose of compliance with any directions given by Her Majesty in connexion with the requisition. " Owner " is defined in s. 17 as the

> " person entitled to sell the property, it being assumed not to be subject to any mortgage, pledge, lien or other similar obligation."

The defendants were thus clearly the " owners " of the vessel at the time of requisition. Section 4 (2) provides that the bareboat element of the compensation

---

* An order relating to the particular Act is necessary; see *Willcock* v. *Muckle* ([1951] 2 All E.R. 367).

> " . . . shall be considered as accruing due from day to day during the period for which the vessel . . . is requisitioned . . . and be apportionable in respect of time accordingly, and shall be paid to the person who, at the time when the compensation accrues due, is the owner of the vessel. . ."

Sub-section (3), however, provides as follows:

> " Where, on the day on which any compensation accrues due by virtue of sub-s. (1) (a) of this section [that is the bareboat element] a person other than the owner of the vessel . . . is, by virtue of a subsisting charter or contract of hiring . . . entitled to possession of, or to use, the vessel . . . but for the requisition, the person to whom the compensation is paid shall be deemed to receive it as a trustee for the first mentioned person."

The plaintiffs contend that this sub-section constitutes the defendants trustees for the plaintiffs of all compensation, or alternatively the bareboat element of the compensation received by the defendants. I say no more of their claim to the whole of the compensation save that it will be still open to them to advance it to a higher and possibly more receptive tribunal than myself. I do not understand it.

Their claim to the bareboat element I do understand. It is said in the first instance, independently of the *Strathcona* (1) principle, that the plaintiffs were the persons who, by virtue of a subsisting charter (namely, their gross time charter with Silver Line) would be entitled to use the vessel but for the requisition. I agree that in this context the expression " entitled to use the vessel " must include " entitled to require the person who has or is entitled to possession of the vessel to use the vessel ", for otherwise it would exclude all charterers other than charterers by demise, and since persons " entitled to possession of the vessel " are already expressly included, the words " or to use " would be otiose. But the relevant time for seeing whether the plaintiffs have any rights under the sub-section is *after* the requisition has taken effect. At that time, although the plaintiffs had a subsisting charter from Silver Line, Silver Line had not got possession of the vessel and were not entitled to possession of the vessel, and the plaintiffs' own charter from Silver Line was not one which entitled them to use the vessel, or to require the person who had or was entitled to possession of the vessel to use it. It was by then no different from any other charter executed by someone who had no interest in the vessel. It is quite true that if the vessel had never been requisitioned, the plaintiffs would have been entitled to require the persons entitled to possession of the vessel to use it, for Silver Line's bareboat demise charter would not have determined. But the expression " but for the requisition " must in this context mean " but for the fact that the possession by the Crown under requisition was subsisting at the time the compensation accrued due "; and Silver Line's right to possession as against the owners of the vessel eo instanti when the vessel was requisitioned, and if even the requisition were terminated a few months afterwards, would not revive.

I hold, therefore, that, so far as their claim under the sub-section against the defendants as statutory trustees is advanced independently of the *Strathcona* (1) principle, it fails.

If I am right in my view that the *Strathcona* case (1) was wrongly decided, this disposes of the plaintiffs' claim under the sub-section, as is also the case if I am right in thinking that the *Strathcona* case (1) (even if rightly decided) applies only in the case of actual knowledge of the subsequent purchaser at the time of the purchase of the charterer's right which in the result is violated—for it is agreed that the defendants had no actual knowledge of the terms of the plaintiffs' charter with Silver Line. But even assuming that the principle laid down in the *Strathcona* case (1) does apply, and the plaintiffs are entitled to avail themselves of it, it still does not assist them under the section, since in my view it gives the plaintiffs no positive rights against the defendants to have the vessel used in accordance with the terms of their charterparty with Silver Line. A It merely gives them a right to restrain inconsistent user by the defendants, and this is not sufficient to bring them within the section as a person who by virtue of a subsisting charter would be entitled to use the vessel.

For these reasons I think that any claim by the plaintiffs as against the defendants as statutory trustees of the compensation money under s. 4 (3) of the Compensation (Defence) Act, 1939, fails. B

Counsel for the defendants advanced other arguments why the plaintiffs' claim under the Act should fail, including the argument that since an agreement was reached between the defendants and the Crown as to compensation, the operation of s. 4 (3) was excluded by s. 15. I should be sorry to think that this particular argument was right, but it and the others that he advanced will be open to him if necessary elsewhere. C

Since I have held that the compensation payable for the requisition is payable in accordance with the Act and not otherwise, the plaintiffs' alternative claim under the principles laid down by LORD PARKER OF WADDINGTON in *Tamplin's* case (2) does not arise. As it must be founded on some positive right to the use of the ship by application of the *Strathcona* (1) principle, I should in any event reject it. D

Finally there is the plaintiffs' contention that independently of the Act or the *Tamplin* (2) principle the defendants are bound to account as constructive trustees for any profit they have made out of the requisition of the vessel. This is based on an extension of the *Strathcona* case (1) and asserts a right to all equitable remedies against the defendants on the basis that they were constructive trustees of the vessel. E

As is obvious from what I have already said, in my view this claim fails: (1) Because the *Strathcona* case (1) was wrongly decided; (2) because, even if it was rightly decided, the defendants do not come within its principles as they had no actual knowledge at the time of their purchase of the plaintiffs' rights under their charter; (3) because, even if it was rightly decided, and the defendants come within its principles (a) they were in breach of no duty to the plaintiffs F since it was by no act of theirs that the vessel during the period of requisition was used inconsistently with the terms of the plaintiffs' charter—it was by act of the Crown by title paramount—and (b) the plaintiffs are not entitled to any remedy against the defendants except a right to restrain the defendants from using the vessel in a manner inconsistent with the terms of the charter.

This interesting action—in which I have been very much indebted to counsel G for their clear and learned arguments—therefore fails, at least so far as this court is concerned.

Action dismissed.

Solicitors: *William A. Crump & Son* (for the plaintiffs); *Holman, Fenwick & Willan* (for the defendants).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

BATHAVON RURAL DISTRICT COUNCIL *v.* CARLILE.

[COURT OF APPEAL (Hodson and Pearce, L.JJ., and Upjohn, J.), February 10, 24, 1958.]

Housing—House of local authority—Rent—Increase—Notice of increase—Whether notice determining tenancy necessary—Housing Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8 *c.* 51), *s.* 85 (6).

Landlord and Tenant—Notice to quit—Validity—Weekly tenancy from midnight Sunday—Notice requiring possession by noon on Monday.

In August, 1956, a council gave notice by letter to the weekly tenant of one of their houses whose tenancy ran from a Monday to midnight the following Sunday, that they had decided to operate a differential rents scheme as from Apr. 1, 1957, and by a further letter dated Mar. 22, 1957, they notified him that his rent would be increased by 12s. as from that date. The tenant did not pay the increase of rent, and the council served on him a notice to quit in the following form: " I hereby give you notice to quit and deliver up the premises known as [address given] by noon on Monday, July 1, 1957. Dated this 14th day of June, 1957 ", a Friday. In an action by the council for possession of the house and for arrears and mesne profits,

Held: (i) the notice of increase of rent was bad, since the requirement of the common law that the tenancy must be determined by notice before such increase could be made was not displaced by the council's power to " review rents and make such changes, either of rents generally or of particular rents . . . as circumstances may require " under the Housing Act, 1936, s. 85 (6).

Newell v. *Crayford Cottage Society* ([1922] 1 K.B. 656); and *Kerr* v. *Bryde* ([1923] A.C. 16) applied.

(ii) the notice to quit was bad since it did not expire at the proper time, viz., the end of a current week's tenancy, but required delivery of possession at noon on the Monday which could not be construed as meaning the first moment of that day.

Dictum of LORD CAMPBELL, C.J., in *Page* v. *More* ((1850), 15 Q.B. at p. 687) applied; *Crate* v. *Miller* ([1947] 2 All E.R. 45) considered.

Appeal dismissed.

[**Editorial Note.** The Housing Act, 1936, is repealed by the Housing Act, 1957, and the provisions of that Act corresponding to s. 83 and s. 85 of the Act of 1936 are s. 111 and s. 113.

As to rents of council houses, see 19 HALSBURY'S LAWS (3rd Edn.) 696, para. 1118; and for cases on the subject, see DIGEST Supp.

As to the date of expiration of notices to quit, see 20 HALSBURY'S LAWS (2nd Edn.) 133, para. 142; and for cases on the construction of a notice to quit, see 31 DIGEST (Repl.) 495, *6204-6206*, 496, 497, *6212-6224*.

For the Housing Act, 1936, s. 85 (6), see 11 HALSBURY'S STATUTES (2nd Edn.) 524.]

Cases referred to:

(1) *Newell* v. *Crayford Cottage Society*, [1922] 1 K.B. 656; 91 L.J.K.B. 626; 127 L.T. 11; 31 Digest (Repl.) 683, *7752*.

(2) *Kerr* v. *Bryde*, [1923] A.C. 16; 92 L.J.P.C. 1; 128 L.T. 140; 87 J.P. 16; 31 Digest (Repl.) 683, *7754*.

(3) *Sidebotham* v. *Holland*, [1895] 1 Q.B. 378; 64 L.J.Q.B. 200; 72 L.T. 62; 31 Digest (Repl.) 488, *6136*.

(4) *Queen's Club Gardens Estates, Ltd.* v. *Bignell*, [1924] 1 K.B. 117; 93 L.J.K.B. 107; 130 L.T. 26; 31 Digest (Repl.) 494, *6203*.

(5) *Lemon* v. *Lardeur*, [1946] 2 All E.R. 329; [1946] K.B. 613; 115 L.J.K.B. 492; 175 L.T. 121; 31 Digest (Repl.) 487, *6129*.

(6) *Crate* v. *Miller*, [1947] 2 All E.R. 45; [1947] K.B. 946; [1947] L.J.R. 1341; 177 L.T. 29; 31 Digest (Repl.) 495, *6206*.

(7) *Page* v. *More*, (1850), 15 Q.B. 684; 117 E.R. 618; 31 Digest (Repl.) 608, *7237*.

Appeal.

The plaintiff council appealed against an order of His Honour Judge Elder Jones made in Bath County Court on Nov. 7, 1957, dismissing the council's claim for possession of a house, 53, Frederick Avenue, Peasedown St. John, near Bath, let by the council to the defendant tenant at a weekly rent of £1 5s. 7d. a week, subject to a notice of increase, and for arrears of rent and mesne profits. The grounds of appeal were that the county court judge was wrong in law and misdirected himself in that he held as follows: (i) that a notice of increase of rent pursuant to s. 85 (6) of the Housing Act, 1936, served by the council on the tenant on Mar. 22, 1957, was not effective to make the increase of rent recoverable in law on and after Apr. 1, 1957; and (ii) that a notice to quit the house by noon on Monday, July 1, 1957, served by the council on the tenant on June 14, 1957, was not a good and valid notice to quit.

Harold Williams, Q.C., and *W. M. Huntley* for the council.
R. E. Megarry, Q.C., and *G. A. Forrest* for the tenant.

Cur. adv. vult.

Feb. 24. **HODSON, L.J.**, read the following judgment of the court: The defendant became tenant of the house on Monday, Mar. 28, 1955, and the relevant terms of the agreement are to be found on a rent card issued to him by the Bathavon Rural District Council. The material terms are 1 and 2 of the general conditions of tenancy printed on the card:

> "The rent is due in advance on Monday in each week and no arrears will be allowed . . . The tenancy may be terminated by either side by the giving of one week's notice in writing before 12 noon on any Monday."

The rent was fixed at £1 5s. 7d. a week, with a provision that, if there were no arrears on the Friday preceding Whit Monday, the August Bank Holiday and Christmas and the Thursday preceding Easter Monday, a rebate equal to a week's rent would be allowed during the holiday week.

The defendant was a weekly tenant, and there is no question between the parties but that the weekly tenancy runs from Monday until Sunday night; i.e., the midnight between Sunday and the Monday following that Sunday. On Aug. 21, 1956, the council gave notice to the tenant by letter that they had decided as from Apr. 1, 1957, to operate a differential rents scheme and by a further letter to him dated Mar. 22, 1957, they purported to increase his rent by 12s. a week as from that date. The tenant did not pay the additional 12s. a week, and the claim for £10 7s. 2d. represents arrears at 12s. a week from the week beginning Apr. 8 to that beginning June 24 (inclusive), with additions for the rebates for two weeks forfeited by the tenant under the terms of the scheme.

The contention of the council was that the notice of Aug. 21 had the effect of raising the rent of the house so as to make it recoverable in law by virtue of the Housing Act, 1936, without any variation of the terms of the contract. Section 83 (1) gives power to the council to make such weekly charge for the tenancy or occupation of the houses as they may determine. Section 85 (5), which is no longer in force*, read:

> "In fixing rents the authority shall take into consideration the rents ordinarily payable by persons of the working classes in the locality, but may grant to any tenant such rebates from rent, subject to such terms and conditions, as they may think fit."

---

* Provisions were substituted for s. 85 (5) of the Housing Act, 1936, by s. 1 of and Sch. 1 to the Housing Act, 1949, and these are now reproduced in s. 113 (3) of the Housing Act, 1957.

Section 85 (6) reads:

> "The authority shall from time to time review rents and make such changes, either of rents generally or of particular rents, and rebates (if any) as circumstances may require."

Section 85 (7) reads:

> "The authority shall make it a term of every letting that the tenant shall not assign, sub-let or otherwise part with the possession of the premises, or any part thereof, except with the consent in writing of the authority, and shall not give such consent unless it is shown to their satisfaction that no payment other than a rent which is in their opinion a reasonable rent has been, or is to be, received by the tenant in consideration of the assignment, sub-letting or other transaction."

The council rely on the terms of s. 85 (6) as giving authority to review rents so as to make the tenant liable ipso facto, once the review has been made, for an altered rent. We agree with the learned county court judge that this view of the Act is not tenable. In the case of periodic tenancies, the right of the tenant is to enter into and remain in occupation until he receives notice to quit, and until the landlord by a positive act exercises his right to terminate the tenancy the original contract persists. The sub-section imposes a duty on the authority to review rents and make such charges as may be necessary in the interests of such authority itself and of the tenant and also negatives the possible inference which could be drawn from the preceding sub-section that rents once fixed were not open to review. It makes no provision for any form of notice, so that, if the authority's contention is correct, the rent could be raised forthwith by the authority and could run at some higher figure before any notice was given to the tenant. Further, the tenant would be bound to continue at the higher rent until such time as he could give a valid notice to the landlord determining his tenancy. There is nothing in the section which gives the authority power to override the contractual rights and obligations of the parties. That the letting is contractual is not disputed and is borne out by the language of s. 85 (7), which has been read. Unless Parliament has otherwise provided, the powers and duties of the authority can only be exercised in accordance with the general law which in this matter requires the tenancy to be determined lawfully by a notice to quit before a new tenancy at a different rent can be created.

This is not the first time that a problem of this character has fallen to be decided. Under the Rent Restrictions Acts, permitted increases of rent may be made, and it was decided in *Newell* v. *Crayford Cottage Society* (1) ([1922] 1 K.B. 656), that a condition precedent to the making of such increase was the termination of an existing contract of tenancy by notice to quit. This decision was approved by the House of Lords in *Kerr* v. *Bryde* (2) ([1923] A.C. 16 at p. 31). It is true that in the House of Lords opinion was divided, but the argument which caused the difficulty was based on the particular words of s. 3 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which referred to the landlord's right to increase rent being dependent, not on whether he would be entitled to possession, but on whether he would be entitled to obtain possession. No such difficulty appears in the instant case, and the language of LORD SUMNER is apt to fit the question which this court has now to consider. He said (ibid., at p. 31):

> "I can find nothing either in the language or the policy of this legislation to show that it was intended to permit a landlord to raise a rent during a period in which under an existing contract, however arising, he was not entitled to do so, or was only entitled to do so after a notice had been given and had expired. Wherever the tenant has, for a time which is or can be made certain, the right to hold possession at a given rent, these Acts do not seek to take away that right."

We should add that the necessity of giving a formal notice to quit in Rent Act cases is now abolished by the Rent Restrictions (Notice of Increase) Act, 1923, in cases where notice to increase rent is duly given.

The second question raised by the appeal is highly technical and depends on the validity of a notice to quit dated June 14, 1957, which is in the following terms: It is headed with the council's name,

> " Notice to quit, to Mr. T. H. Carlile, 53, Frederick Avenue, Peasedown St. John. I hereby give you notice to quit and deliver up the premises known as 53, Frederick Avenue, Peasedown St. John, near Bath, by noon on Monday, July 1, 1957. Dated this June 4, 1957 ",

a Friday, signed by the clerk of the council. If the notice was good, and not otherwise, the council are entitled to judgment for mesne profits as claimed from July 1, 1957, to the date of the hearing.

It was contended by the council that, on the true construction of the notice, it being agreed that the tenancy ended on Sunday night and not on the Monday following, the notice expired at the same time as the tenancy notwithstanding the words "by noon on Monday, July 1, 1957". A. L. Smith, L.J., said in *Sidebotham* v. *Holland* (3) ([1895] 1 Q.B. 378 at p. 388):

> " It cannot be denied that the law upon notices to quit is highly technical; but the technicalities are too deeply rooted in our law to be now got rid of . . ."

This question depends on such a technicality which can be justified because a notice to quit is a unilateral act determining a tenancy without the consent of the opposite party and as such must be strictly construed. The rule of law is that a notice to quit is bad which does not expire at the proper time. The opinion of Lush, J., in *Queen's Club Gardens Estates, Ltd.* v. *Bignell* (4) ([1924] 1 K.B. 117 at p. 124), that the true view was that, in any periodic tenancy, whether it be yearly, quarterly, monthly or weekly, the notice to quit must expire at the end of the current period was expressly approved by the Court of Appeal in *Lemon* v. *Lardeur* (5) ([1946] 2 All E.R. 329 at p. 330). It is scarcely necessary to point out that the trap laid by this technicality is commonly avoided by the addition of words to the effect that if the date mentioned is not the real date on which the period expires, then the notice to quit is to expire on the proper day of expiry next after the expiration of the current period.

The next matter to consider is whether a notice expressed to end on the day following the expiration of the period can be good. The answer is " Yes " and is to be found in *Sidebotham* v. *Holland* (3) and in a later decision of the Court of Appeal in *Crate* v. *Miller* (6) ([1947] 2 All E.R. 45). In the former case, which concerned a yearly tenancy, Lindley, L.J., delivered a judgment in which Lord Halsbury concurred, A. L. Smith, L.J., doubting but not dissenting. The tenancy there began on May 19 and a notice to quit on May 19 was held to be good, that being the anniversary of the commencement of the term. There is a passage in the judgment of Lindley, L.J., which contains this language ([1895] 1 Q.B. at p. 383):

> " The validity of a notice to quit ought not to turn on the splitting of a straw. Moreover, if hypercriticisms are to be indulged in, a notice to quit at the first moment of the anniversary ought to be just as good as a notice to quit on the last moment of the day before. But such subtleties ought to be and are disregarded as out of place."

This passage supports the contention that the notice in this case is not rendered bad by expiring on Monday, for, as Lindley, L.J., pointed out, a notice to quit on the first moment of the anniversary ought to be just as good as a notice to quit on the last moment of the day before, although he continued by saying that such subtleties should be and were disregarded as out of place, no doubt on the

A principle of de minimis non curat lex. However, since the decision of this court in *Crate* v. *Miller* (6), also the case of a weekly tenancy, it seems clear that the true explanation of this principle is, not de minimis non curat lex, but that the court construes a notice given for the anniversary as a notice expiring at the first moment of the anniversary. SOMERVELL, L.J., there delivered the judgment of the court and applied the decision of *Sidebotham* v. *Holland* (3) to a B weekly tenancy, holding that a weekly tenancy which begins on Saturday and ends on Friday may be determined validly by the landlord giving either a notice to quit on Friday or a notice to quit on Saturday, for in either case the notice is properly construed as a notice to quit when the current week ends, for a notice to quit on the last day of the current period and a notice to quit on the day after that day are both equally intimations that the last day of the current period is C the last day of the tenancy.

The council argued on these authorities that, if notice expiring on Monday was good, it could not be rendered bad by the addition of the words " by noon ". The answer is that, while " Monday " without more can be construed (as the authorities show) as meaning the first moment of the day (the preceding midnight), " by noon on Monday " cannot be so construed. The council seek to D escape from this conclusion by reading the notice as if it expired at midnight and contained a licence to continue in occupation until noon of the following day: compare SALTER, J.'s consideration of such a possibility in *Queen's Club Gardens Estates, Ltd.* v. *Bignell* (4). The words will not, however, bear this construction, for the words " by noon on Monday " are expressed to mark the expiration of the notice itself and there is no room for a licence to remain on the premises after E the expiration of the tenancy. The council cannot, in our judgment, avoid this conclusion by treating the words " by noon " as surplusage which can be disregarded. Such an attempt failed in *Page* v. *More* (7) ((1850), 15 Q.B. 684), which was considered in *Sidebotham* v. *Holland* (3). This was an action for double value under the statute 4 Geo. 2, c. 28, s. 1, for holding over after a notice to quit. We recognise that this statute was of a penal nature and LINDLEY, L.J., F in *Sidebotham* v. *Holland* (3) treated the decision in *Page* v. *More* (7) as authoritative only in an action for double rent (sic value) when it was necessary to be more particular. The tenancy was from year to year expiring on Dec. 25 and the notice was expressed so as to demand surrender of the premises at twelve o'clock noon on Dec. 25, 1847. The court refused to reject the words " twelve o'clock at noon " so as to make the notice good, and LORD CAMPBELL, C.J., said (ibid., G at p. 687):

> " The defendant, holding as he did, was entitled to keep possession till midnight on Dec. 25 . . . The defendant is told that, in the event of his not ' so surrendering ', that is at twelve noon, the plaintiff will demand rent at 7s. a day till he can obtain possession. How can that be a demand of possession at the time when the tenancy expires? . . . I can see no difference H between a wrong day and a wrong hour of the day: a demand for the 24th would have been insufficient; and this is equally so."

The language of the Lord Chief Justice applies with great force to a notice of such short duration as a week as compared with the six months' notice which he was considering.

I We agree with the learned county court judge on both points and would dismiss the appeal. That is the judgment of the court.

Appeal dismissed.

Solicitors: *Church, Adams, Tatham & Co.*, agents for *D. M. Woodward*, Bath (for the council); *Knapp-Fishers*, agents for *Faulkner, Creswick & Gould*, Midsomer Norton, near Bath (for the tenant).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

LONDON COUNTY COUNCIL *v.* CENTRAL LAND BOARD.

[CHANCERY DIVISION (Danckwerts, J.), March 11, 12, 1958.]

Town and Country Planning—Development charge—Determination—Land subject to development viewed as a whole—Estate acquired for building purposes—Heavy expenditure to make part of land suitable—Expenditure exceeding value of whole land for building purposes—Whether development charge exigible—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6 *c.* 51), *s.* 70 (2).

The London County Council acquired under the Housing Act, 1936, and a local Order, an estate of 231 acres, the whole of which the council intended to develop as a building estate. The greater part of the land was suitable for this purpose; but heavy expenditure on site works and culverting a watercourse had to be incurred to render the rest of the land suitable for building. The expenditure so incurred exceeded the value of the land as a whole for building purposes. Development permission was obtained in 1949 and 1952, and development, other than development of industrial land, was substantially completed before Nov. 18, 1952. Under s. 70 (2) of the Town and Country Planning Act, 1947, regard must be had, in determining whether development charge was payable in respect of the council's operations, to "the amount by which the value of the land with the benefit of planning permission for those operations" exceeded the value of the land without that permission.

Held: development charge was not payable because, in considering for the purposes of s. 70 (2) the increase of value of the land due to planning permission being granted, regard must be had to the entirety of the land that was the subject of the development operation, and the increase (so considered) in the present case was nil, as the expenditure necessary to render some of the land fit for development exceeded the value of the entirety of the land for building purposes.

[**Editorial Note.** Development charge was abolished in relation to operations begun on or after Nov. 18, 1952, by s. 1 of the Town and Country Planning Act, 1953, subject to certain savings which include savings in relation to operations begun before that date in respect of which determination of development charge had been withheld under s. 70 (1), provisos (b) (c) of the Town and Country Planning Act, 1947.

For the Town and Country Planning Act, 1947, s. 70, see 25 HALSBURY'S STATUTES (2nd Edn.) 576, 577; and for s. 1 of the Town and Country Planning Act, 1953, see 33 HALSBURY'S STATUTES (2nd Edn.) 857.]

Adjourned Summons.

The plaintiff, the London County Council, by its originating summons, dated Apr. 30, 1957, asked that it might be declared on the true construction of the Town and Country Planning Act, 1947, and the Town and Country Planning (Development Charge) Regulations, 1948, that, for the purpose of determining whether any and if so what development charge was to be paid in respect of the operation to be carried out by the plaintiff on land forming the major part of the plaintiff's Sheerwater Estate at Woking pursuant to the Surrey County Council's planning permission and the Woking Urban District Council's planning permission, the defendants ought to value the said land with the benefit of the said planning permissions on the footing that the plaintiff would proceed to carry out the whole of the said operations within a reasonable time.

The Sheerwater Estate was acquired by the plaintiff under the provisions of Part 5 of the Housing Act, 1936, partly by agreement and partly in pursuance of compulsory powers conferred by the County of London (Woking, Surrey) Extension Order, 1951. The plaintiff obtained planning permission for the development of the estate from the Surrey County Council, excluding part of the industrial land, in November, 1949; the plaintiff subsequently obtained planning permission from the Woking Urban District Council (acting on behalf of the Surrey County Council) for the development of the whole of the industrial land in March, 1952. In November, 1951, the plaintiff applied to the defendants for the assessment of the development charge on the whole of the estate, excluding certain small portions which were exempt from development charge or excluded by agreement, and in consideration of an undertaking by the plaintiff to pay the development charge when determined, the defendants consented to the plaintiff's proceeding with the development before the charge was paid. The development of the estate, apart from industrial land, was substantially completed before Nov. 18, 1952.

Michael Rowe, Q.C., and *H. E. Francis* for the plaintiff, the London County Council.

Denys B. Buckley for the defendants, the Central Land Board.

DANCKWERTS, J.: The dispute is between the London County Council, who acquired and developed an estate at Woking, and the Central Land Board, who claim that a development charge became payable under the provisions of the Act by virtue of the permission which was given for the development in question. The estate acquired by the London County Council was the Sheerwater Estate at Woking, having an area of 231 acres. The greater part of the land was suitable for development for building houses, but a portion of it was not so suitable, and by reason of that fact the London County Council had to incur considerable expenditure.

In his affidavit, Joseph Edward James Toole, the valuer of the London County Council, said:

> "By reason of the physical condition of the land the council were compelled to incur very heavy expenditure on site works and in particular on culverting a watercourse known as the Rive Ditch which passed through the land and which took surface water from the town of Woking. In addition, the council had to make a substantial contribution to the Surrey County Council pursuant to the provisions of the Surrey County Council Acts, 1925-36, towards the cost of improving a further length of the Rive Ditch outside the boundary of the estate. The total cost of these works was considerably in excess of the value of the land as a whole for building purposes."

The council contends that as a result of that the increase in value by reason of the permission was nil. On the other hand, the board contend that £22,500 was payable. According to the statement of Mr. Toole in para. 7 of his affidavit the £22,500 was arrived at on the footing that it would be open to the board

> "to assess the development charge on the basis that only those parts of the estate which an ordinary developer would consider it advantageous to develop from a commercial point of view would be developed and that those parts of the estate which would involve abnormal development costs would be left undeveloped."

That statement of the basis of the claim was contradicted by an affidavit of Mr. Stedman, district valuer of the Guildford District of the Inland Revenue Valuation Department. He says:

> "I did not proceed on the footing described in para. 7 (a) of the said affidavit [which I have just read] but on the footing that a developer would be at liberty to carry out forthwith so much of the development as was for the time being profitable and to defer the remainder of the development until such time as the carrying out of that further development would be profitable."

As far as I can see, it comes to much the same thing, because it would mean that the unprofitable part would be left undeveloped indefinitely and perhaps never developed at all, and I am bound to say that I thought that the argument of counsel for the board proceeded very much on those lines.

The London County Council, in pursuance of its purpose and powers provided for in this Act, undoubtedly proceeded to develop the whole estate, notwithstanding the heavy expenditure which it had to make in respect of the less profitable part of it. The provisions which are relevant appear in Part 7 of the Town and Country Planning Act, 1947. Section 69 provides:

> " (1) Subject to the provisions of this Act, there shall be paid to the Central Land Board in respect of the carrying out of any operations to which this Part of this Act applies, and in respect of any use of land to which this Part of this Act applies, a development charge of such amount (if any) as the board may determine, and accordingly no such operations shall be carried out, and no such use shall be instituted or continued, except with the consent in writing of the Central Land Board, until the amount of the charge (if any) to be paid in respect of those operations or that use has been determined by the board in accordance with the provisions of this Part of this Act, and the board have certified that the amount so determined has been paid or secured to their satisfaction in accordance with those provisions.
>
> " (2) This Part of this Act applies to all operations for the carrying out of which planning permission under Part 3 of this Act is required, and to all users of land for the institution or continuance of which such permission is so required."

Section 70 (1) of the Act provides:

> " Subject as hereinafter provided, the Central Land Board shall, on application being made to them in the manner prescribed by regulations under this Act by a person having an interest in land sufficient to enable him to carry out any such operations as aforesaid or to make any such use as aforesaid, or by a person who satisfies them that he is able to obtain such an interest, determine whether any and if so what development charge is to be paid in respect of those operations or that use: Provided that—(a) where planning permission under Part 3 of this Act has not been granted for the carrying out of the said operations or for the institution or continuance of the said use, the board may postpone the determination of the development charge to be paid in respect thereof until such permission has been granted; (b) where the application relates to the carrying out of any operations, the board may refuse to determine the development charge payable in respect thereof unless they are satisfied, after consultation with the local planning authority, that the applicant is able to carry out those operations, and that he will do so within such period as the board consider appropriate . . ."

That seems to me an essential part of the working of the use provisions. In sub-s. (2) (which counsel for the board argued was the only provision dealing with the assessment of the value) it is provided:

> " In determining whether any and if so what development charge is to be paid under this Part of this Act in respect of any operations or any use of land, the board shall have regard to the amount by which the value of the land with the benefit of planning permission for those operations or that use (calculated without regard to any charge payable in respect thereof under this Part of this Act and on the assumption that the operation or use can lawfully be carried out or made apart from the provisions of this Act) exceeds the value which it would have without the benefit of such permission, and shall not give any undue or unreasonable preference or advantage to one applicant over another."

Before turning to the regulations, I should refer to the argument of counsel on behalf of the board based on the contention that a development charge must be payable in this case on the provisions of that sub-section. He says that the London County Council will have paid for the existing site value and that by reason of the expropriation of the right to develop the land compensation would have been paid to the previous owner appropriate to the value of development rights. He says that anybody who obtains permission to develop this land will get an additional value for the right to develop that part of the land which can properly be developed without expenditure, and he contends that there is no legal obligation on the person who applies for permission to develop anything except the land which it is profitable to develop, and, therefore, that it must be assumed that he would not develop the other land which it would be expensive to develop but which would still preserve its existing use value. Therefore, he says, a development charge was justified representing the difference between the existing use value of what I may call the good land and the value with permission to develop.

It is true that no legal obligation is cast on the applicant to develop. On the other hand, the board have to be satisfied, under the provisions of proviso (b) to s. 70 (1) not only that the applicant is able to carry out the operations, but that he will carry out such operations within such period as the board consider appropriate; otherwise the board can refuse to assess the development charge. It seems to me one operation which the board have to carry out, viz., to determine whether the applicant is a person who can be trusted to carry out the development which he proposes, and if it were not so satisfied it would be their duty to refuse to assess the development charge or to refuse permission altogether. While it may be a matter of good faith and honesty, the actual basis of the valuation to be made under s. 70 (2) is that the development the applicant proposes will be carried out, and, therefore, one has no right to assume that any part of the operation will not be carried out. It is to be observed that the value is to be based on the assumption that the operations will be carried out in regard to a particular portion, and is not merely the abstract value of the land with building or development permission. It seems to me that that makes quite a difference. One must regard the value bearing in mind the particular circumstances of the application for development which is made. Furthermore, it appears to me that " land " in this sub-section means all the land in respect of which the application for permission is made.

Having made those remarks, I now propose to pass to the regulations and to certain comments which have been issued by the board which seem to me to support the same view. The Town and Country Planning (Development Charge) Regulations, 1948 (S.I. 1948 No. 1189), provide, by reg. 2:

> " Subject to the provisions of the Act and of any regulations made thereunder and for the time being in force, the general principles set out in the schedule to these regulations shall be followed by the board in determining under Part 7 of the Act whether any, and if so what, development charge is to be paid thereunder in respect of any operations or use of land."

Then comes the schedule which is the most important part of the document. Paragraph 1 provides:

> " Development charge shall be determined so as to secure, so far as is practicable, that land can be freely and readily bought and sold or otherwise disposed of in the open market at a price neither greater nor less than its value for its existing use. This object is the governing principle by which the board are to be guided in determining development charge."

Paragraph 2 seems to me very important:

> " Development charge shall not be more than the amount which, to the satisfaction of the board, represents the additional value, measured by

> normal processes of valuation, of the land due to planning permission for a particular development." A

Therefore, it is plain that the " particular development " must be considered in regard to the amount of the charge. Paragraph 3 is:

> " Development charge shall not be less than the amount referred to in para. 2 of this schedule, unless in the opinion of the board the charge ought properly to be less in order to comply with the governing principle." B

The construction which I have put on the Act is borne out, I think, not only by the regulations, but also by certain comments which have been issued called " Practice notes, being notes on development charges " under the Act, and no doubt have been issued by the board for the assistance of persons who have to operate the Act. They have no force of law in any way, but are of interest C as being the view which has been taken by the board and which counsel for the council has quite properly used as part of the argument. I do not think I need go through the notes in detail, but perhaps I may say a word about the phrases " consent value " and " refusal value ". " Refusal value " means, roughly, the value without permission. " Consent value " is the enhanced value due to permission being obtained. With that preliminary observation, D I turn to para. 58 which says:

> " Consent value will thus be calculated on a suitable process of valuation and on the basis that:—(1) any relevant operations or uses which are not in law ' development ', would be permitted to the owner. (2) any operations or uses which are mentioned in Sch. 3 and which will be available to the owner, after he has carried out the development permitted by the planning permission, would be permitted to the owner . . . (4) the particular operations or uses permitted by an actual planning permission (and subject to any conditions in such permission) will be carried out." E

Then I turn to para. 93:

> " The board will be prepared to assess one development charge for an unit of development of a reasonable size. For the reasons given in Note XXIX, it is important that developers should apply to the board to assess the *complete* development charge for the unit before the *first* works are carried out on the land (e.g., road works or sewers). Application on form D.1 should therefore be made before the first works are to be carried out. The board will normally (other than in very large estates) accept as the unit for fixing the development charge an area of land which is likely to comprise one continuous development comprised in one planning permission." F G

Applying that to the present case, it is quite obvious that the result is that the whole of the estate, i.e., the difficult portion as well as the portion which is easy to develop, is one unit for the purpose of the assessment of the development charge (if any). Paragraph 108 is: H

> " It will always be open to an applicant to ask that the determination of development charge should be related to a part only of the area of land (or buildings) covered by a particular planning permission. Question 6 on form D.1 is designed for this purpose. A planning permission is however given for a particular operation or change of use, and the development charge must be assessed upon the assumption that that permission will be fully operated on the area of land chosen by the applicant." I

Paragraph 120 is:

> " Circumstances in which, and the time at which, a determination of development charge can be made.—The amount of a development charge has to be based on values current at the time the development takes place. In addition, the consent value bears a direct relation, as the term suggests,

> A to the planning consent. Before the board can determine a charge for a particular development, they will require to be satisfied, not merely that the applicant (or someone acting with his authority) is able to carry out that development within a reasonable period but also that the development will in fact be so carried out."

B That is a reference to s. 70 (1) (b). Paragraph 121 says:

> "The following is a summary of the conditions which the board consider necessary: (a) the applicant must be able to show that the development will take place within a reasonable time. The board are not prepared to generalise on the meaning of 'reasonable' in this connexion, but they are unlikely to issue a determination if the development is improbable within one C year, unless the project is a very large one; or unless other valuations are necessary (e.g., monopoly value for licensed premises) . . ."

Those comments are entirely sensible and right to the point and appear to support exactly the view which has been put forward in this case on behalf of the London County Council. The whole of the estate which the council has developed must be taken into consideration. The whole of the operations which they D propose to carry out must be taken into consideration, difficult and easy altogether. It seems to me that the result of that is, as contended for on behalf of the council, that the enhanced value which they might have by virtue of permission in respect of part of the property included in the development plan is entirely wiped out by the heavy expenditure for drainage, and so on, which they have had to incur under the plan in respect of the land which required E expenditure before it could be developed.

Counsel for the board argued that, if no development charge were imposed, the council would be getting the site for less than the existing use value, but that seems to me to be based on a misapprehension. There is no doubt that the council has had to pay for the site, and I suppose that the amount paid would be in accordance with the use value. There is no doubt that the amount which F it had to spend on the development of the land is money which is borne out of the moneys of the council or its ratepayers. It is true that the board have presumably paid out something to the previous owner in respect of the development value of the property, or in respect presumably of the property which was available for development, and, if there is no development charge to be exacted, they will not get back that money paid out of the Exchequer. But that does G not seem to me to alter the situation. It appears to me that it is quite irrelevant. What one has to consider is what is the increase in value to the council by virtue of the permission to carry out the operations which it proposes, and nothing else. It seems to me that the result is nil, because of the heavy expenditure which it has had to make on a part of the estate which it was intending to develop. Consequently, I think that the contention on behalf of the council should succeed on this application.

Declaration accordingly.

Solicitors: *Solicitor, London County Council* (for the plaintiff); *Treasury Solicitor* (for the defendants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re KNIGHT'S QUESTION.

[CHANCERY DIVISION (Harman, J.), March 4, 1958.]

Husband and Wife—Title to property—Jurisdiction—Title deeds of land held by husband as trustee—Retention of deeds by wife—Married Women's Property Act, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 17.

In 1950 the husband purchased freehold property on behalf of a partnership in which the husband and his brother were the partners. The property was conveyed into the name of the husband. A large part of the purchase price was borrowed from a bank on the security of title deeds which were deposited with the bank, and the rest of the purchase money was provided by the partnership. In 1954 the beneficial interest in the property subject to the bank's lien was transferred to a limited company by declaration of trust by the husband and his brother and in 1956 after the loan had been discharged the bank delivered the deeds to the husband, who had throughout retained the legal estate. The husband placed the deeds in the strong-room at his matrimonial home. In 1957, after some matrimonial troubles, the husband left home but did not take the deeds with him. The company desired to produce the deeds to its auditors, but the wife refused to give up possession of them and they were retained by her solicitors as her agents. The husband having applied to the court under the Married Women's Property Act, 1882, s. 17, for an order for delivery of the deeds, the wife contended that the court had not jurisdiction in this matter under that provision.

Held: the court had jurisdiction because the title deeds were themselves property within s. 17 and there was a dispute as to their possession between the husband and the wife; in the circumstances the wife would be ordered to deliver up the deeds to the husband.

[As to summary proceedings between husband and wife as to property, see 19 HALSBURY'S LAWS (3rd Edn.) 898-902, paras. 1488-1494; and for cases on the subject, see 27 DIGEST (Repl.) 263-265, *2119-2133*.

For the Married Women's Property Act, 1882, s. 17, see 11 HALSBURY'S STATUTES (2nd Edn.) 804.]

Case referred to:

(1) *Loosemore* v. *Radford*, (1842), 9 M. & W. 657; 1 Dowl. N.S. 881; 11 L.J. Ex. 284; 152 E.R. 277; 26 Digest 127, *908*.

Adjourned Summons.

This was an application by a husband by originating summons under the Married Women's Property Act, 1882, s. 17, for (a) the determination of all questions between the husband and his wife with respect to the title or possession of the deeds or documents of title of or relating to certain freehold farm lands and premises (situated in the parishes of Hindringham and Binham in the county of Norfolk) and known as the Hindringham Estate; and (b) an order that the wife do deliver up or cause to be delivered up to the husband the deeds and other documents of title.

By a conveyance dated Oct. 11, 1950, the husband purchased the Hindringham Estate for a partnership, R. C. Knight & Sons, consisting of the husband and his brother. By a trust deed dated Nov. 17, 1954, made between the husband of the one part and his brother of the other part, after reciting (i) that it was supplementary to the conveyance: (ii) that the Hindringham Estate was purchased by the husband for and on behalf of the partnership (R. C. Knight & Sons): (iii) that the assets of a partnership (other than R. C. Knight & Sons) between the husband and his brother had been transferred to G. C. & F. C. Knight, Ltd. (therein and hereinafter called the company), it was declared that the husband held the Hindringham Estate on trust for the company in fee simple and the husband agreed that he would at the request of the company convey it to such persons at such time as the company should direct or appoint.

It was not disputed that the title deeds were in the hands of the wife's solicitors as her agents, but the point was raised that title deeds were not themselves " property " and, further, the husband was suing not as husband but as a trustee of the estate and as such having no beneficial interest in it. It was argued that, in these circumstances, procedure under s. 17 of the Act of 1882 was not available to the husband.

S. L. Newcombe for the husband.
W. J. C. Tonge for the wife.

HARMAN, J.: The husband applies for the determination of the question whether he or his wife is entitled to the title deeds of a freehold estate. He asks, if the question is determined in his favour, for an order on the wife to deliver up the title deeds. It is not in dispute that these title deeds are at the present moment in the hands of the wife's solicitors as her agents, nor is it in dispute that the legal estate in the property is vested in the husband. The wife does not controvert any of the facts in evidence, nor does she set up any right, title, or interest, on her own behalf; she merely says that, in these proceedings, the husband can have no relief, these being merely technical proceedings and not an action.

It appears to be the fact that the property was bought by a partnership in which the husband and his brother were the partners. It was mortgaged for a large sum of money to a bank, and subsequently the partners conveyed the equity of redemption to a limited company called G. C. & F. C. Knight, Ltd. That company, having paid off, or procured the payment off of, the balance of the mortgage, the bank then had no lien on the deeds which had been deposited as security for the loan. There appears to have been no mortgage deed. In August, 1956, the loan having been fully discharged, the bank handed the title deeds to the husband, he having retained throughout the legal estate which had been conveyed to him in 1950 when he and his brother bought the property. He therefore has no equitable interest in the property now, the equity being entirely in the limited company. Nevertheless, rebus sic stantibus, he has a right, as I see it, to retain the title deeds in virtue of his ownership of the legal estate, curious though that may be; or the company might, I suppose, direct him to hand the legal estate to some nominee of its own. The husband, having thus obtained the title deeds from the bank, put them in his strong-room in a house called " Stody Lodge ", the matrimonial home, at Melton Constable in Norfolk. He left that matrimonial home in January, 1957, when his marriage broke up, and he left the deeds behind.

During 1957, the company's auditors, in the ordinary course of their duties, wished to check the title deeds, and then it was discovered that they were no longer in this strong-room, nor in the possession or power of the husband. On inquiries being made they turned out to be in the hands of the wife's solicitors not under any claim of lien or right, but merely as her agents; so they are in exactly the same position as if they were in the wife's possession.

The husband therefore launched this originating summons, and he says that it is competent for the court to entertain it under s. 17 of the Act of 1882, which so far as relevant provides:

> " In any question between husband and wife as to the title to or possession of property, either party . . . may apply by summons . . . in a summary way to any judge of the High Court . . . and the judge . . . may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit . . . "

The wife says, first of all, that title deeds, which are the only matter in dispute here, are not themselves property; they are merely the indicia of title; they are very valuable, no doubt, as such, but not in themselves property; they are merely evidence of property, and therefore they do not come within the word "property". I reject that conclusion. One answer to this is that under the law before 1926 title deeds passed to the heir as real property. It seems to me clear that title deeds are property, regarded as pieces of paper or parchment, as the case may be. They are things in which a person has a property, and they are themselves pieces of property.

Loosemore v. *Radford* (1) ((1842), 9 M. & W. 657 at p. 659) shows that in a common law action for title deeds the jury could be, and would be, charged to give to the plaintiff, if he was successful, by way of damages the entire value of the estate, whereas the judgment goes on to say that that would be reduced to 40s. if the deeds were delivered up. It seems to me quite wrong to say that these pieces of paper are not themselves property. It is quite true that their value is that they show the title to land, but they are themselves, in my judgment, property and can be sued for as such.

The second defence which the wife puts forward is this: She says this is not a case between husband and wife, but really between a trustee and a stranger to the trust, and that the husband here is not suing qua husband but qua trustee holding the legal estate in the property, and, admittedly, having no beneficial interest in it. She says the ownership of the property is not in dispute between him and her. By "the property" I mean here the real estate. She says he has no beneficial interest in it, and she does not assert for this purpose that she has either. She says he is a mere trustee and that he cannot make use of this useful summary procedure to extract these deeds from her and thus get round the inability of a husband to sue his wife in tort.

The answer to that is to be found in s. 17 itself, because the action may be about the title to, or the possession of, property, and therefore it does not matter, as I see it, for the purposes of the section whether what the husband or the wife wishes to establish against the other is title to something or possession of it. There is certainly a dispute here between the husband and the wife as to the possession of these deeds, and that seems to be a matter which, if the deeds are themselves, as I have held, property, falls fairly and squarely within the words of s. 17, notwithstanding that the husband has no beneficial interest.

I therefore hold that it is competent to adjudicate on this matter under s. 17, and on that footing I can order that the wife do forthwith hand over to the husband the documents of title relating to the property.

Order accordingly.

Solicitors: *Withers & Co.* (for the husband); *Kenneth Brown, Baker, Baker* (for the wife).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

Re PHOENIX TIMBER CO., LTD.'S APPLICATION.

[COURT OF APPEAL (Lord Evershed, M.R., Parker and Sellers, L.JJ.), March 7, 1958.]

Arbitration—Interpleader proceedings—Arbitration clause in contract—Exercise of court's discretion—Arbitration Act, 1950 (14 *Geo.* 6 *c.* 27), *s.* 5.

The owners of a vessel on a time charter claimed a lien in respect of unpaid hire on a sum due from the consignees for freight of a cargo of timber. The charterers refused to pay part of the hire by reason of counterclaims arising under the time charter, which contained a clause that "Any dispute arising under this charterparty shall be referred to arbitration . . ." The consignees took out an interpleader summons and paid the disputed sum due for freight into court. By the Arbitration Act, 1950, s. 5*, where relief by way of interpleader was granted, the court had a discretion to direct whether the issue between the claimants should be determined in accordance with the arbitration clause or not; by s. 4 (1)* the court also had a discretion to stay legal proceedings in respect of matters within the scope of an arbitration agreement. The master ordered that the issue as to the entitlement to the sum paid into court be tried by the High Court. On appeal by the charterers,

Held: the fact that a particular dispute, within the scope of an arbitration agreement, was eminently suited to be tried by a court of law was not a sufficient ground for refusing to give effect to the agreement for arbitration; therefore the issue between the shipowners and the charterers should be referred to arbitration.

Heyman v. *Darwins, Ltd.* ([1942] 1 All E.R. 337) applied.

Per CURIAM: the discretion under s. 5 of the Arbitration Act, 1950, is to be exercised on the same ground as the discretion under s. 4 (see p. 818, letters C and I, and p. 819, letter C, post).

Appeal allowed.

[As to grant of relief by way of interpleader where there is an arbitration agreement, see 2 HALSBURY'S LAWS (3rd Edn.) 38, para. 87.

For the Arbitration Act, 1950, s. 5, see 29 HALSBURY'S STATUTES (2nd Edn.) 96.]

Case referred to:

(1) *Heyman* v. *Darwins, Ltd.*, [1942] 1 All E.R. 337; [1942] A.C. 356; 111 L.J.K.B. 241; 166 L.T. 306; 2nd Digest Supp.

Interlocutory Appeal.

The Phoenix Timber Co., Ltd. (the consignees) were the owners of timber imported from U.S.S.R. and shipped to England by a vessel of which the respondents, Compania Isla de Oro Limitada of Costa Rica, were the owners and of which the appellants, V/O Sovfracht of Moscow, were the charterers. The consignees were notified by the shipowners that they claimed a lien on the freight (£12,879 odd) due to the charterers. The consignees took interpleader proceedings by originating summons directed to the charterers and the shipowners and, pursuant to orders of the court dated Dec. 20, 1957, and Jan. 30, 1958, paid into court the sum of £10,538. By the latter order, made by Master LAWRENCE, an issue was directed, in which the shipowners were to be claimants and the charterers were to be defendants, as to the entitlement to the £10,538. The charterers appealed on the ground, among others, that the subject-matter of the issue was within arbitration clauses in the two relevant charterparties between the shipowners and the charterers and that it was proper that the parties should be kept to their arbitration agreement. The facts appear in the judgment of LORD EVERSHED, M.R.

---

* The terms of s. 5 and s. 4 (1) are set out at p. 817, letters D, F and G, post.

R. A. MacCrindle for the appellant charterers.
Basil Eckersley for the respondent shipowners.

LORD EVERSHED, M.R.: This is an appeal against an order made by Master LAWRENCE on Jan. 30, 1958, on an application by way of originating summons on the part of a company, Phoenix Timber Co., Ltd., who had paid a certain sum of money into court. The circumstances were that the applicants were the consignees or receivers of a cargo of timber which had been carried in a vessel known as the Ange, from Archangel to London. The steamer was, and is, owned by the respondents before this court, Compania Isla de Oro Limitada of Costa Rica and she was voyaging under the terms of a time charter, the charterers being the appellants in this court, V/O Sovfracht of Moscow. The actual voyage was, I think, the subject of a sub-time charter, a transaction permitted by the original charter, but for present purposes no significance attaches to that circumstance. The bills of lading had been made out on behalf of the charterers, and the sum for freight was, therefore, prima facie payable to the charterers on the discharge of the goods and delivery of the bills of lading.

Clause 17 of the time charter provided as follows:

> " Owners to have a lien upon all cargoes and sub-freights belonging to the time charterers for all claims under this charter . . ."

It seems that a number of disputes had arisen between the owners and the charterers. It was said, for example, that the steamer had not the capacity which, according to cl. 28 of the charter, she was stated to have had. There was again a dispute about bunkering and the like. The result had been a refusal on the part of the charterers to pay sums which otherwise would have been due to the owners for hire. So it came about that, when the consignees of the timber proceeded to pay what they owed for freight amounting to some £13,000, the owners claimed to have a lien on that sum for £9,000 or, perhaps, £10,000 in respect of unpaid hire. The actual sum has since been reduced, I understand, by a payment out of £6,000 or £6,500, but it is not now in doubt that there are issues between owners and charterers arising under the charter, viz., whether there is a valid claim by the charterers against the owners for breach of warranties or other terms of the charter, on the one side, and, on the other side, a claim for unpaid hire.

The charterparty contains an arbitration provision in these terms:

> " Any dispute arising under this charterparty shall be referred to arbitration in London. One arbitrator to be nominated by the owners and the other by the charterers . . ."

with provisions in ordinary form for appointment of an umpire. The disputes between the owners and the charterers are admittedly disputes arising under the charterparty. When the matter was before the master, it was on the application of the consignees, but in the ordinary course he called on the two claimants to say whether or not they claimed this money. So far as the owners are concerned, as counsel informed us, their answer to that question was: Yes, they did, subject to the claim which they did not attempt to deny or conceal that as to some part of it there was an issue, the solution of which would, or might, seriously affect the quantum which the owners could recover by way of the alleged lien. Equally, on the part of the charterers, an affirmative answer was given to the question: Did they lay claim to this money ? But counsel for the charterers has made it clear that, since this was an interpleader proceeding on the initiative of a third party, he was conscious that he must not prejudice the position which he desired to take under the charterparty (namely, that this claim was subject to the arbitration clause) by doing something which might otherwise be regarded as equivalent to taking a step in the action, and he informed us, therefore, that, though he did put the point that he claimed the sum, and, indeed, alleged that the lien was not one which could be asserted against him, he submitted that the issue which arose was one within the arbitration clause and which should, accordingly, be referred by the parties to arbitration.

We were told that the hearing before the master took half an hour and that by far the greater part of that time was spent in looking into the terms of the contract and seeing how the dispute arose, and so on, and that the question whether this matter should go to arbitration or be referred to the arbitrament of the Commercial Court was dealt with somewhat briefly at the end. As SELLERS, L.J., pointed out, on the face of it this dispute is of a kind eminently suited for trial in the Commercial Court, and the advantages of despatch and economy of procedure as well as costs in that court may, perhaps, not always be sufficiently appreciated. Still it remains the fact that these parties, when they made their bargain, included as part of it the arbitration clause.

The question, therefore, is, in brief: Should they now be held to that part of the bargain or should this matter be determined by the court notwithstanding the bargain? The question is dealt with expressly by s. 5 of the Arbitration Act, 1950:

> "Where relief by way of interpleader is granted and it appears to the High Court that the claims in question are matters to which an arbitration agreement, to which the claimants are parties, applies, the High Court may direct the issue between the claimants to be determined in accordance with the agreement."

On the face of it, that would appear to give an unlimited discretion to the High Court to say whether, in all the circumstances of the case, the issue should be determined in accordance with the arbitration clause or not. Although that section re-enacts s. 8 (2) of the Arbitration Act, 1934, there appears to be no authority which serves as a guide to the meaning of the discretion in that section; but a somewhat similar discretion is enshrined in s. 4 (1), which provides:

> "If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred . . ."

then any party before taking any steps may apply to stay the proceedings and the court or judge

> ". . . if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

There, again, the power of the court is expressed as a discretion, but, as regards that discretion, there is the highest authority as to its significance. We have been referred by counsel for the charterers to *Heyman* v. *Darwins, Ltd.* (1) ([1942] 1 All E.R. 337). There the question arose under the corresponding section of the Act of 1889, s. 4, and there is admittedly no relevant difference in language between that section and the present. The learned judge at first instance (CASSELS, J.) had thought that the issues which had arisen between the parties were of a nature which made it particularly appropriate and economically beneficial that the matter should be tried in the Commercial Court. LORD WRIGHT said this (ibid., at p. 355):

> "The judge, in this case, like the master, has carefully set out his reasons in writing. His view, in effect, is that the broad issue is a question of law, apparently not so much on the construction of the contract as on that of the correspondence, whether in law or in fact or in both there has been a

> repudiation. In my opinion, these reasons are not sufficient to justify staying the action",

and Lord Porter and the other noble Lords gave similar reasons for the view which the House took. It must, therefore, be taken that, in a case under s. 4 of the Arbitration Act, 1950, the mere fact that the dispute is of a nature eminently suitable for trial in court is not a sufficient ground for refusing to give effect to what the parties have by contract agreed. It is quite true, as counsel for the owners observed, that in s. 4 some guide to a conclusion is given by the parliamentary language; for it will be remembered that the section says that the court

> "if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement . . .",

words which are not repeated in s. 5. The absence of any repetition in s. 5 does not persuade me, however, that the discretion in s. 5 is to be exercised for some different, still less some opposite, reason. In my judgment, the discretion in s. 5 is to be exercised on similar grounds as the discretion in s. 4. Section 5 is only dealing with a different procedural occasion in which an issue arises which has been previously the subject of an arbitration contract. There seems to be no ground of principle why there should be a different basis for deciding that question in the one case from that to be applied in the other. I, therefore, think that the principles which were laid down in *Heyman* v. *Darwins, Ltd.* (1) for application under s. 4 ought also to be applied in a case, such as this, under s. 5.

In those circumstances, I think, with all respect to him, that the master erred in directing, as he did, that this issue should be tried in the Commercial Court and should not be referred to arbitration. In fairness to him, it is plain from what has been said that this matter was rather left as a kind of postscript to the main part of the argument, and I have no doubt, therefore, that his attention was not fully directed to the matter as ours has been in this court. Had it been so directed, I think it highly probable that he would have taken the view that, however suitable for trial in the Commercial Court, the bargain should still be adhered to. I am also satisfied, in view of what I have said, that nothing that the parties did before the master in any way forfeits or qualifies their right now to ask that effect should be given to the contract.

In those circumstances, I have come to the conclusion that this order should be, so far as necessary, varied so as to direct that the issue between the two parties should be referred in accordance with their contract to the arbitration provided by cl. 22 of the time charter.

PARKER, L.J.: I agree, and I would only add this. I think it is plain that, if the owners had started proceedings in the High Court to re-claim the sum now in dispute, and the time charterers had applied for a stay, it would have been granted. The owners, on whom the onus would rest to show there were good reasons why the court should deal with it rather than the tribunal agreed on between the parties, would be completely unable to put up any good ground for opposing the stay. In those circumstances, it does seem to me surprising if, as is suggested, different principles apply when, instead of the owners taking proceedings, the issue is stated in interpleader proceedings. It cannot in principle matter how the question comes before the court whether there is to be arbitration or not.

Counsel for the owners has stressed the different wording in s. 5 of the Arbitration Act, 1950, as compared with s. 4, and it is suggested that s. 5 gives the master a much wider discretion. It seems to me, however, that the same principles apply to s. 5, following as it does directly after s. 4; and, indeed, I take it to be the law that, where this court has power to interfere with what parties have agreed, they will not do so except for good reasons shown. Lord Porter said, in *Heyman* v. *Darwins, Ltd.* (1) ([1942] 1 All E.R. 337 at p. 356), in connexion with an application under s. 4:

> " The parties have chosen to refer their differences to arbitration, and to arbitration they should go in the ordinary course, unless there is some good reason to the contrary . . ."

Accordingly, I feel that there was no evidence on which the master could exercise his discretion in the way he did, and I would allow the appeal.

SELLERS, L.J.: I agree, reluctantly but without doubt. Reluctantly, because I think the master was right when he said this was a very proper and suitable case to try before the Commercial Court, but without doubt, because I can see no ground to justify a refusal to stay the action or, in effect, to make the order that the parties should be bound by their agreement to arbitrate.

I agree with my Lords in their interpretation of s. 5 of the Act.

Appeal allowed.

Solicitors: *Middleton, Lewis & Co.* (for the appellant charterers); *Constant & Constant* (for the respondent shipowners).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

FRY *v.* INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Danckwerts, J.), March 5, 12, 1958.]

Estate Duty—Interest in expectancy—Option to defer payment of duty—Option exercised—Subsequent purchase of interest by tenant for life—Trust fund handed over to tenant for life—When estate duty on interest in expectancy becomes payable—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 7 (6).

By his will dated Nov. 30, 1915, a testator who died on Nov. 4, 1918, settled his residuary estate on trust to pay the income thereof to his daughter, N. during her life. After her death, the capital was to be held on trusts for her issue and subject thereto on trust for the testator's four sons in equal shares absolutely. In 1940 one of the sons, C., died, and his executors elected under the Finance Act, 1894, s. 7 (6), to defer payment of estate duty in respect of his interest in expectancy in the testator's residuary estate until " the interest falls into possession ". In 1954, N., who was then a widow aged eighty-three years and had never had a child, purchased from C.'s executors C.'s interest in expectancy and also the remaining three interests in the testator's residuary estate expectant on her own death. The trustees of the testator's will transferred the settled fund to N. A claim for estate duty was made on the value of the investments transferred to N. representing C.'s share on the footing that C.'s reversionary interest fell into possession in 1954 on the purchase by N. Alternatively, it was claimed that estate duty would be payable on the value of C.'s share on N.'s death.

Held: C.'s interest did not fall into possession (for the purpose of rendering the deferred estate duty payable under s. 7 (6) of the Finance Act, 1894) on the acquisition of C.'s interest by N., but it would fall into possession for that purpose on N.'s death; consequently estate duty would then be payable in respect of C.'s interest in accordance with s. 7 (6).

Re O'Connor's Estate ([1931] I.R. 98) considered.

[As to time for payment of estate duty in respect of an interest in expectancy, see 15 HALSBURY'S LAWS (3rd Edn.) 109, para. 231.

For the Finance Act, 1894, s. 7 (6), see 9 HALSBURY'S STATUTES (2nd Edn.) 363.]

Cases referred to: A

(1) *Inland Revenue Comrs.* v. *Priestley*, [1901] A.C. 208; 70 L.J.P.C. 41; 84 L.T. 700; 21 Digest 8, *30*.

(2) *Re Avery, Pinsent* v. *Avery*, [1913] 1 Ch. 208; 82 L.J.Ch. 434; 108 L.T. 1; 21 Digest 7, *31*.

(3) *Mutlow* v. *Mutlow*, (1859), 4 De G. & J. 539; 45 E.R. 209; 23 Digest (Repl.) 337, *4030*. B

(4) *Re Fletcher, Reading* v. *Fletcher*, [1917] 1 Ch. 339; 86 L.J.Ch. 317; 116 L.T. 460; 20 Digest 509, *2364*.

(5) *Re O'Connor's Estate, Hendrick* v. *Revenue Comrs.*, [1931] I.R. 98; Digest Supp.

(6) *Ward* v. *Van der Loeff, Burnyeat* v. *Van der Loeff*, [1924] A.C. 653; 93 L.J.Ch. 397; 131 L.T. 292; 44 Digest 336, *1662*. C

(7) *Re Deloitte, Griffiths* v. *Deloitte*, [1926] Ch. 56; 95 L.J.Ch. 154; 135 L.T. 150; 37 Digest 149, *752*.

Adjourned Summons.

The plaintiff, the surviving executor of the will of Conrad Penrose Fry, deceased, by his originating summons, dated Oct. 15, 1957, asked for the determination, among others, of the following questions: (i) Whether having regard D to the completion of the purchase by Norah Lilian Cooke-Hurle of the interest in the residuary estate of the late Francis James Fry to which Conrad Penrose Fry was at the date of his death contingently entitled in reversion expectant on the death of Norah Lilian Cooke-Hurle without issue (a) the said contingent reversionary interest will never fall into possession for the purpose of s. 7 (6) of the Finance Act, 1894; or (b) the said interest will fall into possession E for that purpose on the death of Norah Lilian Cooke-Hurle, if she dies without issue; or (c) the said interest fell into possession for that purpose on the date of the completion of the said purchase. (ii) In the the event of it being determined that the said interest will fall into possession for the said purpose on the death of Norah Lilian Cooke-Hurle, how the value of the said interest ought to be calculated for the purpose of estate duty. F

John Pennycuick, Q.C., and *R. Cozens-Hardy Horne* for the plaintiff.

R. O. Wilberforce, Q.C., and *E. Blanshard Stamp* for the defendants.

Cur. adv. vult.

Mar. 12. **DANCKWERTS, J.**, read the following judgment: The G question to be decided on this originating summons is the liability for estate duty in respect of a reversionary interest to which Conrad Penrose Fry was entitled at his death in 1940, and which has been purchased from his executor by the person entitled for her life to the income of the property.

The history starts with the will dated Nov. 30, 1915, of Francis James Fry who died on Nov. 4, 1918. By that will the residuary estate was settled on H trust to pay the income thereof to the testator's daughter Norah Lilian Cooke-Hurle during her life and after her death the capital was to be held on trusts for her issue, and, in default of issue, for her brothers, the testator's four sons. As Mrs. Cooke-Hurle is now over eighty-six years of age, is a widow, and has had no children, it is and has been for a great many years a certainty that the trusts in favour of the brothers must take effect on her death. One of the four brothers, I Conrad Penrose Fry, died on June 5, 1940. His executors elected not to pay estate duty on this reversionary interest in one quarter of the residuary estate of his father, but to postpone payment until that reversionary interest should fall into possession. By an agreement dated June 22, 1954, Mrs. Cooke-Hurle (who was then eighty-three years of age) purchased from the trustees of Conrad Penrose Fry's will, the trustees of another deceased brother's will (who was also the assignee of the share of a third brother) and the trustees of a settlement made by the remaining brother, all the four reversionary shares in the father's residuary estate. The price paid for Conrad Penrose Fry's share was £39,750. This was based on an actuarial valuation made on the footing that no estate duty would be payable under Francis James Fry's will on Mrs. Cooke-Hurle's death. On the basis that Conrad Fry's interest, if sold to some other person, would be subject to estate duty on Mrs. Cooke-Hurle's death at a rate of sixty-five per cent., the actuary calculated that the value of the reversionary interest was £13,900 only. The agreement provided for the satisfaction of the purchase price by the transfer of investments forming part of Mrs. Cooke-Hurle's free estate equivalent in value to the amount of the purchase price as valued on Mar. 9, 1954. There was no provision in the agreement in regard to merger, but on the completion of the purchase the trustees of Francis James Fry's will transferred to Mrs. Cooke-Hurle all the investments comprised in the settled share of which she had been enjoying the income.

A claim for estate duty on the value of the investments transferred to Mrs. Cooke-Hurle in respect of Conrad Fry's share has been made by the Commissioners of Inland Revenue on the footing that his reversionary interest fell into possession in 1954 on the purchase by Mrs. Cooke-Hurle. An alternative claim is made that estate duty will be payable on the value of that interest on Mrs. Cooke-Hurle's death. It is contended on behalf of the surviving executor of Conrad Fry's will that no estate duty is or ever will be payable in respect of Conrad Fry's reversionary interest, as that interest has not fallen and now can never fall into possession. The value on which estate duty is claimed is also contested.

The sections of the Finance Act, 1894, which affect the matter are as follows: Section 1 provides that

> " In the case of every person dying after the commencement of this Part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called ' Estate Duty ' . . ."

There is no dispute that on Conrad Fry's death his reversionary interest either " passed " or was caught by the terms of s. 2 (1) (a) (as suggested in *Inland Revenue Comrs.* v. *Priestley* (1), [1901] A.C. 208, per Lord Macnaghten at p. 213, and *Re Avery, Pinsent* v. *Avery* (2), [1913] 1 Ch. 208, per Hamilton, L.J., at p. 217). Section 7 (6) provides:

> " Where an estate includes an interest in expectancy, estate duty in respect of that interest shall be paid, at the option of the person accountable for the duty, either with the duty in respect of the rest of the estate or when the interest falls into possession, and if the duty is not paid with the estate duty in respect of the rest of the estate, then—(a) for the purpose of determining the rate of estate duty in respect of the rest of the estate the value of the interest shall be its value at the date of the death of the deceased; and (b) the rate of estate duty in respect of the interest when it falls into possession shall be calculated according to its value when it falls into possession, together with the value of the rest of the estate as previously ascertained."

By s. 22 (1) (j) there is a definition:

> " The expression ' interest in expectancy ' includes an estate in remainder or reversion and every other future interest whether vested or contingent, but does not include reversions expectant upon the determination of leases."

There is no doubt that Conrad Fry had an interest in expectancy at the date of his death. There is no definition of the words " fell into possession ". The meaning must, therefore, be ascertained by regard to ordinary legal English. The definition offered by counsel for the plaintiff is that an interest in expectancy falls into possession when the holder of the interest becomes entitled by virtue of the interest to present enjoyment of the property. It was contended, therefore, that on the purchase Mrs. Cooke-Hurle did not become entitled to present enjoyment of the property by virtue of the interest in expectancy because she had already present enjoyment by virtue of her life interest. This interest, it was said, was enlarged into absolute ownership as a result of the purchase, and the merger consequent thereon, and, therefore, the interest in expectancy can never fall into possession.

It seems to me desirable at the outset to consider the nature and effect of merger. But, first of all, though the liability to estate duty arose by reason of the death of Conrad Fry, was there any charge on the interest of Conrad or the property created thereby ? No doubt the executors were accountable under s. 8 (3) of the Act, but unless the property did not pass to the executor as such no charge would be created under s. 9 (1). Although the interest of Conrad Fry was an equitable interest, it would appear to have been a legal asset (personal property), and, therefore, to have passed to the executor as such: see *Mutlow* v. *Mutlow* (3) ((1859), 4 De G. & J. 539). Accordingly, the matter is not complicated by any charge of duty on the interest or the property.

In Challis, Real Property (3rd Edn.) (1911), p. 86 and p. 87, quoting Preston's Conveyancing, the rules in regard to merger are stated as follows:

> " A contingent remainder, not being in the eye of the common law an estate, but only a possibility to have an estate at a future time upon the happening of a contingency, did not suffice to prevent merger, if interposed between two vested estates, which were otherwise such that the one would merge in the other.
>
> " But there was in this respect an important distinction between cases in which the two vested estates came to the same hand subsequently to the creation of the contingent remainder, and cases in which they came to the same hand *eo instante* with the creation of the contingent remainder. In the former case the merger was absolute, and thereby the contingent remainder was for ever destroyed. But in the latter case, the merger was not absolute, and the two estates united by it remained, according to the language in use, *liable to open and let in the contingent remainder*, provided that it became vested during what would have been the continuance of the precedent estate if it had not been merged."

In the present case, the two interests plainly came to the same hand subsequently to the creation of the contingent remainder. Of course, the two interests were both equitable interests in personal property. But that is immaterial, as the same rules were applied in equity, except that where merger was possible, equity applied the intention of the parties, and, if their intention was not expressed, assumed an intention to cause merger, if this were beneficial: *Re Fletcher, Reading* v. *Fletcher* (4) ([1917] 1 Ch. 339).

Since the Judicature Act, 1873, s. 25 (4) (now the Law of Property Act, 1925, s. 185), the rules of equity are applied in any case. I suppose counsel for the plaintiff would say that it was in the interests of the parties to effect merger, if this would defeat a claim for estate duty; but I apprehend that this would not eliminate the possibility of the two interests reopening to let in a contingent remainder or other interest in expectancy.

In the Irish case of *Re O'Connor's Estate, Hendrick* v. *Revenue Comrs.* (5) ([1931] I.R. 98), the interest of a man expectant on the death of his brother without issue, was treated as not falling into possession for the purposes of duty, until the brother died without issue, notwithstanding that the interest in expectancy on the earlier death of the owner of the expectancy in the lifetime of the other brother came to the latter (as tenant for life) as his heir at law, so that he had both the interests. The Irish court seems to have treated the interest in expectancy as a contingent interest, though it may be more accurate to regard it as a vested interest liable to be divested by the birth of issue of the tenant for life. In the Irish case the tenant for life was a man, and a man is always treated by the law as capable of having issue until his death. Is the position of a woman any different ? It is true that the Chancery Division permits trustees to dispose of interests in the course of administration without regard to the possibility of the birth of children to a woman who is past the normal limit of childbearing; but this practice has not been applied in cases where some rule of law is involved, e.g., the rule against perpetuities (*Ward* v. *Van der Loeff, Burnyeat* v. *Van der Loeff* (6), [1924] A.C. 653), or the rules restricting accumulations (*Re Deloitte, Griffiths* v. *Deloitte* (7), [1926] Ch. 56).

Of course, the trustees of Francis James Fry's will were perfectly safe in handing over the investments forming the trust fund to Mrs. Cooke-Hurle in 1954, as she was then eighty-three and there was no possiblity of her having any issue in fact. Ought I to regard birth of issue as still theoretically possible so as to cause a possible opening of the merger, so that the interests in expectancy of the brothers were not indefeasibly vested when these interests were purchased in 1954 ? And, if not, does the impossibility of the birth of issue make any difference to the situation ? If the possible defeasance by the birth of issue has disappeared, at what particular moment of time did it disappear ? The final impossibility of issue varies with individuals and with circumstances. On the other hand it was possible to say with certainty in 1954 that there could no longer then be any chance of issue. These seem to me to be difficult questions, but I do not find it necessary to answer them.

As is apparent from the rules which I have mentioned previously, the theory of the merger of estates is a highly artificial idea. I am not satisfied that such theoretical and obsolescent rules ought to be allowed to decide liability to estate duty. The facts are that Mrs. Cooke-Hurle had a life interest in the income of the fund; when she purchased the interests in expectancy of her brothers in 1954, she acquired the interests which would take effect in the event of her death without issue, but would confer no right to possession at any earlier date than her death. It is true that (on the footing that the birth of issue of Mrs. Cooke-Hurle was no longer a possibility) after the purchase no one but Mrs. Cooke-Hurle had any interest in the trust fund, and so the trustees handed over the investments comprising the trust fund to her. I do not regard that as the same thing as the falling into possession of the interest in expectancy. If the interest in expectancy did not fall into possession on the purchase in 1954, it seems to me that it will fall into possession in the estate of Mrs. Cooke-Hurle on her death.

This accords with the result which was reached by the Irish court in *Re O'Connor's Estate* (5). That case, of course, is not binding on this court, but it does show that such a result was considered by another court to be possible. To reject such a result seems to me to defeat the intention of s. 7 (6) of the Finance Act, 1894, and to abuse the indulgence conferred by that sub-section.

The difficulties of valuation which may arise on Mrs. Cooke-Hurle's death were commented on in argument. I am afraid that these will have to be faced when the time for payment arises. The value of the interest when it falls into possession will have to be ascertained at that time in accordance with the provisions of the Act. This must depend on the circumstances at that date. I am not prepared, and I am not compelled, to express any opinion in advance of the event.

Declaration accordingly.

Solicitors: *Rider, Heaton, Meredith & Mills*, agents for *Osborne, Ward, Vassall, Abbot & Co.*, Bristol (for the plaintiff); *Solicitor of Inland Revenue.*

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

PRESCOTT (orse. FELLOWES) *v.* FELLOWES.

[Probate, Divorce and Admiralty Division (Stevenson, J.), March 5, 7, 14, 1958.]

Variation of Settlement—Ante-nuptial settlement—Deed agreeing to transfer securities as absolute gift immediately after marriage—No transfer to trustees—Whether ante-nuptial settlement—Matrimonial Causes Act, 1950 (14 *Geo.* 6 *c.* 25), *s.* 25.

The parties were married on June 20, 1953. The wife's means were considerably greater than those of the husband and on the day before the marriage they entered into a deed described as " Settlement on marriage " whereby the wife in consideration of the marriage covenanted immediately after the marriage to transfer to the husband " as an absolute gift unaffected by anything hereinafter contained " certain securities to the value of £15,000. The deed further provided for the payment in certain circumstances of a further £20,000 to the husband, this sum to be treated for all purposes as a loan by the wife to the husband with interest payable by the husband at five per cent. per annum. The deed was made with a view to the husband's becoming a member of Lloyd's and thereby acquiring an income in which the wife would, presumably, share. Investments valued at £15,000 were duly transferred, but the husband never became a member of Lloyd's and the £20,000 was never paid. On Jan. 28, 1958, a decree absolute of divorce was granted to the wife. The wife now applied under the Matrimonial Causes Act, 1950, s. 25, to vary the deed and for an inquiry what investments or securities represented the sum of £15,000. The husband contended that the deed did not constitute an ante-nuptial settlement since the securities representing the £15,000 had been transferred to him as an absolute gift and he had now realised the money. There was no evidence before the court of the present form of investment of the £15,000.

Held: (i) the deed constituted an ante-nuptial settlement for the purposes of s. 25 of the Matrimonial Causes Act, 1950, notwithstanding the words " as an absolute gift " and the absence of trusts, because by it the wife made provision in favour of the man whom she intended to marry and in his favour in the character of intended husband.

(ii) an inquiry would be directed what investments or securities now represented the £15,000, since the evidence was consistent with the money being in the form of investments still under the husband's control.

Smith v. *Smith* ([1945] 1 All E.R. 584) applied.

[As to settlements within the statutory power to vary ante-nuptial or post-nuptial settlements, see 12 Halsbury's Laws (3rd Edn.) 451, 452, paras. 1015 and 1016, note (q); and for cases on the subject, see 27 Digest (Repl.) 646-648, *6097-6106*.

For the Matrimonial Causes Act, 1950, s. 25, see 29 Halsbury's Statutes (2nd Edn.) 412.]

Cases referred to:

(1) *Prinsep* v. *Prinsep*, [1929] P. 225; 98 L.J.P. 105; 141 L.T. 220; *subsequent proceedings*, [1929] P. 265; 27 Digest (Repl.) 646, *6098*.

(2) *Halpern* v. *Halpern*, [1951] 1 All E.R. 315; [1951] P. 204; 27 Digest (Repl.) 648, *6106*.

(3) *Parrington* v. *Parrington*, [1951] 2 All E.R. 916; 27 Digest (Repl.) 648, *6105*.

(4) *Smith* v. *Smith*, [1945] 1 All E.R. 584; 114 L.J.P. 30; 173 L.T. 8; 27 Digest (Repl.) 647, *6101*.

Application.

This was an application to vary a marriage settlement.

On June 19, 1953, the parties entered into a deed described as " Settlement on marriage " whereby " in consideration of the marriage " the wife covenanted, inter alia, that she would,

> "immediately after the solemnisation of the marriage transfer to [the husband] as an absolute gift unaffected by anything hereinafter contained the securities . . . set out in the schedule hereto."

On June 20, 1953, the parties were married. There were no children. In 1954 the husband deserted the wife and she took again by deed-poll the name Prescott, which had been hers before the marriage. On Oct. 25, 1957, the wife in an undefended suit was granted a decree nisi on the ground of the husband's desertion. By a notice dated Nov. 14, 1957, the wife stated that she intended to

> "apply to the court for an order that the ante-nuptial marriage settlement made between the [wife] and the [husband] and dated June 19, 1953, be varied and that [the husband] do transfer to the [wife] the securities specified in the schedule thereto or alternatively, that [the husband] do pay to her the sum of £15,000 as representing the value of such securities."

In his affidavit in answer the husband stated that the deed of June 19, 1953, was not an ante-nuptial settlement or a marriage settlement at all, and that securities to the value of £15,000 had been transferred to him as an absolute gift and that he had realised these securities. On Jan. 28, 1958, the decree was made absolute, and on Feb. 13, 1958, Mr. Registrar KINSLEY made his report and referred the application to the judge for his decision.

G. H. Crispin for the wife.
P. R. Hollins for the husband.

Cur. adv. vult.

Mar. 14. **STEVENSON, J.,** read the following judgment: This is an application, following a decree of divorce, under s. 25 of the Matrimonial Causes Act, 1950, to vary the provisions of a deed dated June 19, 1953, which is said to be an ante-nuptial settlement within s. 25. The matter has been the subject of a report dated Feb. 13, 1958, by Mr. Registrar KINSLEY.

The applicant, who is the former wife and the petitioner in the divorce suit, contends that the deed of June 19, 1953, is an ante-nuptial settlement. The husband says it is not an ante-nuptial settlement. The wife further seeks to obtain an order for the transfer to her of securities representing the sum of £15,000, alternatively for payment to her of £15,000, but she has by her counsel in this court modified that demand and she now asks for an order for an inquiry before the registrar as to what investments or securities now represent the sum of £15,000.

The marriage took place on June 20, 1953. In May, 1954, according to the evidence given at the hearing of the petition, the husband deserted the wife. A decree nisi was pronounced on Oct. 25, 1957, and a decree absolute on Jan. 28, 1958. There are no children of the marriage. The husband was a squadron leader in the Royal Air Force and it appears from the affidavits filed on this application that he had no resources save his service pay. The wife's means were substantially greater than those of her husband and I have been told that she was substantially older. The parties were described in the certificate of their marriage as "of full age". As a result of discussions between the parties before the marriage took place, it was contemplated that the husband should resign from the Royal Air Force with a view to becoming an underwriting member of Lloyd's and that the wife should provide funds to enable him to do so and thereby acquire an income in the benefit of which the wife would, as a wife, presumably enjoy some share. As a result of discussions between the parties and negotiations between their respective solicitors, the deed, the nature and effect of which is in issue in this case, came into existence. It was, as I have already said, executed on June 19, 1953, the day before the marriage. It is called on its indorsement, "Settlement on marriage".

The body of the document recites that a marriage has been agreed on and will shortly take place between the parties and the operative part proceeds:

> "Now this deed witnesseth that in consideration of the said marriage it is hereby agreed as follows: 1. Lady Prescott [being the then name of the wife] will immediately after the solemnisation of the said marriage transfer to Squadron Leader Fellowes as an absolute gift unaffected by anything hereinafter contained the securities short particulars of which are set out in the schedule hereto."

The schedule in question includes a reference to £22 in cash, which was, I understand, the sum which the parties believed at the date of the deed would be sufficient to bring the value of the securities specified in the schedule up to £15,000. In its second clause, the deed contains a covenant by Lady Prescott with Squadron Leader Fellowes which provides so far as material, that if at any time before Dec. 31, 1955, Squadron Leader Fellowes shall produce written evidence from a recognised firm of Lloyd's underwriters that they are prepared to recommend him for membership of Lloyd's subject to his being able to show assets to the value of £35,000 and that all other conditions precedent to membership of Lloyd's have been fulfilled, then Lady Prescott will pay to Squadron Leader Fellowes the sum of £20,000 or transfer to him securities or other property or bonds all being so far as possible of a nature acceptable to Lloyd's for membership to a total value of £20,000. There follows a proviso limiting Lady Prescott's obligation under the covenant to the value of her unencumbered cash securities and freehold and leasehold property at the time when she may be called on to comply with the covenant.

Clause 4 provides that the sum of £20,000 or any property representing the same transferred by Lady Prescott to Squadron Leader Fellowes in pursuance of the covenant which I have quoted, shall be for all purposes treated as a loan by Lady Prescott to Squadron Leader Fellowes and goes on to provide for payment of interest at five per cent. per annum on the loan by Squadron Leader Fellowes to Lady Prescott if demanded by Lady Prescott on the usual quarter days, but if Squadron Leader Fellowes did not become a member of Lloyd's by Mar. 31, 1956, or at any time ceased to be a member of Lloyd's, the loan was to be immediately repayable. There are further provisions for securing the loan by an endowment policy of assurance on the life of Squadron Leader Fellowes and various other events are provided for in the deed which I do not think are material to the present application.

The husband did not become a member of Lloyd's and the terms of the deed relating to the provision of £20,000 by the wife did not come into effect and have to be considered in this case only so far as they throw any light on the question whether the document was an ante-nuptial settlement. The practical purpose of this application from the wife's point of view is therefore to recover £15,000 or the investment or investments representing that sum.

The registrar came to the conclusion that the deed in question was an ante-nuptial settlement. He says:

> "This deed has none of the features of an ante-nuptial settlement. There are no trustees and no provision is made for the payment of the income from the fund to either spouse, or on the death of one spouse, or as to the fund itself, on the death of either or both spouses, as to children of the marriage. Clause 1 of the deed appears to constitute an absolute gift of securities (amounting to about £15,000) to the husband immediately after the solemnisation of the marriage. The rest of the deed is inoperative."

After referring to certain authorities* dealing with post-nuptial settlements the registrar says:

---

* *Halpern* v. *Halpern* ([1951] 1 All E.R. 315); *Parrington* v. *Parrington* ([1951] 2 All E.R. 916).

> "Applying the tests laid down by the authorities it seems to me that the settlement in this case provides for the financial benefit of the husband, and probably of the wife, after the marriage."

The registrar goes on to say that the provisions of cl. 1 and cl. 2 of the deed together with the affidavit evidence make it abundantly clear that the motive of the settlement was to set up the husband as a member of Lloyd's thus providing him with an income from which the wife would also derive some benefit. The husband could not approach Lloyd's on the basis that he had a rich wife. The money and securities had to be in his name. For these reasons the registrar comes to the conclusion and submits that the deed dated June 19, 1953, is an ante-nuptial settlement within the meaning of s. 25 of the Matrimonial Causes Act, 1950.

Counsel for the husband has contended before me that the transfer of £15,000 or securities representing the same was an absolute gift made before marriage which cannot properly be regarded as an ante-nuptial settlement for the purpose of s. 25. It has been pointed out that the following words of the deed disclose a patent ambiguity:

> "Now this deed witnesseth that in consideration of the said marriage it is hereby agreed as follows: 1. Lady Prescott will immediately after the solemnisation of the said marriage transfer to Squadron Leader Fellowes as an absolute gift unaffected by anything hereinafter contained the securities short particulars of which are set out in the schedule hereto."

It is said that if the phrase "an absolute gift" is given its full meaning, it cannot be reconciled with the phrase "in consideration of the said marriage". It was suggested in argument that the words in the deed "as an absolute gift" may have been inserted by the solicitor acting for the wife because he had in mind some advantage connected with stamp duty in using them. I have no means of determining this and I have not taken it into account in forming my view as to the proper construction of this deed.

Looking at the deed as a whole and having regard to the position of the parties when they entered into it as it appears from the language of the document and the affidavits before me, I have no doubt that it was a provision made by Lady Prescott in favour of the man whom she was intending to marry and made in his favour in the character of an intended husband. I have no doubt that it was in fact made in consideration of the marriage which was to take place on the day following the execution of the deed. To the extent to which the words "as an absolute gift unaffected by anything hereinafter contained" grammatically exclude the concept of a transfer of property to the intended husband for a consideration passing from him to the intended wife, I think that the words must be treated as having less than the full meaning that they would bear if their ordinary connotation were given to them.

Prinsep v. *Prinsep* (1) ([1929] P. 225), *Halpern* v. *Halpern* (2) ([1951] 1 All E.R. 315), *Parrington* v. *Parrington* (3) ([1951] 2 All E.R. 916), and *Smith* v. *Smith* (4) ([1945] 1 All E.R. 584), have all been cited and carefully considered before me. They are all cases dealing with the question whether particular dispositions made after marriage were post-nuptial settlements falling within s. 25 of the Matrimonial Causes Act, 1950. No case has been cited to me dealing with an ante-nuptial settlement. I apprehend that where a financial provision is made between intending spouses before and expressed to be in consideration of marriage, the question whether it is an ante-nuptial settlement under s. 25 of the Matrimonial Causes Act, 1950, is unlikely to be seriously contested and I think that the relevance of the various authorities dealing with post-nuptial settlements in the present cases is that they demonstrate that the word "settlement" in

A the section must be liberally construed and also that the transfer of property to trustees who are to hold it for the benefit of the spouses or either of them is not an essential feature of a post-nuptial settlement. In my opinion it is not an essential feature of an ante-nuptial settlement for the purpose of s. 25. The provisions of cl. 4 of the deed of June 19, 1953, did contemplate, in the events there set out, the making of periodical payments by the husband to the wife and this, I think, gives further support to the view that this is an ante-nuptial B settlement.

In the result I hold that the deed of June 19, 1953, is an ante-nuptial settlement within the meaning of s. 25 and is correctly described in its indorsement as " Settlement on marriage ". It is not, in my opinion, possible to sever cl. 1 from the remainder of the deed as I was invited to do. I ought perhaps to mention that the evidence before me includes a letter from the wife's then C solicitor to the husband's solicitor dated Dec. 31, 1957, and correspondence between the wife's present solicitors and the Controller of Stamps from which it appears that the instrument of June 19, 1953, is not considered by the Controller of Stamps to fall within the charge of duty under " settlements " in Sch. 1 to the Stamp Act, 1891, because it does not contain trusts limiting the use of the securities for any person in succession. I mention this correspondence only to D make clear that in my view the Stamp Act, 1891, and the views of the Controller of Stamps as to the stamp duty attracted by the deed in question have no bearing on the question which I have to decide and I have excluded such matters from my mind.

Dealing with the second part of the application, the registrar says in his report:

E

> " The husband in this case has realised the securities and used the money and this does not seem to be disputed. The securities therefore can not be transferred to the wife as they do not exist and there is no power under s. 25 to order the husband to make a cash payment even if the money were in his possession."

He therefore submits that the application should be dismissed. F

By an affidavit sworn by the husband on Dec. 18, 1957, the husband says in para. 12:

> " In any event, the money realised from the securities transferred to me has been used by me for the purpose of business other than Lloyd's. I treated the money as my own, and I say I have every right to do so, as the G securities were transferred to me as an absolute gift."

The husband does not specify the business " other than Lloyd's " for which he has used the money realised from the securities and there is no evidence before me to indicate what is the present form of investment, if any, of these moneys, but the husband's affidavit is in my opinion consistent with this money being in the form of investments or an investment still under the husband's control. H

In *Smith* v. *Smith* (4) ([1945] 1 All E.R. at p. 586), DENNING, J., after dealing with the authorities to which I have already referred relating to post-nuptial settlements, said:

> " A wife is often free to assign her interest under an ordinary marriage settlement or a separation deed, but it is none the less a ' settlement '. If I she should assign her interest, the court might treat the proceeds in her hands as representing the property; and a co-respondent, or indeed any person, who takes an assignment from her with notice that proceedings are pending as to the application of the property, will find that the arm of the court is long enough to reach the property in his hands."

In these circumstances, I direct an inquiry before the registrar as to what investments or securities now represent the assets transferred to the husband under cl. 1 of the deed of June 19, 1953, and I direct that this application be restored to the list when this inquiry has been concluded.

Order accordingly.

Solicitors: *Culross & Co.* (for the wife); *Norman S. Caney* (for the husband).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

WESTMINSTER BANK, LTD. *v.* BARFORD (INSPECTOR OF TAXES).

[CHANCERY DIVISION (Vaisey, J.), February 14, 17, 25, March 7, 1958.]

Income Tax—Profits—Death of taxpayer—Periodical payments under contract received by trustees of will—Contract resulting from special services by director to company—Liability to tax—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5 *c.* 40), *Sch. D, Case III—Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *Sch. D, Case III.*

A company, Trust of Insurance Shares, Ltd., was the manager of a unit trust, the Cornhill Trust of Bank and Insurance Shares and British Government Stocks, from which it received an initial service charge on deferred units sold and management remuneration. The chairman of directors of the company had rendered special and valuable services in connexion with the unit trust, devising the scheme embodied in the trust deed, settling the deed, preparing prospectuses of and advertisements for the sale of units, negotiating the sale of over one million units, underwriting many units on a public issue and purchasing and paying for 158,904 in his own name or for other parties. The company recognised that these were special services outside his ordinary duties as director and under a power in the company's articles of association it made an agreement with him under which he was paid a sum of £3,000 (based on the service charge received by the company) and he, his executors, administrators or assigns were to receive a proportion of payments in respect of management remuneration as received by the company during the continuance of the trust. After the chairman's death, the trustees of his will continued to receive payments under the agreement. They were assessed to income tax in respect of the sums received as being annual payments under Case III of Sch. D. On appeal,

Held: the periodical payments under the agreement were assessable to income tax under Case III of Sch. D, and the death of the chairman did not affect their liability to tax, because the right to receive the periodical payments arose from the agreement and it was immaterial that the agreement originated from services rendered by the chairman in his office as director.

Gospel v. *Purchase* ([1951] 2 All E.R. 1071) distinguished.

Appeal dismissed.

[As to annual payments under Case III of Sch. D to the Income Tax Act, 1952, see 20 HALSBURY'S LAWS (3rd Edn.) 245, para. 448; and for cases on the subject, see 28 DIGEST 62-77, *316-421*, 81, 82, *451-462*.

For Case III of Sch. D to the Income Tax Act, 1952, see 31 HALSBURY'S STATUTES (2nd Edn.) 116.]

Case referred to:

(1) *Gospel* v. *Purchase*, [1951] 2 All E.R. 1071; [1952] A.C. 280; 32 Tax Cas. 367; 3rd Digest Supp.

Case Stated.

The taxpayers in their capacity of trustees of the will of the Right Hon. C. A. McCurdy, deceased, appealed to the Special Commissioners of Income Tax against income tax assessments under Case III of Sch. D in respect of annual payments as follows: 1950-51, £372; 1951-52, £368; 1952-53, £101; 1954-55, £14. The question for determination was whether the assessments were correctly made in respect of sums arising to Mr. McCurdy, his executors, administrators or assigns by virtue of an agreement dated Dec. 9, 1938, between a company, Trust of Insurance Shares, Ltd. and Mr. McCurdy. Mr. McCurdy was chairman of the company's board of directors until his death on Nov. 10, 1941.

Under the articles of association of the company, the directors were entitled to £500 per annum remuneration each, with, in the case of the chairman, a further £500 per annum, and to such further sums as were voted to them by the company in general meeting, such remuneration to be divided equally. If by arrangement with the other directors any director performed or rendered any special duties or services outside his ordinary duties as a director, the directors could pay him special remuneration, in addition to his ordinary remuneration, by way of salary, commission, participation in profits or otherwise.

The company was manager of, inter alia, a unit trust entitled the Cornhill Trust of Bank and Insurance Shares and British Government Stocks. The trust deed authorised the creation and issue of debenture units and deferred units on terms which it specified, and the sale by the company of deferred units at a price calculated as specified which was to include an initial service charge. The trustees of the fund constituted by the trust deed, Midland Bank Executor and Trustee Co., Ltd., were also required to pay the company out of the fund on the last day of each distribution period until the determination of the trust a sum equal to one quarter of one per cent. of the mean market value of the trust fund as management remuneration. The company was also given power to form a new limited company to take over the trust fund, and on this being done was to receive remuneration at the rate of three-eighths per cent. per annum (or such less rate as might be agreed between the two companies) on the mean market value of the investments of the new company in consideration of its providing that company with all secretarial, registration and management services and office accommodation. By arrangement with the other directors Mr. McCurdy had rendered special and valuable services to the company in connexion with the unit trust and in particular had devised the scheme embodied in the trust deed, settled the trust deed, prepared prospectuses of and advertisements for sale of units, negotiated the sale of units exceeding one million in number and underwritten a large number of units on a public issue thereof. He had also purchased and paid for 158,904 deferred units in his own name or in the names of other parties.

In the agreement, the company recognised that the services rendered by Mr. McCurdy to the company were special services outside his ordinary duties as director within the articles of association and the directors agreed to pay him the following special remuneration: (i) £3,000, being an amount equal to the service charge included in the purchase price of the deferred units purchased by Mr. McCurdy less the standard rate of commission allowed to him on the purchase of the units; (ii) after deducting twenty per cent. from the management remuneration as an agreed contribution towards the cost of the management of the unit trust for the appropriate distribution period, so much of the balance as bore to the whole of the balance the same proportion as 158,904 bore to the total number of deferred units in issue at the end of the last day of each distribution period. The proportion of the management remuneration already received was to be paid to Mr. McCurdy forthwith, and the proportion of the management remuneration subsequently received to Mr. McCurdy, his executors, administrators or assigns within fourteen days of receipt of the remuneration.

If the new company took over the trust fund, Mr. McCurdy was to receive an equivalent proportion of the remuneration of three-eighths per cent. per annum or such less remuneration as was provided for, less the twenty per cent. deduction. But he was not to receive a greater proportion than one tenth of each payment made to the company in respect of management remuneration or remuneration after deduction therefrom of the twenty per cent. Sums payable to Mr. McCurdy under the agreement were to be deemed to be moneys had and received by the company for and on behalf of Mr. McCurdy, his executors, administrators or assigns. The trust deed provided that the trust should determine on Oct. 4, 1958, and it had continued throughout the years since Mr. McCurdy's death. The executors and trustees of Mr. McCurdy's will had received payments from the company under the agreement each year and the amounts so received coincided with the income tax assessments under Case III of Sch. D, subject to the effect of assessment on the preceding year's income.

The taxpayers contended that the payments were remuneration for Mr. McCurdy's services as a director of the company which could not be assessed under Case III of Sch. D by reason of the decision in *Gospel* v. *Purchase* (1) ([1951] 2 All E.R. 1071). The Crown contended that the payments were annual payments assessable under Sch. D on the trustees of Mr. McCurdy's will, and that on a proper construction the agreement provided for a series of payments to Mr. McCurdy during his lifetime and to his representatives after his death for the period of the existence of the trust, the payments being irrespective of the employment of Mr. McCurdy by the company or of his holding of the office of director of the company. The Special Commissioners held that from their inception the payments were not assessable under Sch. E and were therefore assessable under Sch. D, Case III, as annual payments which continued to be assessable after Mr. McCurdy's death. They therefore confirmed the assessments.

C. N. Beattie for the taxpayers.

C. P. Harvey, Q.C., and *A. S. Orr* for the Crown.

Cur. adv. vult.

Mar. 7. **VAISEY, J.**, read the following judgment: Two views may be taken of this case. The first is that it is extremely complicated and difficult, and the second is that, when analysed, it is fairly simple and easy. The former view is supported by the length and elaboration of the findings of the Special Commissioners, and the long and interesting arguments of counsel, for which I am much obliged. In inclining to the latter view of the case, I hope that I have not over-simplified it in this judgment. No oral evidence was called before the Special Commissioners, and the whole matter is contained in the Stated Case bearing date Nov. 4, 1957, to which reference may be made along with this judgment.

This is an appeal by the Westminster Bank, Ltd., representing as one of the trustees of his will the estate of the late Right Hon. C. A. McCurdy, K.C. They ask me to reverse the decision of the Special Commissioners confirming assessments to income tax made on them under Sch. D, in respect of certain annual payments for the four years 1950-51 to 1954-55 inclusive. The amounts of the annual payments were £372, £368, £101 and £14, so it will be seen that the total amount at stake is not very large. Mr. McCurdy died on Nov. 10, 1941.

These, briefly, are the facts. By an agreement made on Dec. 9, 1938, between Trust of Insurance Shares, Ltd. (now Bank Trust Corporation, Ltd.) of the one part, and Mr. McCurdy of the other part, it was provided, first, that Mr. McCurdy should receive from the said company a sum of £3,000; and, secondly, that periodical payments should be made to him, his executors, administrators or assigns during a period which will shortly come to an end, namely, Oct. 4, 1958. The consideration for the contract was the performance by Mr. McCurdy of certain special services to the company, rendered by him in his office of chairman A of its board of directors.

It seems to me that Mr. McCurdy was taxable under Sch. E in respect of the £3,000, and under Sch. D (or perhaps Sch. E) in respect of the annual payments which fell due during his lifetime. It was suggested that Mr. McCurdy could, and perhaps should, have been charged under Sch. E on the value of the total benefits accruing to him under the said agreement, estimated, presumably, as at B the date of the agreement. This did not happen, and it seems to me most unlikely, for surely it could not be suggested that such an assessment would free Mr. McCurdy, and also his executors, administrators and assigns from all further claims for income tax in respect of the annual payments. The case of *Gospel* v. *Purchase* (1) ([1951] 2 All E.R. 1071) is, in my opinion, a very different case.

As I view the position, the company gave to Mr. McCurdy a contract under C which the annual sums in question were payable to his executors, administrators or assigns subject to tax under Sch. D. In other words, the benefit which he received from the company was a contract for the payment of periodical sums of indeterminate amounts which were always subject to and never free from tax. Even if the annual sums payable during Mr. McCurdy's life were in strictness, as they came to his hands, taxable under Sch. E, I cannot see how that D could affect the liability to tax of the actual recipients of the same sums after his death. His sequels in title, whether testamentary (executors) or statutory (administrators) or arising from an act inter vivos (assigns) are, in my judgment, liable to tax under Sch. D, and it makes no difference that historically the sums originated from services rendered by Mr. McCurdy in his office of director. The four sums now in question are annual payments arising under a contract— E that is under the agreement of Dec. 9, 1938—and it was to that agreement, rather than to Mr. McCurdy's services as director, that those payments were attributable. In other words, the consideration for the contract was the services of Mr. McCurdy, and the consideration for the payments was the contract, which itself by its independent vitality "generated income" (cp. *Gospel* v. *Purchase* (1), [1951] 2 All E.R. at p. 1075). In my judgment, the assessments were F properly made, and this appeal fails.

Appeal dismissed.

Solicitors: *Rhys Roberts & Co.* (for the taxpayers); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

A

BRITISH LAND CO., LTD *v.* HERBERT SILVER (MENSWEAR), LTD.

[Court of Appeal (Hodson and Pearce, L.JJ., and Upjohn, J.), February 11, 12, 13, March 6, 1958.]

B *Rent Restriction—"Dwelling-house"—Premises containing shop and dwelling accommodation—Sub-tenancy of dwelling accommodation for residential purposes—New lease of premises subject to sub-tenancy—Whether letting subject to Rent Acts—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5 *c.* 17), *s.* 1, *s.* 12 (2)*—Rent and Mortgage Interest Restrictions Act,* 1939 (2 *&* 3 *Geo.* 6 *c.* 71), *s.* 3 (1), (3).

C Premises at Godalming, Surrey, comprised a shop and living accommodation, and were assessed at £66 rateable value. They were let on lease at a rent of £90 per annum to a lessee, who had sub-let the living accommodation with the landlords' consent. The lessee sold her business to a purchaser conditionally on obtaining and assigning to the purchaser a new lease of the premises for some fifteen years at a rent of £325 per annum. In 1955 the lessee obtained the new lease which, it was conceded, was subject to and with D the benefit of the sub-letting of the residential accommodation. The lease was duly assigned to the purchaser. Subsequently the purchaser alleged that the letting of the premises was subject to the Rent Acts and refused to pay rent in excess of £90 per annum, which was agreed to be the recoverable rent if the Acts applied. It was conceded that the shop and the living accommodation could not be regarded as separate entities for the purposes E of the Rent Acts.

Held: the Rent Acts applied to the premises because the lease of 1955 admittedly carried the benefit of the sub-tenancy of the residential accommodation, which showed that the use of that part of the premises as a dwelling-house was contemplated, and the premises were, therefore, having regard particularly to s. 3 (3) of the Rent and Mortgage Interest Restrictions F Act, 1939, let as a separate dwelling within s. 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by the Act of 1939.

Dictum of Evershed, L.J., in *Wolfe* v. *Hogan* ([1949] 1 All E.R. at p. 574), which was cited with approval by Jenkins, L.J., in *Levermore* v. *Jobey* ([1956] 2 All E.R. at p. 367), applied.

G Appeal dismissed.

[**Editorial Note.** The decision in the present case remains relevant to the application of the Rent Acts to premises containing shop and living accommodation, but the particular premises with which the decision was concerned will have been decontrolled by the Rent Act, 1957, s. 11. The decision may, perhaps, H conveniently be considered with, in addition to the cases mentioned above, *Whiteley* v. *Wilson* ([1952] 2 All E.R. 940) where the Court of Appeal rejected the question of the dominant user of the premises as the test whether or not they were within the Rent Acts.

As to rent restriction affecting premises used partly for business purposes, see 20 Halsbury's Laws (2nd Edn.) 315, para. 371; and for cases on the subject, see 31 Digest (Repl.) 647-649, *7517-7527*.

I For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 1, s. 12 (2), see 13 Halsbury's Statutes (2nd Edn.) 982, 1004; and for the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1) (3), see ibid., 1077, 1078.]

Cases referred to:

(1) *Rofe* v. *Sidney Macfarlane, Ltd.*, (Nov. 12, 1956, C.A.), not reported.

(2) *Anspatch* v. *Charlton Steam Shipping Co., Ltd.*, [1955] 1 All E.R. 693; [1955] 2 Q.B. 21; 3rd Digest Supp.

(3) *Carter* v. *S.U. Carburetter Co.*, [1942] 2 All E.R. 228; [1942] 2 K.B. 288; 111 L.J.K.B. 714; 167 L.T. 248; 31 Digest (Repl.) 634, *7429*.

(4) *Ebner* v. *Lascelles*, [1928] 2 K.B. 486; 97 L.J.K.B. 497; 139 L.T. 140; 92 J.P. 114; 31 Digest (Repl.) 649, *7531*.

(5) *Whitty* v. *Scott-Russell*, [1950] 1 All E.R. 884; [1950] 2 K.B. 32; 31 Digest (Repl.) 645, *7507*.

(6) *Levermore* v. *Jobey*, [1956] 2 All E.R. 362; 3rd Digest Supp.

(7) *Wolfe* v. *Hogan*, [1949] 1 All E.R. 570; [1949] 2 K.B. 194; 31 Digest (Repl.) 640, *7477*.

(8) *Capital & Provincial Property Trust, Ltd.* v. *Rice*, [1951] 2 All E.R. 600; [1952] A.C. 142; 3rd Digest Supp.

(9) *Prout* v. *Hunter*, [1924] 2 K.B. 365; *affd.* C.A. [1924] 2 K.B. 736; 93 L.J.K.B. 993; 132 L.T. 193; 31 Digest (Repl.) 639, *7467*.

Appeal.

The landlords appealed against an order of His Honour JUDGE RAWLINS made in Reading County Court on Nov. 11, 1957, dismissing the landlords' action for arrears of rent alleged to be due from the tenants in respect of premises, No. 14, High Street, Godalming, Surrey, and allowing the tenants' counterclaim for repayment of rent alleged to be overpaid; and declaring that the standard rent of the premises under the Rent Acts was £90 per annum. The grounds of appeal were that the letting of the premises comprised in a lease dated May 4, 1955, between the landlords and Elsie Jane Daniels was not a letting subject to the Rent Acts, 1920 to 1939. The grounds on which the tenants supported the county court judge's decision were (i) that the letting of the premises was subject to the Acts; (ii) that the tenants as assignees of the lease of the premises were entitled to rely on the provisions of the Acts relating to standard rent and that the state of affairs existing between them and the landlords and whether or not the tenants were able to occupy the premises residentially were irrelevant matters; and (iii) that, accordingly, and on the true construction of s. 1 and s. 12 (1) (a) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and of s. 3 (1) and (3) of the Rent and Mortgage Interest Restrictions Act, 1939, the county court judge was right in deciding that the standard rent of the premises was £90 and the tenants were entitled to rely on the provisions of the Acts relating to standard rent.

R. E. Megarry, Q.C., and *P. V. Baker* for the landlords.
G. G. Baker, Q.C., and *R. B. Willis* for the tenants.

Cur. adv. vult.

Mar. 6. **HODSON, L.J.:** The judgment of the court will be read by UPJOHN, J.

UPJOHN, J.: This is an appeal from the judgment delivered on Nov. 11, 1957, by His Honour JUDGE RAWLINS at Reading, who decided in favour of the tenants that certain premises were within the protection of the Rent Acts. He ordered repayment of rent paid in excess of the standard rent. The premises in question consist of a two-storey building at 14, High Street, Godalming, in the county of Surrey. The ground floor consists of shop premises and at the back residential accommodation consisting of a kitchen, bathroom and water closet. There is a connecting door between the shop and the residential accommodation. On the first floor there is a living room and three bedrooms reached by a staircase from the residential part of the ground floor accommodation. The landlords concede that, for the purposes of the Rent Acts, the business and residential parts of the premises cannot be treated as separate entities.

In July, 1947, the landlords purchased the freehold of the whole of the premises subject to and with the benefit of a lease of the same for a term of years which was due to expire on June 24, 1956, at a rising rent which at all material times was £90 per annum. At the time of this purchase the lessee (an assign of the original lessee) was a Miss Daniels, and she carried on on the shop part of the premises the business of a ladies' outfitter. The residential part of the premises was let to a sub-tenant who went out of possession in or before the year 1952. On Feb. 2, 1953, Miss Daniels, with the consent of the landlords, let the residential part of the premises to one Emily Medland on a weekly tenancy at an inclusive rent of £1 per week. Miss Medland is still in occupation as a contractual tenant on the terms of that tenancy. By an agreement in writing dated Feb. 10, 1955, Miss Daniels agreed to sell to the tenants the goodwill of the business carried on by her on the premises and certain fixtures and fittings for the sum of £1,685. The agreement was expressed to be conditional on Miss Daniels obtaining from the landlords a new lease of the premises at a rent of £325 for a term of fifteen and a half years from Dec. 25, 1954.

This condition was fulfilled; the existing lease was surrendered and on May 4, 1955, the landlords granted a new lease to Miss Daniels. Clause 1 was, so far as relevant, in these terms:

> " 1. In consideration of the rents hereinafter reserved and of the covenants on the part of the lessee hereinafter contained the company hereby demise unto the lessee all that messuage or shop and premises situate and being No. 14 High Street Godalming in the county of Surrey as the same is in the occupation of the lessee."

Then followed certain exceptions and reservations, and the clause continued:

> " To hold the premises hereby demised unto the lessee from Dec. 25, 1954, for the term of fifteen years and six months of another year yielding and paying therefor during the said term yearly and proportionately for any fraction of a year the rent of £325 such rent to be paid without any deduction except for landlord's property tax by equal quarterly instalments in advance on the usual quarter days the first of such instalments to become due and payable on the signing hereof."

Clause 2 contained a number of repairing and other covenants, and sub-cl. (21) contained certain covenants restrictive of user, but, as it has not been suggested that in the circumstances mentioned in a moment it prohibits the lessee or her sub-tenants from using the residential part as living accommodation, we need not read it.

It is at once obvious that the subject-matter of the demise of May 4, 1955, was not free from ambiguity, and the landlords in fact pleaded that the residential part of the premises in the occupation of Miss Medland was not included in the demise. That plea was, however, abandoned before the learned county court judge; and counsel for the landlords concedes that the demise did include the residential part of the premises subject to and with the benefit of Miss Medland's weekly tenancy, and the lease must either be so construed, or, alternatively, for the purposes of this case be rectified accordingly. That, however, is without prejudice to the question, should it ever arise, whether as against the landlords Miss Medland is entitled to the protection of the Rent Acts. Clearly she is so entitled as against Miss Daniels and her successors in title, the tenants, to whom the premises were, in accordance with the agreement of Feb. 10, 1955, assigned on June 25, 1955, with the written consent of the landlords.

The transaction into which the tenants entered was from start to finish a business transaction with no doubt the rent of £325 negotiated principally on the suitability of the site as business premises but having regard to the profit rental of £52 per annum, yet on Sept. 19, 1956, they wrote claiming that the premises were subject to the Rent Acts and that they were entitled to be repaid the difference between the rent of £325 and the standard rent or to set off the excess against future rent. The tenants' claim is utterly without any merit, but they are entitled to take the point and, if it is established, to relief accordingly. The tenants refused to pay more than the standard rent, so on Mar. 8, 1957, the landlords issued a plaint in the county court claiming arrears of rent due by the terms of the lease; and the tenants counterclaimed for rent allegedly overpaid.

The parties have either agreed or it is conceded that: (i) if the demised premises were rent controlled they were first controlled by the Rent and Mortgage Interest Restrictions Act, 1939, and the standard rent for the purposes of the Acts is £90 per annum; (ii) at all material times the rateable value of the demised premises was £66; and (iii) so far as the future is concerned, the demised premises will in any event become decontrolled by the Rent Act, 1957. There is, therefore, no issue before the court on the figures.

We must now refer to some sections of the Rent Acts. The tenants' claim depends on s. 1 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which, as amended by the Rent and Mortgage Interest Restrictions Act, 1939, and omitting references to mortgage interest, reads as follows:

> " Subject to the provisions of this Act, where the rent of any dwelling-house to which this Act applies . . . has been, since Sept. 1, 1939, or is hereafter, increased, then, if the increased rent . . . exceeds by more than the amount permitted under this Act the standard rent . . . the amount of such excess shall, notwithstanding any agreement to the contrary, be irrecoverable from the tenant . . ."

Section 12 (2) so far as relevant is in these terms:

> " This Act shall apply to a house . . . let as a separate dwelling, where either the annual amount of the standard rent or the rateable value does not exceed . . . (c) elsewhere, £78; and every such house or part of a house shall be deemed to be a dwelling-house to which this Act applies."

By s. 14 of the Act of 1920 sums which are irrecoverable by virtue of the Act, if paid, may be recovered from the landlord or deducted from any rent payable by the tenant. Section 16 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, further defined " dwelling-house " in these terms:

> " ' Dwelling-house ' has the same meaning as in the principal Acts, that is to say, a house let as a separate dwelling or a part of a house being a part so let."

The last Act to which we must refer is the Rent and Mortgage Interest Restrictions Act, 1939. Section 3 (1) applied the Rent Acts to every dwelling-house outside London or Scotland where the rateable value did not exceed £75. Section 3 (3) is important and is so far as relevant in these terms:

> ". . . the application of the principal Acts, by virtue of this section, to any dwelling-house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade or professional purposes . . ."

The question which has to be answered is really a very short one. Bearing in mind s. 3 (3) of the Act of 1939, can these premises be properly described for the purposes of the Rent Acts as a house let as a separate dwelling or part of a house being a part so let?

Counsel for the landlords argued that this letting could not properly be regarded as a letting of premises as a dwelling-house at all. The lease to Miss Daniels was essentially a lease of business premises. He illustrated his point in this way. Any estate agent, he said, wanting to introduce a purchaser to the property would seek out some one interested in business premises and business premises only. He would offer them as such, adding that there was £1 a week coming in as the rent of controlled premises. The rent to be paid, he argued, would be negotiated solely in relation to the business part of the premises bearing in mind that it was producing an income of £52 per annum. No one, he submitted, could regard such a letting as the letting of premises " as a separate dwelling-house ". Indeed, he contended that no one could sensibly say that it was a letting of a dwelling-house as such when in fact the premises were already let to a separate residential tenant. As we understand counsel's argument, it essentially depends on the fact that in this case there was a sitting tenant in rent-controlled premises at the time of the lease. He concedes that, if at the date of the lease the residential part of the premises had been vacant, leaving it open to the tenants to instal a manager there or with the consent of the landlords to sub-let that accommodation, he could not escape the conclusion that the premises would be properly described as premises let as a separate dwelling-house and, therefore, subject to control. That was expressly decided in this court on Nov. 12, 1956, in the unreported case of *Rofe* v. *Sidney Macfarlane, Ltd.* (1) (Nov. 12, 1956).

Counsel for the tenants submitted that one must look at the actual facts and see for what purpose as to user the premises were let. One finds that, construing the lease in the manner already mentioned, in this case a letting of property " as a separate dwelling " for the parties contemplated continued user of the residential part of the premises as such. It cannot matter, he submitted, whether there was a sitting tenant or not. One cannot change the nature of the letting or of the premises merely because a tenant is already in occupation. He further submitted that this case was covered by the decision of this court in *Anspatch* v. *Charlton Steam Shipping Co., Ltd.* (2) ([1955] 1 All E.R. 693). He pointed out (and in our judgment it must be taken as clearly settled by authority binding on this court) that, so far as the Rent Acts affect the recovery of rent due under a contractual tenancy, they apply as well to the case when a company is the tenant as to the case of an individual, although the company is incapable of enjoying personal occupation but can only do so through its servants, agents, licensees or sub-tenants (*Carter* v. *S.U. Carburetter Co.* (3), [1942] 2 All E.R. 228; *Anspatch* v. *Charlton Steam Shipping Co., Ltd.* (2)). That, in our judgment, is indeed only one example of the wider proposition that, to secure the protection of the Acts during the subsistence of a contractual tenancy, it is not necessary to show that the tenant either intended to occupy or in fact occupied the premises personally (*Ebner* v. *Lascelles* (4), [1928] 2 K.B. 486; *Whitty* v. *Scott-Russell* (5), [1950] 1 All E.R. 884).

There was some discussion before us as to the moment of time at which the issue whether the premises are let as a separate dwelling-house must be decided. When suing for rent unpaid or for excess rent overpaid, the latest time would seem to be the date of the issue of the plaint when the cause of action must have accrued. It is quite different from a claim for possession. As there has been no change in the circumstances between the letting in 1955 and the issue of the plaint in 1957, it seems unnecessary to say more on this subject.

A long line of authorities, for the most part in this court, has established that, on the issue whether the premises are let as a separate dwelling, one must look to the bargain made between the parties and see for what purpose the parties intended that the premises would be used. The first place to ascertain their intentions is in the lease itself. If that does not provide an answer, one looks to all the surrounding circumstances and see what must have been in the contemplation of the parties; if that yields no solution, one must look to the nature of the premises and the actual user at the relevant time. All the earlier authorities have been very recently reviewed in this court by JENKINS, L.J., in *Levermore* v. *Jobey* (6) ([1956] 2 All E.R. 362) and we do not propose to refer to them again but will content ourselves with one sentence from Mr. MEGARRY's book on the RENT ACTS (4th Edn.), p. 19, which was approved by EVERSHED, L.J., in *Wolfe* v. *Hogan* (7) ([1949] 1 All E.R. 570 at p. 574):

> " Where the terms of the tenancy provide for or contemplate the use of the premises for some particular purpose, that purpose is the essential factor, not the nature of the premises or the actual use made of them."

This part of the judgment of EVERSHED, L.J., was quoted by JENKINS, L.J., with

approval in *Levermore* v. *Jobey* (6) ([1956] 2 All E.R. at p. 367), and the quotation A
from Mr. MEGARRY's book has been approved on at least two other occasions in this court (see MEGARRY, RENT ACTS (8th Edn.), p. 58). Applying that test to this letting, it seems clear that there can only be one answer. The demised premises included the residential part of the premises; the lease (construing it, as admittedly it must be construed, as subject to and with the benefit of Miss Medland's tenancy) plainly contemplated that such part would be used as a B
separate dwelling-house. Bearing in mind s. 3 (3) of the Act of 1939, that provides an affirmative answer to the question: Were the premises let as a separate dwelling-house?

In our judgment, the only relevance of the fact that at the time of the demise the residential part of the premises was occupied by a sitting tenant on a rent-controlled tenancy is that in this case it affords conclusive evidence as to the C
intentions of the parties. It is otherwise irrelevant.

No doubt the parties reasonably regarded the arrangements made in 1955 between the landlords, Miss Daniels and the tenants as a purely business transaction relating to business premises with the benefit of a rent-controlled tenancy bringing in £52. The landlords' argument, however, overlooks the point that the transaction in fact involved the demise of a dwelling-house, albeit with the D
benefit of a sub-demise with the intention that it should be used as such. We agree with the county court judge when he said in reference to the argument of counsel for the landlords that

> "the fact that the tenants had no immediate right to the residential portion of the premises does not prevent the premises from being let as a dwelling-house." E

We agree with counsel for the landlords that *Anspatch* v. *Charlton Steam Shipping Co., Ltd.* (2) does not cover this case, because, as the learned county court judge pointed out in his judgment, it was a decision on s. 12 (1) of the Act of 1920 made on an application to fix the standard rent. It has been settled by the House of Lords that the standard rent may be fixed by reference to rent paid F
when the premises are not controlled: *Capital & Provincial Property Trust, Ltd.* v. *Rice* (8) ([1951] 2 All E.R. 600).

Nevertheless, in view of the argument of counsel for the landlords, some of the observations of DENNING, L.J., in *Anspatch* v. *Charlton Steam Shipping Co., Ltd.* (2) are of some persuasive force. In that case certain premises were subject to an existing furnished tenancy in 1940. The owners granted a five years' lease of G
the flat subject to and with the benefit of the furnished tenancy to a property company. DENNING, L.J., said this ([1955] 1 All E.R. at p. 696):

> " Counsel's third point was that the lease in 1940 was in its nature a letting for business purposes, it was a business transaction not within the Acts. I cannot agree. The lease was a letting of a dwelling-house as a separate dwelling, and it is not deprived of that character simply because the lessee H
> was a limited company who could only occupy by servants or agents or by sub-tenants. This is in accord with the view expressed by BAILHACHE, J., in *Prout* v. *Hunter* (9) ([1924] 2 K.B. 365 at p. 370), by CHARLES, J., in *Ebner* v. *Lascelles* (4) ([1928] 2 K.B. at p. 501), and it is implicit in *Carter* v. *S.U. Carburetter Co.* (3)."

In our judgment the learned county court judge reached a perfectly correct I
conclusion, and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Russell, Sons & Bass* (for the landlords); *Cunliffe & Mossman*, agents for *Hewitt & Pim*, Reading (for the tenants).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

MIGUEL SANCHEZ & COMPANIA S.L. *v.* OWNERS OF RESULT (NELLO SIMONI, LTD., Third Party). THE RESULT.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), March 7, 1958.]

Practice—Parties—Adding persons as parties—Third party—Third party intending to dispute basis of plaintiff's claim and to counterclaim—Whether jurisdiction to join third party as co-defendant—R.S.C., Ord. 16, *r.* 11.

The third party agreed to purchase from the plaintiffs, a Spanish company, seven thousand cases of oranges f.o.b. Almeria (a port in Spain), payment by the third party to be by irrevocable letter of credit. The third party chartered the defendants' ship, Result, and nominated that and another ship, Juno, each to load three thousand five hundred cases and carry them to England. One thousand cases only were loaded on board the Result under a bill of lading dated Nov. 16, 1957; no cases were loaded on board the Juno. On the arrival in England of the Result the defendants delivered the thousand cases to the third party. The plaintiffs brought an action in rem against the Result claiming that the defendants were in breach of the contract under the bill of lading in that they delivered the oranges to the third party without production of the bill of lading and without the authority of the plaintiffs, or alternatively that by so delivering them the defendants were guilty of conversion. The defendants pleaded that the plaintiffs in shipping the oranges acted only as agents for the third party and that the bill of lading was not a contractual document. The defendants also obtained leave to issue a third-party notice claiming to be indemnified by the third party in the event of their being found liable to the plaintiffs. The third party now applied under R.S.C., Ord. 16, r. 11, to be joined as defendant so as to counterclaim against the plaintiffs in respect of the plaintiffs' alleged breach of contract in failing to ship the further six thousand boxes of oranges whereby the third party suffered loss of freight and of profit.

Held: there was not jurisdiction to order the third party to be added as a defendant, because the action was not (in the words of R.S.C., Ord. 16, r. 11) " liable to be defeated by reason of the nonjoinder " of the third party for the following reasons—

(i) though the proprietary rights of the third party in the one thousand cases of oranges would be affected by the order sought by the plaintiffs in the action, yet it was not necessary to add the third party as a defendant in order to adjudicate on all questions in the action, since the third party was entitled to be heard as such and to contest the plaintiffs' claim to be owners of the one thousand cases, and,

(ii) the third party's real desire was to assert a counterclaim in respect of oranges not shipped (which were not the subject of the action), and it was not necessary to add the third party as a defendant in order to enable it to protect its legal rights in relation to the one thousand cases of oranges (which alone were the subject of the action) since the third party had had the one thousand cases.

Amon v. *Raphael Tuck & Sons, Ltd.* ([1956] 1 All E.R. 273) applied.

[As to joinder of defendants, see 26 HALSBURY'S LAWS (2nd Edn.) 19-21, paras. 16, 17; and for cases on the subject, see DIGEST (Practice) 429-431, *1243-1266*.]

Cases referred to:

(1) *Amon* v. *Raphael Tuck & Sons, Ltd.*, [1956] 1 All E.R. 273; [1956] 1 Q.B. 357; 3rd Digest Supp.

(2) *Moser* v. *Marsden*, [1892] 1 Ch. 487; 61 L.J.Ch. 319; 66 L.T. 570; Digest (Practice) 423, *1194*.

(3) *Montgomery* v. *Foy, Morgan & Co.*, [1895] 2 Q.B. 321; 65 L.J.Q.B. 18; 73 L.T. 12; 40 Digest 413, *354*.

(4) *Byrne* v. *Brown & Diplock*, (1889), 22 Q.B.D. 657; 58 L.J.Q.B. 410; 60 L.T. 651; Digest (Practice) 425, *1207*. A

(5) *Dollfus Mieg et Compagnie S.A.* v. *Bank of England*, [1950] 2 All E.R. 605; [1951] Ch. 33; 2nd Digest Supp.

Appeal.

This was an appeal by the plaintiffs, the shippers, against an order made by the Admiralty Registrar on Feb. 14, 1958, whereby it was ordered that the third B party be added as co-defendant in an action in rem brought by the plaintiffs and that the writ of summons be amended accordingly. In their statement of claim the plaintiffs alleged that under a bill of lading dated in Almeria, Nov. 16, 1957, and issued by or on behalf of the defendants the plaintiffs shipped on board the defendants' vessel Result for carriage to Portsmouth one thousand cases of oranges the property of the plaintiffs; and that by the contract so evidenced the C defendants undertook to deliver the goods to the order of the plaintiffs or their assigns but in breach of their contract the defendants delivered the goods to the third party, without the plaintiffs' authority on the arrival of the vessel at Portsmouth. In the alternative the plaintiffs alleged that by the delivery of the goods to the third party the defendants converted the goods, and the plaintiffs claimed damages. The facts concerning the issue of the third-party notice and D the substantive ground of defence, appear in the judgment.

The appeal was heard in chambers on Feb. 24, 25, 1958, and adjourned into court for judgment.

H. V. Brandon for the plaintiffs.

Sebag Shaw and *A. E. Bolton* for the third party.

Cur. adv. vult. E

Mar. 7. **WILLMER, J.**, read the following judgment: The plaintiffs claim in rem against the defendants' vessel Result under a bill of lading, dated in Almeria Nov. 16, 1957, and issued by or on behalf of the defendants, in respect of one thousand cases of oranges shipped on board the Result for carriage to Portsmouth. By their statement of claim, delivered on Jan. 11, 1958, the F plaintiffs allege that on the arrival of the vessel at Portsmouth the defendants, in breach of their contract under the bill of lading, delivered the oranges without production of the bill of lading, and without the authority of the plaintiffs, to the third party. Further or alternatively the plaintiffs allege that, by so delivering the oranges, the defendants were guilty of conversion.

On Jan. 23 the defendants obtained leave to issue a third-party notice, G whereby they claimed that, in the event of their being held liable for the plaintiffs' claim, they were entitled to be indemnified by the third party, on the ground that the delivery of the oranges to the third party was effected only in return for, and in consideration of, an undertaking in writing, whereby the third party agreed to indemnify them against all consequences of doing so. By their defence, delivered on Feb. 7, 1958, the defendants denied that they were under H any liability to the plaintiffs. The substantial defence sought to be set up is that contained in para. 4, whereby it is alleged that the plaintiffs, in shipping the oranges, acted only as agents for the third party, which was the charterer of the Result under a charterparty dated Oct. 25, 1957. It is alleged that in the circumstances the bill of lading was not a contractual document, under which the plaintiffs are entitled to claim, but that the defendants were entitled to I deliver the oranges direct to the third party.

On the same day as the defence was delivered, the summons in question herein was issued by the third party, asking for an order that the third party be added as co-defendant. In support of the summons an affidavit, sworn by Mr. Nello Simoni, a director of the third party, was filed. In his affidavit, Mr. Simoni deposes that the thousand cases of oranges, the subject of this action, were part of the subject-matter of a contract, made on, or about, Oct. 23, 1957, between the plaintiffs and the third party, whereby the third party agreed to purchase from the plaintiffs 6,000/7,000 boxes of oranges at a certain price f.o.b. Almeria. The Result was chartered by the third party to carry these cases of oranges, as well as other goods belonging to the third party, to the United Kingdom. Mr. Simoni further deposes that an agreement was made with a representative of the plaintiffs that payment for the oranges was to be made in part by an irrevocable credit to be opened by the third party in favour of the plaintiffs and that the balance should be paid in London within twenty-four hours of the goods being delivered in the United Kingdom. In pursuance of this arrangement the third party duly opened a credit in respect of three thousand five hundred cases of oranges, and cabled the plaintiffs nominating the Result to load these three thousand five hundred cases, and a vessel called the Juno to load another three thousand five hundred cases. A few days later, it is alleged, a further credit in similar terms was opened in respect of the further three thousand five hundred cases to be shipped on board the Juno. Mr. Simoni complains that only one thousand cases of oranges were in fact available to be shipped on board the Result, and none at all on the Juno. The plaintiffs, it is said, were thereby in breach of their contract, as a consequence of which it is claimed that the third party suffered damage, consisting of loss of freight and loss of profit on two thousand five hundred boxes not shipped on board the Result and loss of profit on three thousand five hundred boxes not shipped on board the Juno. Mr. Simoni concludes his affidavit by asking for an order that the third party should be added as defendant in the action, " so that they will be in a position to counterclaim against the plaintiffs ".

The summons was heard on Feb. 14, when the learned registrar made the order now appealed from. At the same time he issued third-party directions, whereby it was ordered inter alia that the third party should be at liberty to appear at the trial of the action and take such part as the judge should direct and be bound by the result of the trial. It was intimated to me by counsel for the plaintiffs that the plaintiffs do not accept as accurate Mr. Simoni's version of the arrangement made with regard to the terms of payment, but contend that the third party failed to open a credit in accordance with the arrangement which the plaintiffs say was made. It was, however, conceded that for the purposes of this summons I must proceed on the basis that the facts deposed to by Mr. Simoni are true. I was informed that at the hearing before the learned registrar the parties did not attend by counsel, and that the registrar heard only a brief argument, in the course of which none of the authorities was called to his attention. I have had the benefit of a very full argument by counsel for both the plaintiffs and the third party, in the course of which my attention has been called to a number of authorities, including the recent judgment of DEVLIN, J., in *Amon* v. *Raphael Tuck & Sons, Ltd.* (1) ([1956] 1 All E.R. 273) where all the previous authorities are reviewed. It is now contended on behalf of the plaintiffs (i) that in the circumstances of this case there is no jurisdiction to make an order, against the wish of the plaintiffs, adding the third party as defendant, and (ii), alternatively, if there is jurisdiction, it is a jurisdiction which the court, in the exercise of its discretion, ought not to exercise on the particular facts of this case.

The rule providing for the joinder of additional parties is R.S.C., Ord. 16, r. 11. It is not, I think, disputed that the third party is entitled to the order sought only if it can bring itself within the terms of that rule. The rule provides as follows:

> " No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court or a judge to be just, order that . . . the names of any parties, whether plaintiffs or defendants, who ought to have

> been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added . . . Every party whose name is so added as defendant shall be served with a writ of summons . . . and the proceedings as against such party shall be deemed to have begun only on the service of such writ . . ."

Having regard to the terms of the rule, it appears to me that the questions to be determined on this summons are these. First, is the cause or matter liable to be defeated by the nonjoinder of the third party as defendant? This, I think, means in effect: Is it possible for the court to adjudicate on the cause of action set up by the plaintiffs, unless the third party is added as defendant? Secondly, is the third party a person who ought to have been joined as defendant in the first instance? Thirdly, and alternatively, is the third party a person whose presence before the court as defendant will be necessary in order to enable the court effectually and completely to adjudicate on and settle all the questions involved in the cause or matter?

To each of these three questions the third party contends that the answer must be in the affirmative. As to the first question, it is contended that the real issue between the parties turns on the matters alleged in Mr. Simoni's affidavit, which not only affect the right of the third party to succeed on the counterclaim sought to be set up, but also govern the question as to the plaintiffs' right of property in the oranges, which lies at the root of the cause of action set up by them. In such circumstances it is argued that unless the third party is added as defendant, so that it can prove the facts alleged and set up its counterclaim, the cause or matter will be defeated. As to the second question, it is argued that the third party ought to have been joined as defendant in the first instance, in the sense that a plaintiff, who deliberately chooses not to join as a defendant a party against whom, if his version of the facts is true, he has a cause of action, must take the risk of an application by such party to be joined. As to the third question, it is contended that, for the reasons already given, the court cannot effectually and completely adjudicate on and settle all the questions involved in the cause or matter, unless the third party is added as defendant and given the opportunity of asserting its counterclaim in these proceedings.

Many of the authorities in which R.S.C., Ord. 16, r. 11, has been considered were cited to me in the course of the argument. I do not find it necessary to refer to them in detail in this judgment, for they were exhaustively reviewed by Devlin, J., only two years ago, in *Amon* v. *Raphael Tuck & Sons, Ltd.* (1). As pointed out by Devlin, J., the earlier authorities are by no means easy to reconcile, and broadly speaking it is true to say that two views have been expressed as to the scope of the rule. Devlin, J., himself, after reviewing the authorities, held himself bound by the decision of the Court of Appeal in *Moser* v. *Marsden* (2) ([1892] 1 Ch. 487), to decide in favour of what he called the narrower construction of the rule. This involved that he was unable to follow certain dicta, notably of Lord Esher, M.R., in *Montgomery* v. *Foy, Morgan & Co.* (3) ([1895] 2 Q.B. 321), and *Byrne* v. *Brown & Diplock* (4) ((1889), 22 Q.B.D. 657), in which a wider and more liberal view of the construction of the rule was expressed. Having read and re-read the very full judgment of Devlin, J., it is sufficient for me to say that I am in agreement with his analysis of the decided cases, and am content to follow his view as to the true construction of the rule, with which I am happy to express my agreement. My difficulty is to apply the provisions of the rule, as so construed, to the particular facts of this case, which seem to me to raise questions rather different from those that have arisen in any of the decided cases.

In seeking to apply the rule, it is useful, I think, to start by reminding oneself of what Lindley, L.J., in *Moser* v. *Marsden* (2), described as the key to it. In that case, he said ([1892] 1 Ch. at p. 490):

> A "In order to properly understand the rule we must look at the whole of it. It begins by saying, 'No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties'—that is the key to the whole section: if the court cannot decide the question without the presence of other parties, the cause is not to be defeated . . ."

B That observation may be read in conjunction with the useful note which appears in the ANNUAL PRACTICE, among the notes to R.S.C., Ord. 16, r. 1 (1958 Edn. at p. 324), and which was referred to with approval by WYNN-PARRY, J., in *Dollfus Mieg et Compagnie S.A.* v. *Bank of England* (5) ([1950] 2 All E.R. 605 at p. 608). The note says:

> "Generally in common law and Chancery matters a plaintiff who C conceives that he has a cause of action against a defendant is entitled to pursue his remedy against that defendant alone. He cannot be compelled to proceed against other persons whom he has no desire to sue . . . Generally speaking, intervention can only be insisted upon in three classes of case, namely: (A) In a representative action where the intervener is one of a class whom plaintiff claims to represent . . . (B) Where the proprietary D rights of the intervener are directly affected by the proceedings . . . (C) In actions claiming the specific performance of contracts where third parties have an interest in the question of the manner in which the contract should be performed."

It is not suggested that the facts of this case fall within class (A) or class (C). E As to class (B), within which the third party must bring this case if it is to succeed, it is, I think, proper to observe that (though this has apparently not so far been noted by the learned editors of the ANNUAL PRACTICE) the ambit of the class has been materially widened as a result of the decision of DEVLIN, J., in *Amon* v. *Raphael Tuck & Sons, Ltd.* (1); the effect of this decision is to include any case in which the order for which the plaintiff asks directly affects the intervener, F not in his commercial interests, but in the enjoyment of his legal rights—see [1956] 1 All E.R. at p. 290.

Applying this test, I do not see how it is possible to avoid the conclusion that the order asked for by the plaintiffs in this case does affect the third party in the enjoyment of its legal rights. It is alleged by the plaintiffs in para. 1 of the statement of claim that the thousand cases of oranges in dispute were the G property of the plaintiffs. This is an allegation which the plaintiffs will have to prove if they are to succeed on their claim; but it is an allegation which, I am assured by counsel for the third party, it is concerned to dispute; the third party wishes, I am told, to contend that the property in the oranges had passed to it. I am bound to say that Mr. Simoni's affidavit is singularly uninformative on this aspect of the case. It contains no specific allegation that the property had H passed, nor does it set out any facts from which the court could be invited to infer that the property had passed. Nor indeed does it in terms disclose any desire on the part of the third party to be heard on the plaintiffs' claim to be the owners of the oranges. I think, however, that counsel for the third party was justified in his submission that, although not stated in terms, it is implicit in the affidavit of Mr. Simoni that, according to his contention, the property had passed. I At all events, I am prepared to give the third party the benefit of the doubt and on that basis it seems clear to me that the plaintiffs' claim is one that does affect the third party in the enjoyment of its legal rights.

However this, in my judgment, does not conclude the matter. I still have to consider whether the third party is a person which it is necessary to add as defendant in order to enable the court effectually and completely to adjudicate on and settle all the questions involved in the cause or matter. I agree with the observation of DEVLIN, J., in *Amon* v. *Raphael Tuck & Sons, Ltd.* (1) ([1956] 1 All E.R. at p. 287) that:

> "The only reason which makes it *necessary* to make a person a *party* to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party."

Here the third party is already a party to the action and under the terms of the third-party directions it is at liberty to appear at the trial and take such part as the judge shall direct. If the third party does desire to contest the plaintiffs' claim to be the owners of the thousand cases of oranges, this is a matter on which it will already have the right to be heard at the trial, and it will be bound by the result. It was submitted by counsel for the third party that the fact of his client being already third party to the action is an entirely irrelevant consideration when the question at issue is one of jurisdiction. I cannot agree. The jurisdiction to add defendants depends on the rule, and the rule permits them to be added only when it is necessary to enable the court effectually and completely to adjudicate on and settle all the questions involved in the cause or matter. So far as concerns the plaintiffs' claim in respect of the thousand cases of oranges the court is already in a position to do this with the action constituted as it is at present.

If that were all, it would be an end of the matter; but I have yet to consider the counterclaim which the third party desires to put forward against the plaintiffs. It was very properly conceded by counsel for the plaintiffs that, if the order asked for by the plaintiffs would directly affect the third party in the enjoyment of its legal rights, it would not matter that the method sought to be adopted by the third party to protect such legal rights was by way of counterclaim against the plaintiffs. But the counterclaim must be such as will serve to protect the legal rights threatened by the plaintiffs' action. I agree with the submission of counsel for the plaintiffs that the mere assertion of a counterclaim, in respect of matters which happen to be connected with the subject-matter of the original claim, does not make it necessary to add the third party as defendant, unless the legal rights sought to be asserted by the counterclaim are rights which are directly affected by the plaintiffs' claim. If the third party was seeking to assert a counterclaim in respect of the thousand cases of oranges which form the subject of the plaintiffs' claim, then I apprehend it might well be necessary to add it as defendant, so as to enable it to protect its legal rights in relation to the oranges the subject-matter of the plaintiffs' claim. Suppose, for example, that the thousand cases of oranges with which the plaintiffs' claim is concerned had been delivered, not to the third party, but to some other person, e.g., a warehouseman. If the third party desired to assert a claim to the oranges, in opposition to the plaintiffs' claim, then I apprehend that there could be no question but that the third party ought to be added as defendant, so as to enable it to protect its rights by counterclaim. Such a case would be covered by the decision in *Montgomery* v. *Foy, Morgan & Co.* (3). Here, however, no such state of affairs exists. The third party has already had the oranges the subject of the plaintiffs' claim. Its only concern with these oranges is to defeat the plaintiffs' claim for damages, and on this question it is, as third party, already entitled to be heard.

The real desire of the third party, as plainly appears from the affidavit of Mr. Simoni, is to assert a counterclaim, not in relation to the thousand cases of oranges which were shipped, and which form the subject of the plaintiffs' claim, but in relation to the remaining six thousand cases, which were not shipped, and in respect of which it is alleged that the plaintiffs were in breach of their contract. It is true that, according to Mr. Simoni's affidavit, the six thousand cases that were not shipped were the subject-matter of the same contract under which it is alleged that the thousand cases, the subject of the plaintiffs' claim, were purchased; but otherwise there is no connexion between the six thousand cases, the subject-matter of the proposed counterclaim, and the thousand cases, the subject-matter of the plaintiffs' claim. The issue whether the plaintiffs were in breach of their contract in failing to ship the six thousand cases, and whether, if so, the third party is entitled to recover the alleged or any damages for such breach of contract, does not depend on any question as to the passing of the property in any of the oranges. Assuming that the third party is able to make good its allegation that the plaintiffs were in breach of their contract in failing to ship the further six thousand cases, the decision of that question will not in any way affect the issue whether the property in the thousand cases actually shipped passed to the third party, or whether the assertion of the plaintiffs' claim affects the third party in the enjoyment of its legal rights in relation to the subject-matter of that claim. The determination of the issue as to the plaintiffs' right to sue in respect of these thousand cases remains quite unaffected by the success or failure of the third party's proposed counterclaim. So far as the proposed counterclaim is concerned, therefore, this is an entirely different case from *Montgomery* v. *Foy, Morgan & Co.* (3), in which the proposed counterclaim did in fact relate to the same subject-matter as the plaintiffs' claim.

In these circumstances I am unable to see how the adding of the third party as defendant, so as to enable the third party to put forward its proposed counterclaim, is necessary so as to enable it to protect its legal rights in relation to the subject-matter of the plaintiffs' claim. Nor is it necessary in order to enable the court to adjudicate on and settle the questions involved in the cause or matter, which, as pointed out by DEVLIN, J., in *Amon* v. *Raphael Tuck & Sons, Ltd.* (1) ([1956] 1 All E.R. at p. 279) means " the action as it stands between the existing parties ". In these circumstances, in my judgment, the third party's application to be added as defendant must fail, because it is not shown that the cause or matter—i.e., the dispute arising in relation to the plaintiffs' claim—is liable to be defeated by the nonjoinder of the third party as defendant, nor is it shown to my satisfaction that the third party is a person which ought to have been joined as defendant in the first instance, or that its presence before the court, as defendant, is necessary to enable the court effectually and completely to adjudicate on and settle all questions involved in the cause or matter, within the meaning of the rule. I do not think that on any view it can be said that the third party is a person which ought to have been joined as defendant in the first instance. On this point I agree with the submission of counsel for the plaintiffs that the test is whether, under the old practice, a plea in abatement would lie. It is not to be forgotten that the remedy sought by the plaintiffs is a remedy in rem against the ship. This is a remedy which prima facie they are entitled to pursue, and I do not think that it can be said that the action is not properly constituted because it is brought only in rem against the ship.

It may be thought that this result produces the maximum of inconvenience—that it would be sensible and reasonable, and would save unnecessary costs, if the third party could be added as defendant, so that all the questions in issue between the parties can be dealt with at one and the same time. It is possible, of course, that the third party will be able to achieve this result in another way, e.g., by starting a fresh action against the plaintiffs and applying to consolidate, or at least to have the actions tried together. As to this I say nothing. I am dealing with this matter as a question of jurisdiction. Jurisdiction depends on the terms of the rule, and not on what I may or may not think would be a convenient course in all the circumstances. For the reasons which I have endeavoured to state, I hold that the third party's application is not within the rule, and that accordingly there is no jurisdiction to make the order asked for. The appeal will therefore be allowed, and the order made by the learned registrar set aside.

Order accordingly.

Solicitors: *William A. Crump & Son* (for the plaintiffs); *Roche, Son & Neale* (for the third party).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

COSTAGLIOLA *v.* BUNTING AND ANOTHER.

[NORWICH ASSIZES (Gorman, J.), February 12, 13, 17, 18, 1958.]

Agriculture—Agricultural holding—Notice to quit—Notice given to personal representatives—Reason stated that the late tenant had died within three months—Deceased was herself widow and executrix of original tenant—Whether executrix of tenant can be the tenant within Agricultural Holdings Act, 1948, (11 *&* 12 *Geo.* 6 *c.* 63), *s.* 24 (2) (*g*).

The plaintiff was the owner of agricultural land which had been leased by her predecessor in title to B. B. died in 1932 and his widow, who was his executrix, continued in possession of the land, which for some years had been worked by her sons, the defendants. She died on Mar. 8, 1956. On May 23, 1956, the plaintiff gave to the defendants notice to quit the land on a date in October, 1957. The notice stated that it was given in pursuance of s. 24 (2) (g)* of the Agricultural Holdings Act, 1948, and for the reason that the widow, the late tenant, had died within three months before the date of the giving of the notice. Accordingly, if the widow were a tenant " with whom the contract of tenancy was made " within s. 24 (2) (g), the defendants would be precluded from serving a counter-notice rendering the notice to quit ineffective under s. 24 (1)† unless the Minister consented to its operation. By s. 94 (1) of the Act " tenant " meant " the holder of land under a contract of tenancy, and includes the executors, administrators . . . of a tenant . . ." In June, 1956, the defendants gave a counter-notice under s. 24 (1). It was not alleged that the Minister's consent had been obtained.

Held: B.'s widow was not at any time a tenant " with whom the contract of tenancy was made " within the meaning of s. 24 (2) (g) of the Agricultural Holdings Act, 1948, although she was the tenant of the land within the meaning of s. 94 (1) of the Act; therefore the notice to quit was ineffective under s. 24 (1) of the Act.

[For the Agricultural Holdings Act, 1948, s. 24, see 28 HALSBURY'S STATUTES (2nd Edn.) 46.]

Action.

The plaintiff, Mrs. Costagliola, was the owner of two parcels of land at Terrington St. John, Norfolk, one of which was situate at Middle Gates Lane (hereinafter called " Middlegate ") and the other at Church Lane (hereinafter called " Church Lane "). By memorandum of agreement dated Aug. 19, 1914, Church Lane was leased by the plaintiff's predecessor in title, Captain Monson, to one John Bunting. On his death in 1932, Sarah Bunting, who was his executrix, remained in occupation of Church Lane on the terms of her husband's tenancy. John Bunting and Sarah Bunting had two sons, Thomas Frederick and George Edmund, the defendants, who had worked on the land at Church Lane and Middlegate since 1929. Mrs. Bunting died on Mar. 8, 1956, and the defendants continued in possession of Church Lane and Middlegate. The rent for the two holdings was £20 15s. per annum. By a memorandum of agreement dated Mar. 12, 1934, Middlegate was leased by Captain Monson to Mrs. Bunting.

---

* Section 24 (2), so far as relevant, provides: " (2) The foregoing sub-section shall not apply where—

" (g) the tenant with whom the contract of tenancy was made had died within three months before the date of the giving of the notice to quit, and it is stated in the notice that it is given by reason of the matter aforesaid."

† Section 24 (1) of the Agricultural Holdings Act, 1948, provides: " Where notice to quit an agricultural holding or part of an agricultural holding is given to the tenant thereof, and not later than one month from the giving of the notice to quit the tenant serves on the landlord a counter-notice in writing requiring that this sub-section shall apply to the notice to quit, then, subject to the provisions of the next following sub-section, the notice to quit shall not have effect unless the Minister consents to the operation thereof."

A who held this holding under this agreement until she died. On May 23, 1956, the plaintiff gave notice to quit both the holdings to the defendants, as Mrs. Bunting's personal representatives. The notice was headed "Agricultural Holdings Act, 1948," and required delivery to the landlord of possession of the two parcels of land "which was held . . . by the late Sarah Bunting as tenant thereof . . . on Oct. 11, 1957, or at the expiration of the year of the said tenancy B which should expire next after the end of twelve months from the date of service of this notice". The notice further provided:

> "Take notice that this notice to quit is given for the following reasons and in pursuance of the provisions of s. 24 (2) (g) of the said Act, namely that the said Sarah Bunting the late tenant has died within three months before the date of the giving of this notice to quit."

C On June 18, 1956, the defendants served on the plaintiff a counter-notice requiring that s. 24 (1) of the Act of 1948 should apply. The defendants contended that the notice to quit was not a valid notice because, among other matters, Mrs. Bunting was not "the tenant" of the two holdings or either of them within the meaning of s. 24 (2) (g). It was not alleged that the Minister's consent to the D notice to quit had been obtained.

This report deals only with the decision in regard to the land at Church Lane and the construction of s. 24 of the Agricultural Holdings Act, 1948, GORMAN, J., finding that the notice to quit in respect of Middlegate was valid.

R. M. O. Havers for the plaintiff.
C. G. Allen for the defendants.

E **GORMAN, J.:** It is said that, in respect of Church Lane, Mrs. Bunting was not the tenant with whom the contract of tenancy was made. There is a general definition of "tenant" in s. 94 (1) of the Agricultural Holdings Act, 1948, in these terms:

> "In this Act, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to F say:— . . . 'tenant' means the holder of land under a contract of tenancy, and includes the executors, administrators, assigns, committee of the estate, or trustee in bankruptcy of a tenant, or other person deriving title from a tenant."

Counsel for the defendants said that Mrs. Bunting was not at any time the G person with whom a contract of tenancy was made; and this is common ground, for I have seen the letters of administration. She was the administratrix of her husband, and, though she might qualify, and does, in fact, qualify, as a tenant within the meaning of s. 94 (1), she is not the tenant so far as s. 24 (2) (g)* is concerned. It may be put (without dealing with all the arguments) shortly in this way: that the words in s. 24 (2) (g) "with whom the contract of tenancy H was made" have a limiting effect on the definition of "tenant" in s. 94 (1), so that in s. 24 (2) (g), the meaning of the word "tenant" is restricted by the qualifying words "with whom the contract of tenancy was made". It is said by counsel for the defendants that the only person who comes within the scope of s. 24 (2) (g) is the tenant with whom the contract of tenancy was made.

I am clearly of the opinion that the contention of the defendants is right, I and that the words "with whom the contract of tenancy was made" in s. 24 (2) (g) have a limiting effect on the definition of "tenant" in s. 94 (1). Many matters have been addressed to me in which there is force. For instance, that the effect of this construction is to put the successor of a direct tenant in a worse position than the successor of a tenant by operation of law, such as the executor or administrator, because it will not be possible to get rid of the successor of a tenant (other than a direct tenant) without the consent of the Minister.

---

* Under which the notice to quit was given.

Such difficulties always arise and it is often difficult to find the reason. I have A no doubt, however, that the words " with whom the contract of tenancy was made " have this limiting effect, and that s. 24 (2) (g) has in contemplation only what has been called the " original contract " or the tenant who has been in contractual relationship with the landowner.

Counsel for the plaintiff gives two replies to that. The first reply is that in this case the meaning of the word " tenant " in s. 24 (2) (g) is not limited but B has the width of the definition of tenancy in s. 94 (1); alternatively he says that, whatever might be the initial relationship between Mrs. Bunting and the landlord, it would be sufficient if she were the contractual tenant at the time of her death. That is right and is agreed by counsel for the defendants. [HIS LORDSHIP then referred to the question whether by estoppel or inference from fact the position between the parties was that Mrs. Bunting must be regarded C as having been a contractual tenant at the time of her death, and continued:] I cannot find, whether I regard the question as one of estoppel or as one of inference to be drawn from the facts, that Mrs. Bunting ceased to be holder by virtue of her being administratrix of her husband and became holder by reason of a contract of tenancy between her and Captain Monson* or some other person. I have anxiously considered the submissions here; it is my view that the con- D struction of s. 24 (2) (g) is as put forward on behalf of the defendants, and I am unable to say that Mrs. Bunting was at any time in her lifetime truly describable as the tenant with whom the contract of tenancy was made. Therefore the notice served in respect of Church Lane was a bad notice in the sense that Mrs. Bunting was not a person who came within the scope of the word " tenant " in s. 24 (2) (g) of the Agricultural Holdings Act, 1948. E

Judgment in part for the plaintiff.

Solicitors: *Metcalfe, Copeman & Pettefar* (for the plaintiff); *Field, Roscoe & Co.*, agents for *Sadler, Lemmon & Gethin*, King's Lynn (for the defendants).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

F

BURCH v. BURCH.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), February 24, 25, 26, March 10, 1958.]

Divorce—Condonation—Knowledge of respondent's adultery—Suspicion not amounting to knowledge—Materiality of knowledge of second association.

The parties were married in 1938 and a daughter was born to them in 1943. G On or about Jan. 4, 1945, the husband, who was then in the army and on leave, returned to his unit and sailed for Burma. In February, 1945, the wife was aware that she was pregnant and wrote to inform her husband. In March, 1945, the wife again wrote to the husband referring to her pregnancy and telling him that she had associated with a United States soldier. The husband was at the time distressed by this news because he H thought that the soldier might have taken advantage of the wife's pregnancy to have sexual intercourse with her. A son, R., was born to the wife on Oct. 12, 1945. In February, 1946, the husband returned to England and resumed married life, including sexual intercourse, with the wife. Some time between 1947 and 1950, however, the husband who had continued to think about the letter of March, 1945, and of the wife's association with the I U.S. soldier, convinced himself that the son, R., was not his child, and began to make remarks to that effect to his wife. Sexual intercourse between the parties continued until 1952; thereafter until 1956 they continued to live together in the matrimonial home. In April, 1956, the wife discovered that the husband had formed an association with another woman and in an effort to keep the marriage intact she told the husband of an isolated act of adultery between herself and a Canadian airman in 1945. The husband immediately consulted a solicitor and made certain inquiries. In August, 1956, he left the matrimonial home and presented a petition for divorce on the ground of the wife's adultery with the Canadian airman. The wife pleaded condonation.

---

* The plaintiff's predecessor in title.

Held: there had not been condonation because—

(i) before the wife's confession the husband had not been aware of any facts on which a belief in her adultery with the Canadian could reasonably be founded, and

(ii) although the husband had convinced himself of his wife's adultery with the U.S. soldier, yet belief in her adultery at a time when the child might have been conceived was not enough since the existence of an association with a second man would have been material to the husband and was unknown to him before the wife's confession, and

(iii) the circumstances were not such that the husband had taken back the wife regardless of whether she had or had not been guilty of adultery, and

(iv) condonation after the wife's confession could not be inferred.

Dicta of Viscount Simon, L.C., in *Henderson* v. *Henderson & Crellin* ([1944] 1 All E.R. at p. 45) and of Denning, L.J., in *Tilley* v. *Tilley* ([1948] 2 All E.R. at p. 1124) applied on (i) above.

Dictum of Sir Cresswell Cresswell in *Keats* v. *Keats & Montezuma* ((1859), 1 Sw. & Tr. at p. 346) considered on (iii) above.

Per Curiam: whilst belief is generally an essential ingredient in the knowledge required for condonation (*Ellis* v. *Ellis & Smith* (1865), 4 Sw. & Tr. 154) belief of itself does not constitute such knowledge (see p. 854, letter E, post).

[As to knowledge of the act condoned, see 12 Halsbury's Laws (3rd Edn.) 303, para. 600, note (b); and for cases on the subject, see 27 Digest (Repl.) 402, 403, *3311-3320*.]

Cases referred to:

(1) *Glenister* v. *Glenister*, [1945] 1 All E.R. 513; [1945] P. 30; 114 L.J.P. 69; 172 L.T. 250; 109 J.P. 194; 27 Digest (Repl.) 367, *3040*.

(2) *Wood* v. *Wood*, [1947] 2 All E.R. 95; [1947] P. 103; [1948] L.J.R. 784; 111 J.P. 428; 27 Digest (Repl.) 320, *2667*.

(3) *Jones* v. *Jones*, [1953] 2 All E.R. 345; 117 J.P. 348; 3rd Digest Supp.

(4) *Bernstein* v. *Bernstein*, [1893] P. 292; 69 L.T. 513; sub nom. *Bernstein* v. *Bernstein, Turner & Sampson*, 63 L.J.P. 3; 27 Digest (Repl.) 403, *3320*.

(5) *Cramp* v. *Cramp & Freeman*, [1920] P. 158; 89 L.J.P. 119; 123 L.T. 141; 27 Digest (Repl.) 397, *3274*.

(6) *Henderson* v. *Henderson & Crellin*, [1944] 1 All E.R. 44; [1944] A.C. 49; 113 L.J.P. 1; 170 L.T. 84; 27 Digest (Repl.) 397, *3271*.

(7) *Tilley* v. *Tilley*, [1948] 2 All E.R. 1113; [1949] P. 240; [1949] L.J.R. 929; 27 Digest (Repl.) 405, *3346*.

(8) *Keats* v. *Keats & Montezuma*, (1859), 1 Sw. & Tr. 334; 28 L.J.P. & M. 57; 32 L.T.O.S. 286, 321; 164 E.R. 754; 27 Digest (Repl.) 395, *3260*.

(9) *Lowther* v. *Lowther*, (C.A. Feb. 5, 1945), unreported.

(10) *Allen* v. *Allen*, [1951] 1 All E.R. 724; 115 J.P. 229; 27 Digest (Repl.) 84, *633*.

(11) *D'Aguilar* v. *D'Aguilar*, (1794), 1 Hag. Ecc. 773; 1 Hag. Con. 134, n.; 162 E.R. 748; 27 Digest (Repl.) 487, *4256*.

(12) *Ellis* v. *Ellis & Smith*, (1865), 4 Sw. & Tr. 154; 34 L.J.P.M. & A. 100; 13 L.T. 211; 164 E.R. 1475; 27 Digest (Repl.) 402, *3315*.

(13) *Donnithorne* v. *Donnithorne*, [1930] S.A.S.R. 182; 27 Digest (Repl.) 403, *1467*.

(14) *Mackrell* v. *Mackrell*, [1948] 2 All E.R. 858; 27 Digest (Repl.) 398, *3278*.

Petition.

This was a petition by the husband for divorce on the ground of the wife's adultery.

The parties were married on July 30, 1938, and there were two children born during the marriage, Barbara Jean born on July 3, 1943 and Roger Clive born on Oct. 12, 1945. In his petition the husband alleged that the paternity of Roger Clive was in dispute and alleged that the wife had committed adultery on or about Jan. 13, 1945, with a certain French Canadian named Louis who was then serving in the Royal Canadian Air Force. Leave was given to dispense with service of the petition on " Louis ". By her answer the wife denied adultery and stated (i) that if sexual intercourse had taken place as alleged it had been without her consent at a time when she was asleep or being awakened from sleep and while she was under the influence of drink and (ii) that if she had been guilty of adultery the husband had condoned it in that with full knowledge of all the material facts he had lived and cohabited with her from January, 1946, until Aug. 20, 1956, and had sexual intercourse with her during that period with the intention of forgiving and remitting her adultery. By his reply the husband alleged that he did not know until May 6, 1956, that the wife had committed adultery with " Louis " and that, therefore, at the time when he resumed cohabitation he did not know all the material facts. The suit was heard by Sachs, J., at Winchester Assizes on July 8, 9, 1957; at the end of that hearing His Lordship adjourned the case for legal argument by the Queen's Proctor on the issue of condonation. The facts appear in the judgment. After the adjournment from Winchester Assizes, the husband obtained leave to file a supplemental petition dated Oct. 18, 1957, alleging adultery by the wife with one B. in July, 1957. The wife filed an answer denying that adultery and the co-respondent entered an appearance also denying the adultery.

G. W. Willett for the husband.

R. Hughes for the wife.

R. F. Ormrod for the Queen's Proctor.

Cur. adv. vult.

Mar. 10. **SACHS, J.**, read the following judgment: The marriage was a very happy one from the time it took place in 1938 until January, 1945. Early that month the husband, then a regular serving soldier, sailed for Burma, having previously had an embarkation leave which officially commenced on Dec. 22, 1944, and ended on Jan. 4, 1945. He left his home either then or shortly afterwards. By February the wife was aware that she was pregnant, having, however, first had a false period not long after the husband was last at home. Of the many letters written by the wife to her husband in the first three months of 1945, the first that survives is dated Mar. 22; it reached the husband in Burma. In it she refers both to her pregnancy, of which she had already written in February, and to her having been in association with a U.S. soldier during the days immediately preceding the writing of the letter. The tenor of the letter is that of a wife having a baby by a husband whom she loves, and I accept her evidence that at that time she had no doubts but that the child was his. Equally I accept so much of the husband's evidence as stated that at the moment of receipt of the letter he, too, although a bit surprised at the unintended pregnancy, accepted the baby as being his. (I pause to mention that the first child of the marriage was also the result of an unintended pregnancy.)

The husband, however, was distressed by the fact that the wife had been going about with a U.S. soldier, for all these were anathema to him. He was doubly distressed as he thought that advantage of the wife's condition of pregnancy might have been taken by that soldier to have sexual intercourse with her. The husband's phrase was: " a woman cannot become pregnant twice ". After receiving that letter the husband wrote a bitter reply, and though the later correspondence appears to show that matters before long got on to an even keel yet some bitterness remained in his heart. In his view his wife had let him down by having thus associated with a U.S. soldier. This fact he seemed never to get over. Later, by confused and erroneous thinking, including some wholly unfounded idea that the child was born considerably later than the wife had originally wished him to believe probable, he began to question matters which he had previously and rightly accepted as true and to wonder if the pregnancy was not due to his wife's association with the U.S. soldier. In fact the child, Roger, was born on Oct. 12, somewhere between two hundred and seventy-eight and two hundred and eighty-three days after the end of the husband's last leave. The child weighed ten pounds at birth, was certainly not premature, and arrived perhaps a week after its due date. At this stage I should mention that the husband at trial expressly disclaimed any intention of ever seeking to try to bastardize Roger.

In February, 1946, the husband returned to this country. Here he resumed married life, including sexual intercourse with his wife, without making any reference to the doubts that had crossed his mind. Unfortunately, however, he was of a suspicious nature and indeed already before 1945 had from time to time wrongly felt jealous of other men. In 1947 and again in 1949 unfounded suspicions of his wife, on account of matters having nothing to do with the birth of Roger, stirred his mind. That in turn revived his clouded thoughts about Roger's birth. Then at some stage this man, whose thoughts had apparently never fully recovered from the effects of the letter of Mar. 22, 1945—in the sense that the ideas engendered by it returned intermittently to his mind—managed to convince himself that Roger was not his own son. He reached this conviction despite having no facts emanating either from his wife or from any other source on which he could reasonably found that belief, and without ever having heard of the Canadian airman or of having any cause for complaint of his wife's conduct in January, 1944. The date he reached that state of mind cannot be precisely fixed. It is my finding that it was probably reached in 1947 or 1948 and at very latest by March, 1950. Having reached that state of mind he from time to time—not frequently—threw out remarks to his wife such as " I am certain Roger is not mine ". Later he made other remarks which were intended to convey the same impression to his wife. Sexual intercourse, however, continued, but with lessening frequency, and it continued until at any rate 1952. Between the date of the cessation of sexual intercourse and April, 1956, the wife continued in all other respects in her position in the matrimonial home.

About April, 1956, the wife discovered that the husband had formed an undue association with another girl whom he met in the course of serving in the Royal Auxiliary Air Force, which he had then joined. (In fact the association had started about 1953.) She tackled her husband about this and embarked on a conversation with a view to trying to keep the marriage together. In its course she on her side came to confess her adultery with a Canadian soldier eleven years before. In so doing she gave her husband a true account of that isolated, unpremeditated, and unfortunate occasion. It was in this fashion that the husband became aware of this single lapse many years earlier of one who had both before and since been a good and loving wife, and who at all times had been a good mother to both children. However, this man, still in undue association with the other girl, went immediately to a solicitor with a view to seeking a divorce. The husband and wife remained together in the same house until August, when the husband, who had been making further inquiries in order to check the confession made by his wife, left. By his petition dated Aug. 21, 1956, he prays a divorce on account of the 1945 adultery. Whatever one may think of a man for seeking a decree against the above background, he is entitled to it unless the court either finds that he condoned the adultery or is not satisfied that he did not condone it.

As regards condonation, the first period to be dealt with is that between February, 1946, and the date of the confession. Having regard to the arguments adduced on this issue, it is now convenient to summarise certain conclusions of fact, or in some instances mixed fact and law, reached on the evidence before me. During this period: (i) The husband had no evidence on which he could reasonably institute proceedings for divorce. (ii) The husband had no reasonable grounds deriving from the wife's conduct for believing that his wife had committed adultery—if the tests to be applied are the same as in *Glenister* v. *Glenister* (1) ([1945] 1 All E.R. 513) and that line of cases. (In parenthesis it is to be noted that in *Wood* v. *Wood* (2) ([1947] 2 All E.R. 95) it was held that a three hundred and forty-six day gestation did not of itself afford such a ground, and in *Jones* v. *Jones* (3) ([1953] 2 All E.R. 345) emphasis was laid on the degree of proof needed to establish such a belief.) (iii) The husband had no reasonable grounds for such a belief derived from any other source. (iv) On no view of the facts (not even if the husband's evidence were accepted), could any proceedings ever have been reasonably instituted with a view to establishing that Roger was not legitimate. (This view was accepted by all counsel concerned.) (v) The husband's suspicions, which gradually crystallised into convinced belief, related to the U.S. soldier and not to the Canadian airman. (vi) He never forgave his wife (in the conversational meaning of " forgiveness ") for her association with that soldier. Having assessed the husband as best I could after watching him in the witness-box, my finding is that on and after convincing himself of his wife's guilt his attitude was in effect: " As I have no real evidence there is nothing I can do: I must carry on as if she were not guilty." (vii) Upon and at all times after convincing himself, he would in all probability have sought a divorce if he had secured evidence of his wife's guilt, and the wife probably feared that such was the case. (viii) The husband never asked the wife a direct question as to her guilt. The wife never told a direct lie about it. Her replies to any remarks about Roger took shapes such as: " If you know so much and suspect so much, why did you come back ? " (It is to be noted that as regards all material times, i.e., before and immediately after the husband reached his convinced belief, the wife on being asked " Did you commit adultery with that U.S. soldier ? " or " Is Roger our son ? " would in answering " No " and " Yes " respectively have stated what she believed to be true.)

Counsel for the wife, supported in this by counsel for the Queen's Proctor, submitted that in that state of affairs the husband had condoned the wife's guilty act. Their main submissions were that sexual intercourse with the wife after being convinced of her guilt constituted condonation with knowledge of that guilt; that the husband's state of mind was thus immaterial; and that because his concern related to the conception of Roger it did not matter that the adultery was with a man different from the one he had in mind. Counsel for the husband contended that there was no condonation, submitting, inter alia, that in the absence of forgiveness in the conversational sense there can be no condonation unless there is knowledge founded on appropriate evidence; and that in any event it did matter that the adultery was with someone other than the U.S. soldier. Counsel for the Queen's Proctor helpfully cited a considerable number of authorities bearing on the problems raised by the conclusions that I have stated. Save in one set of circumstances, to which I will later refer, " knowledge " of the wife's offence is stated in every case to be essential before a husband can condone. The phrases used as to the extent of the requisite knowledge vary a little. To take the more modern authorities, one finds " with knowledge of all that is forgiven ", *Bernstein* v. *Bernstein* (4) ([1893] P. 292 at p. 303) per Lopes, L.J.; " substantially aware of the matrimonial sin committed ", *Cramp* v. *Cramp & Freeman* (5) ([1920] P. 158 at p. 163) per McCardie, J.; " knowledge of the wife's offence ", *Henderson* v. *Henderson & Crellin* (6) ([1944] 1 All E.R. 44 at p. 45), per Viscount Simon, L.C.; " full knowledge of all the material facts ", *Tilley* v. *Tilley* (7) ([1948] 2 All E.R. 1113 at p. 1124), per Denning, L.J. But the necessity of such knowledge is emphasized.

The exception where no " knowledge " is required is that set out in the charge to the jury in the first case in which condonation was discussed after the passing of the Matrimonial Causes Act, 1857. In *Keats* v. *Keats & Montezuma* (8) ((1859), 1 Sw. & Tr. 334 at p. 346), the Judge Ordinary (Sir Cresswell Cresswell) stated that:

> " . . . a man may condone whether he knows of the offence or not, in this way: he may say, ' I have heard stories about my wife. A. and B. have told me she has committed adultery. I can hardly believe it. I am in doubt about it; but whether guilty or not, I will take her back; she shall be restored to my bed.' That would be a condonation without actual knowledge; and I think if after this he took her to his bed again, he could not afterwards, on acquiring more certain knowledge, revive the charge, as to which he had himself said, ' I care not whether it is true or false; I do not know whether it is true or not; but be it one or be it the other, I would equally take her back to my bed '."

This passage, so far as counsel before me were aware, has never been criticized, and indeed in *Lowther* v. *Lowther* (9) (Feb. 5, 1945, unreported) it was expressly approved by the Court of Appeal.

It follows in the present case that if condonation is to be established affirmatively it must be shown either that the husband had " knowledge " of the wife's offence before the date of the confession, or alternatively that the husband's attitude was that referred to in the above cited passage of the charge to the jury in *Keats* v. *Keats & Montezuma* (8). In the former event the fact that there was sexual intercourse at material times renders unnecessary any investigation into, or findings as to, the husband's state of mind or as to what he said: the fact that there was sexual intercourse amounts to " clear proof that the husband has carried forgiveness into effect " (*Henderson* v. *Henderson & Crellin* (6), [1944] 1 All E.R. at p. 45), and the husband is precluded from denying that there was forgiveness in the special meaning (see *Cramp* v. *Cramp & Freeman* (5), [1920] P. at p. 169) of that word in relation to condonation. In the second event questions arise as to the husband's words and state of mind at the material time.

Accordingly the first question is whether the husband had at any time before the wife's confession the requisite knowledge of her offence. That phrase seems in the above cited authorities to have been used compendiously to cover a number of constituent elements. It is necessary in each case to consider on what foundation rests the alleged knowledge, whether the spouse believes (or must be taken to believe) that which is alleged to be known, and what are the material facts which must be shown to be known. As regards the foundation needed for the knowledge, it has been argued on behalf of the wife that a firm conclusion reached in the absence of what a reasonable man regards as evidence constitutes knowledge within the meaning of the authorities. For the husband it was asserted that the possession of credible evidence, whether coming from the wife or from third parties, is an essential element of such knowledge. As a matter of first impression it seems to me that a conclusion based on intuition, delusion, jealous obsession, or any other method than reasonable deduction from ascertained facts, does not constitute knowledge. Ingrained suspicion does not become knowledge merely because the man who holds it becomes convinced of its truth without proper supporting evidence.

I turn next to the special problems that arise in relation to the word " knowledge " in connexion with condonation, to see if there is any reason for that first impression to be displaced. In *Glenister* v. *Glenister* (1) Lord Merriman, P. ([1945] 1 All E.R. at p. 518) draws attention to the risks which a husband might incur if he were not entitled for the time being to leave his wife when once he had reasonable grounds for believing that she had committed adultery. Here one has the converse case and must take into account the risks and difficulties which a husband might incur if at a time when he had no reasonable grounds for such a belief he were held to be bound either to leave his wife or forfeit for ever his right to relief. In relation to the problems arising in the *Glenister* (1) line of cases, Sir Raymond Evershed, M.R., in *Allen* v. *Allen* (10) ([1951] 1 All E.R. 724 at p. 731) said that if a man alleges that he bona fide and reasonably believes his wife to be an adulteress, he must (save perhaps in exceptional cases) be regarded as stating:

> " 'I say and allege that the evidence and materials in my possession are such that on them a court should and would find that adultery has been committed '."

The same approach was made to the parallel problems that arise in respect of condonation by no less an authority than Sir William Scott in *D'Aguilar* v. *D'Aguilar* (11) ((1794), 1 Hag. Ecc. 773 at p. 786) where he said ". . . it is not shown that she knew it so that she could legally prove it ". There thus seems nothing to displace and much to confirm the impression previously stated.

Condonation being an absolute bar to a husband's right on securing evidence to be granted relief, it is of course obvious that a court would not lightly hold the bar to have been applied at a moment when from a practical angle, having regard to the absence of evidence, he neither has that right nor has any wish to forego it. It is not, however, in the present case necessary to decide whether in order to impute knowledge to a spouse it must of necessity always be shown that he or she had evidence fit to be laid before a court. In the present case the husband was not aware of any facts on which a reasonable man could ground a belief in his wife's adultery; and it seems to me that whilst belief is generally an essential ingredient in the knowledge required for condonation (*Ellis* v. *Ellis & Smith* (12) (1865), 4 Sw. & Tr. 154), belief of itself does not constitute such knowledge. Mere suspicion that grows to conviction is no different from suspicion that does not lead to that result. For these reasons the husband cannot be held to have had knowledge of his wife's adultery before the confession. There is a further reason why the husband cannot be held to have had the requisite knowledge. The facts which he believed did not constitute all the material facts. What facts are material—or what are the facts of which the spouse must be " substantially aware "—must necessarily depend on the circumstances of the particular case, and are not always easy to determine. Prima facie any fact is material which would be so taken by a reasonable man. In addition any fact is material which the offending party knows would be so regarded by the innocent spouse.

At one stage of the argument I was attracted to the submission of counsel for the Queen's Proctor that the only thing that the husband was really concerned with was that there had been adultery at a time when the conception of Roger might have been effected; that his belief thus related to the essence of the offence; that accordingly it was immaterial that the adultery was with a Canadian airman and not the U.S. soldier; and that in this way there could be overcome the obvious difficulty, well exemplified in terms of pleading—of asserting that mistaken awareness of adultery with A can constitute condonation of adultery with B. On further consideration, however, I have been persuaded by the argument of counsel for the husband, whose submissions on the issue of condonation were consistently compact and helpful, that for this husband there would, as his wife well knew, have been a considerably added distress in finding that there had been two men in her life at that period—and not merely the one of whom she had told him. This added distress would undoubtedly have weighed in the scales with him, even if he could at the vital moment have approached the matter on the footing that the association with the U.S. soldier was innocent. Accordingly I hold that the identity of the adulterer was material, and would only add that I very much doubt whether the obvious difficulty to which I have above referred is overcome by counsel for the Queen's Proctor's argument, attractive though it may have been.

It is proper to record that in the course of argument at the Bar various submissions were made as to what the husband and wife respectively should have done as regards asking for and giving information in the period before the husband became convinced of his wife's adultery. Counsel for the Queen's Proctor, in particular, founded much on moves which he argued that the husband should have made. Matrimonial life, however, is not a game of chess: it is an infinitely variable compound of human relations. I for one feel neither competent to formulate nor desirous of formulating rules how spouses should conduct themselves in circumstances such as those which here arose. The difficulties in such situations are always great and here the interests of Roger were an important factor which could never be left out of account. Some of the difficulties that can arise are mentioned in the judgment of RICHARDS, J., in *Donnithorne* v. *Donnithorne* (13) ([1930] S.A.S.R. 182). There (ibid., at p. 185) he refers to the risks, which are run by a husband who suspects his wife, of

> " insulting a perfectly innocent wife by a question which she might take as implying an accusation, or of making surreptitious inquiries, the very fact of making which might well embitter his mind, with the probable result of permanent unhappiness."

Those were not perhaps the particular difficulties which faced the husband in this case, but that merely serves to illustrate the hazards of attempting to formulate rules.

It being thus established that before the wife's confession the husband had no knowledge of her guilt, she cannot assert that there was condonation before that date unless it can be shown that this was one of those cases in which in effect the husband said:

> " I care not whether it is true or false; I do not know whether it is true or not; but be it one or be it the other, I would equally take her back to my bed."

Once, however, I had indicated the probability that my findings as to the husband's state of mind would be those mentioned earlier in this judgment, the contention that the present case could be brought within the above passage in the Judge Ordinary's charge was only faintly pressed.

One important respect in which the position of a husband who has knowledge of his wife's offence differs from that of one who has suspicion short of such knowledge is as follows. The former on having sexual intercourse with his wife must be held, and on otherwise reinstating her will normally be held, to be precluded from denying that he has forgiven her within the meaning of that word earlier indicated. In the case of the latter he cannot be held to have thus forgiven her unless the evidence of what he said or what he led his wife to believe warrants such a conclusion. (It may also be that proof of his intention aliunde would suffice—but that does not arise here.) Suffice it accordingly to say that the husband neither stated nor felt that he " did not care "; the wife was never led to believe he did not care—indeed she knew that he did care; and there was thus no express or implied forgiveness—either in the conversational sense or within the special meaning of that word. There was thus no condonation of the type under consideration.

There next falls to be considered the period between the confession and the time when the husband left the matrimonial home. It was neither pleaded nor argued at the trial that there had been such condonation, but counsel for the Queen's Proctor properly called attention to this question. Where the parties remain, without having sexual intercourse, in the same matrimonial home after the husband has gained knowledge of his wife's guilt, the question whether condonation is to be inferred from continuance under the same roof is in essence a question of fact: cf. *Mackrell* v. *Mackrell* (14) ([1948] 2 All E.R. 858). Cases were cited which fell on either side of the line on their particular circumstances.

Immediately that a husband learns the truth from his wife she is notionally deposed from her matrimonial position. There then follows that which for lack of a better name may be called a suspense period. During that period the husband has time to consider the position. That period may be terminated in favour of the wife either by some explicit words or conduct of his which constitutes condonation, or by his letting things run on so long that the day comes when the court infers that the wife has been reinstated. Alternatively, if the husband leaves home before either of the above events, the court may be satisfied that there was no condonation. Having regard to the strained relations that existed between the husband and the wife at the material times, to the fact that during the period he went to solicitors and made certain inquiries before he left, and to the other factors which emerged in evidence, I am satisfied that there was no condonation after the confession. It follows that as it has been affirmatively shown that the husband did not condone his wife's adultery either before or after the confession, his petition must succeed.

If the upshot of the present case reflects somewhat starkly the aphorism of McCardie, J., that:

> " By the matrimonial law of this country the offence of every married person is recorded on tablets which do not perish "

(*Cramp* v. *Cramp & Freeman* (5), [1920] P. at p. 161) the remedy might lie in the legislature allowing some discretion whether those rare petitioners who come to the courts on discovering after so many years an old offence shall be granted a decree.

There remains to be mentioned the supplemental petition. This was filed at the end of October, 1957, just at the time when there would normally have been heard the argument for which this cause was adjourned from Winchester Assizes. The matters in it have nothing to do with the issues I have so far referred to and rests on events alleged to have occurred after the evidence at Winchester was concluded. Neither the application to file this supplemental petition nor the order giving leave for it to be filed was brought to my notice till recently, when I caused a summons for further directions to be issued. It then appeared that it was not as universally known as one would have thought that once at assizes a judge has been seized of a cause to the extent of hearing evidence, every application affecting the pleadings or the conduct of the trial ought, save in really exceptional circumstances, to be made to or referred to that judge: and for this reason I mention the matter. Had the application come before me I would have rejected it. As it was the trial of the issues raised by the supplemental petition were ordered to be deferred until those raised by the original petition had been disposed of. In the circumstances as they now exist it seems that the order, subject to any further argument as to its form, should be, first, that a decree nisi is granted on the original petition, and secondly, that the supplemental petition be either permanently stayed or alternatively dismissed—the order to dismiss not to be drawn up for three months; each party to have liberty to apply in that period. That leaves for decision such questions as may be raised on costs, and whether maintenance should not be ordered in respect of this wife having regard, inter alia, to the fact that the marriage lasted for some twenty years.

Decree nisi.

Solicitors: *Blundell, Baker & Co.*, agents for *Clement J. Collard*, Bournemouth (for the husband); *Batchelor, Fry, Coulson & Burder*, agents for *F. J. M. Gale & Co.*, Bournemouth (for the wife); *Queen's Proctor*.

[*Reported by* A. T. Hoolahan, Esq., *Barrister-at-Law.*]

Re J. & P. SUSSMAN, LTD.

[CHANCERY DIVISION (Vaisey, J.), March 10, 1958.]

Company—Winding-up—Petition—Amendment—Name of company misspelt—Errors repeated in advertisement and in order made—Jurisdiction.

A creditor of a company which was named J. & P. Sussmann, Ltd., brought an action against " J. & P. Sussman, Ltd. " (thus misspelling the name) for the debt. The company entered an appearance in the name of " J. & P. Sussman, Ltd.", and judgment was obtained by the creditor against the company in that (misspelt) name. Subsequently, the creditor petitioned for the winding-up of the company, described in the petition as " J. & P. Sussman, Ltd.", basing the petition on the judgment debt. An order for the winding-up of the company was made on that petition. When it was sought to record the winding-up order on the register, it was discovered that there was no company registered under the name of " J. & P. Sussman, Ltd." The creditor applied to have the petition amended in order to correct the name of the company wherever it appeared.

Held: the court had jurisdiction to and would allow the amendments to be made; the petition need not be re-advertised and the winding-up of J. &. P. Sussmann, Ltd., would be ordered.

Re L'Industrie Verrière, Ltd. ([1914] W.N. 222) followed.

Cases referred to:

(1) *Re L'Industrie Verrière, Ltd.*, [1914] W.N. 222; 58 Sol. Jo. 611; 10 Digest (Repl.) 885, *5888*.

(2) *Re E. S. Snell & Sons, Ltd.*, (Dec. 20, 1911), " The Times."

Petition.

After an order had been made on Mar. 3, 1958, for the compulsory winding-up of a company, it was discovered that the name of the company had been misspelt in the petition. The petitioner applied to the court for leave for the name of the company " J. & P. Sussman, Ltd.", as given in the petition, to be amended to " J. &. P. Sussmann, Ltd.", and for such other amendments as might be necessary for confirmation of the order made on Mar. 3, 1958.

I. Edwards-Jones for the petitioner, a judgment creditor.

Leonard Lewis sought leave to appear out of time on behalf of a creditor.

VAISEY, J.: This is a petition by Arthur Maiden, Ltd. to wind up a company whose correct name is " J. & P. Sussmann, Ltd." (the name being spelt with two " n's "). Unfortunately, the petition originally was presented with the name of the company that was to be wound up misspelt and when the matter came before me on Mar. 3, 1958, I made an order to wind up " J. & P. Sussman, Ltd." (the name being misspelt with one "n"). When the necessary steps were taken to record on the register the winding-up order, it was discovered that there was no company called " J. & P. Sussman, Ltd." The order which I made could not be recorded against the company which did exist, J. & P. Sussmann, Ltd.

This petition was based on a judgment debt, and the judgment was for a sum which with costs amounted to £447 4s. 9d. The apparent origin of the mistake was the innocent fault of the petitioners, Arthur Maiden, Ltd., because they brought their action against a company the name of which was spelt " Sussman " in the action of Arthur Maiden, Ltd., against J. &. P. Sussman, Ltd. If the defendant company, J. &. P. Sussmann, Ltd., wished to defend the action, as they apparently did, they ought to have entered appearance for J. &. P. Sussmann, Ltd., " sued as J. &. P. Sussman, Ltd." I have the duplicate appearance before me and they did not do that. They entered an appearance in the name of J. &. P. Sussman, Ltd. (as misspelt), not realising the unfortunate consequences which would ensue from their having adopted the misspelt name.

Having got judgment in that form, Arthur Maiden, Ltd., presented a petition based on that judgment to wind-up the company which we now know to be J. &. P. Sussmann, Ltd. At the time this mistake was made another creditor had recovered judgment and the sheriff had gone into possession and various rights, described as vested rights, had been created. To make the matter a little more complicated perhaps, that other creditor, who now asks me for leave to appear on this petition, is closely associated with J. &. P. Sussmann, Ltd., and he asks me to treat this petition as if it were a complete nullity, and objects, not improperly for his own purposes, to my permitting any amendment which would give effect to the order which I made on the petition by correcting the name of the company.

I think that the real origin of the mistake was the conduct of this company which chose to adopt as its name and enter an appearance in the misspelt name. I do not see how the company can be now heard to say that my order against " J. & P. Sussman, Ltd.", is not effective against itself, J. & P. Sussmann, Ltd.

The decision of Astbury, J., in *Re L'Industrie Verrière, Ltd.* (1) ([1914] W.N. 222) seems to give me jurisdiction to make the amendment which would put this matter right. Astbury, J., said (ibid.):

> " that the rule on which the court had long acted was that an error in the name of the company in the advertisement rendered the advertisement absolutely void."

Here, of course, there was " Sussman " (with one " n ") in the advertisement as well as in the petition. The learned judge said that (ibid.):

> " It was important that this rule should be strictly enforced. Where, however, the mistake consisted of a very trifling error in spelling, by which no one could possibly be misled, and there was no other company of any similar name on the register, his Lordship thought he had and ought to exercise his discretion of waiving the formal defect under r. 217 [of the Companies (Winding-up) Rules, 1909]. This view was in accordance with *Re E. S. Snell & Sons, Ltd.* (2) ((1911), Dec. 20, " The Times "), where the petition had been presented and advertised as ' Re E. S. Snell & Son, Ltd.', and the title was corrected and the order made without re-advertisement. In these circumstances the petition might be amended and the order stand without any further advertisement."

In the case before Astbury, J., the difference was not between " Sons " and " Son " but between " industrie ", a French word, and a non-existent word " industre " leaving out the last letter but one. That is very much the same sort of error as has crept into the proceedings on this occasion. It seems to me that I have jurisdiction to allow this petition to be properly amended.

The amendments in the petition which are required are not only to get the name " Sussmann " correctly spelt wherever it appears, but also the reference in the petition to the judgment should be amended like this: " The company is indebted to your petitioner [in a sum of £——,] the amount of a final judgment obtained by your petitioner in an action in the High Court of Justice against the company in the said action described as J. & P. Sussman, Ltd." It will then state the judgment correctly, but it will indicate that it was obtained in the wrong name.

I think that I am entitled to allow the matter to be put in order in that way and a winding-up order to be made under the authority of *Re L'Industrie Verrière, Ltd.* (1), and to treat the petition as amended. That case justifies me in making, as I do make, the original order for the winding-up of the company as of today. The petition need not be re-advertised. I do not give the leave to appear which has been applied for.

Order accordingly.

Solicitors: *Pritchard, Englefield & Co.*, agents for *Latin & Masheder*, Liverpool (for the petitioner); *B. A. Woolf & Co.* (for another creditor).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

LEWIS *v.* LEWIS.

[COURT OF APPEAL (Hodson and Pearce, L.JJ.), March 11, 1958.]

Divorce—Practice—Pleading—Answer—Amending answer by alleging adultery—Adultery disclosed in petitioner's cross-examination—Generality of pleading.

Divorce—Evidence—Cross-examination—Adultery—Petition on ground of cruelty—Petitioner asked whether he had committed adultery—Admissibility—Matrimonial Causes Act, 1950 (14 *Geo.* 6 *c.* 25), *s.* 32 (3).

The husband petitioned for divorce on the ground of cruelty, alleging, among other matters, that in April, 1954, the wife had hit him across the face saying " I have got all the evidence I want now ", and that she deserted him in that month. By amendment the husband asked for the court's discretion to be exercised in his favour, having regard to his adultery. The wife, in the particulars of her answer, wherein she denied cruelty and asked for a divorce on the ground of her husband's cruelty, alleged that in an incident in the same month (possibly the same one) she had accused him of philandering with other women, that violent quarrelling had ensued, and that he had threatened to kill her if she did not leave him alone. In cross-examination the husband was asked whether he had committed adultery. The husband unsuccessfully objected to answering the question; he then admitted that he had committed adultery. Further questioning on this matter was stopped. The wife was given leave to amend her answer by alleging as a further ground of divorce that the husband " on some day or days unknown, save that it was after April, 1954, at a place or places unknown committed adultery with a woman or women whose name or names are unknown ". On appeal,

Held: (i) the question put to the husband in cross-examination was admissible because it was no longer a question that was incriminating by reason of ecclesiastical penalties (*Blunt* v. *Park Lane Hotel, Ltd.*, [1942] 2 All E.R. 187, applied), and the privilege against answering such a question given by s. 32 (3) of the Matrimonial Causes Act, 1950, had no application, as the suit was instituted for cruelty not in consequence of adultery; moreover, the question was relevant, in the circumstances, to the charge of cruelty.

(ii) it was right to give the wife leave to amend, and to grant such leave was generally the convenient course if no injustice would be done, though a party was not entitled to such leave as a right.

Clueit v. *Clueit* (ante, p. 417) approved in *Clear* v. *Clear* (Feb. 26, 1958, unreported) followed.

(iii) the amendment was a sufficiently specific charge.

Per CURIAM: in the ordinary case it is convenient that, where the petitioner seeks the exercise of discretion, evidence of his adultery should be given in the place in examination-in-chief where the fact chronologically appears, rather than by producing the discretion statement separately at some other stage (see p. 863, letters F and G, post).

Appeal dismissed.

[As to amendment of pleading by adding charges in a matrimonial cause, see 12 HALSBURY'S LAWS (3rd Edn.) 320-323, paras. 645-654; and for cases on the subject, see 27 DIGEST (Repl.) 453, 454, *3857-3871.*

As to form of pleading in a petition for dissolution of marriage, see 12 HALSBURY'S LAWS (3rd Edn.) 315-317, 339, paras. 633, 634, 704; and for cases on the subject, see 27 DIGEST (Repl.) 448-450, *3800-3816.*

As to questions on adultery in proceedings for dissolution of marriage, see 12 HALSBURY'S LAWS (3rd Edn.) 372, 373, para. 812; and for cases on the subject, see 27 DIGEST (Repl.) 519-521, *4617-4640.*

For the Matrimonial Causes Act, 1950, s. 32 (3), see 29 HALSBURY'S STATUTES (2nd Edn.) 417.]

Cases referred to:

(1) *Blunt* v. *Park Lane Hotel, Ltd.*, [1942] 2 All E.R. 187; [1942] 2 K.B. 253; 111 L.J.K.B. 706; 167 L.T. 359; 2nd Digest Supp.

(2) *Redfern* v. *Redfern*, [1891] P. 139; 60 L.J.P. 9; 64 L.T. 68; 55 J.P. 37; 27 Digest (Repl.) 267, *2147*.

(3) *Clear* v. *Clear*, (Feb. 26, 1958, C.A.), unreported.

(4) *Clueit* v. *Clueit*, ante, p. 417.

(5) *B.* v. *B. & G.*, [1936] 2 All E.R. 1254; [1937] P. 1; 105 L.J.P. 90; 155 L.T. 322; 27 Digest (Repl.) 479, *4175*.

Appeal.

In the course of the hearing by Commissioner Sir Harry Trusted, sitting at Newport, Monmouthshire, on Jan. 30, 1958, of a petition for divorce on the ground of cruelty presented by the husband (amended to ask for the exercise of the court's discretion), to which the wife's answer denied cruelty and asked for a divorce on the ground of the husband's cruelty, the husband admitted in cross-examination that he had committed adultery. The question was unsuccessfully objected to. The wife was granted leave by the commissioner to amend her answer by adding as a ground of divorce that the husband had committed adultery and the husband was given fourteen days to amend the reply, the case being adjourned part heard sine die. With the leave of the commissioner the husband appealed against the order to the Court of Appeal. The grounds of appeal were: (i) the amendment was not permissible in law because the husband had been deprived in the same proceedings of statutory protection to which he would be entitled by reason of the amendment; (ii) the amendment was not permissible in law because evidence had already been admitted in the same proceedings which ought not to have been admitted when the amendment was made; (iii) the amendment raised an issue which had already been established by evidence wrongly admitted; (iv) the commissioner exercised discretion to allow the amendment on a wrong principle; (v) the form of amendment was too vague; (vi) the amendment was applied for too late in the proceedings.

H. B. D. Grazebrook, Q.C., and *W. R. K. Merrylees* for the husband.
N. N. McKinnon, Q.C., and *P. G. Langdon-Davies* for the wife.

HODSON, L.J.: This is an appeal from an order of Commissioner Sir Harry Trusted dated Jan. 30, 1958. The appeal is by leave of the commissioner, which was given on Jan. 31 against that part of the order which gave leave to the respondent wife in a divorce suit to amend her answer so as to include a charge of adultery. The charge of adultery is set out in the amended answer:

> "That the petitioner on some day or days unknown, save that it was after April, 1954, at a place or places unknown committed adultery with a woman or women whose name or names are unknown."

Consequential amendments were allowed in the two succeeding paragraphs. The suit was instituted on Mar. 14, 1956, by the husband for divorce, based on cruelty; and on June 12 he amended the prayer of his petition, pursuant to an order of June 4, so as to include a prayer for the exercise of the discretion of the court in his favour. The wife by her answer denied cruelty, herself alleged cruelty, and asked for a divorce on that ground. There was originally no charge of adultery in the wife's answer.

The husband gave evidence in support of his allegation of cruelty, and in his evidence-in-chief made no reference to his own adultery, which it was known he was going to admit eventually because of the amendment of the prayer. He was cross-examined, and in the cross-examination he was asked by counsel for the wife whether he had committed adultery. The answer he gave was: "Yes";

and the effect of the answer is contained in the amended answer. Objection was taken by counsel on behalf of the husband to the question being asked. At first, at any rate, it was put on the ground that it was an incriminating question and ought not to be asked, or at any rate that the witness ought to have the opportunity of objecting to answer on that ground. The commissioner gave leave to amend the answer so as to include the allegation of adultery, based solely on the sworn evidence of the husband given in the suit in the witness-box. Evidence was given by the wife on the issue of cruelty, and she had no evidence herself to give on the charge of adultery. The matter was then adjourned in order that, as the pleadings then stood, counsel for the husband might have an opportunity of pleading to the charge of adultery. As soon as the adjournment was granted, the question of this appeal was considered, and on the following day, Jan. 31 (the hearing ended on Jan. 30), counsel made the successful application for leave to appeal.

The objection taken to the amendment is on a variety of grounds. Dealing with the question, first of all, whether the question was properly asked—which no doubt goes to the root of the matter—the objection that the question was an incriminating question is unsound. The ecclesiastical penalties which may be involved in cases where persons commit adultery have been held by the court not to be, at the present time, such as to carry with them the protection of witnesses which they are able to claim in order to avoid incriminating questions. It is unnecessary to do more than refer to the decision of the Court of Appeal in *Blunt* v. *Park Lane Hotel, Ltd.* (1) ([1942] 2 All R. R. 187), where reliance was placed on some observations in the judgment of Bowen, L.J., in a divorce case, *Redfern* v. *Redfern* (2) ([1891] P. 139), as showing that the peril of ecclesiastical punishment was still a live peril against which witnesses were entitled to claim protection. But that view was held to be obsolete, and it was pointed out that the decision in *Redfern* v. *Redfern* (2) was based on the particular provisions of the statute which, in proceedings instituted in consequence of adultery, prevented questions being asked tending to show that a witness had committed adultery. The relevant statute at the present time—later than the statute under consideration in *Redfern* v. *Redfern* (2)—is the Matrimonial Causes Act, 1950, s. 32 (3):

> " The parties to any proceedings instituted in consequence of adultery and the husbands and wives of the parties shall be competent to give evidence in the proceedings, but no witness in any such proceedings, whether a party thereto or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery."

These proceedings having been instituted not in consequence of adultery but, as I have already stated, in consequence of cruelty, that express statutory provision does not apply and does not become applicable now that the amendment has taken place. The answer was given in the witness-box when the proceedings were proceedings for cruelty. If it be objected to the question that, whether incriminating or not, it could not be asked because it was irrelevant to the issue—which was an issue of cruelty on both sides—the answer is to be found in the pleadings. I have already said that in para. 14 of the petition (which is dated Mar. 14, 1956) the charge of cruelty relates to April, 1954. In para. 14 the husband said that on Apr. 17, 1954, at a public house in Aylesbury, the wife hit him across the face saying: " I have got all the evidence I want now ". That may not be a very pointed reference to evidence of adultery, but in the particulars of the answer, relating also to April, 1954 (which, of course, may or may not relate to the same incident) the wife says that she accused him of philandering with other women, that violent quarrelling ensued, and that he threatened to kill her if she did not leave him alone. So that whether or not this man was philandering or committing adultery with other women is closely connected A with the issue of cruelty which it was for the court to decide on the pleadings as they originally stood. It is unnecessary to go further and consider whether in any event the question might have been permissible as tending to go to shake the credit of the husband, to whom the question as to adultery was addressed. So that, so far as the evidence was concerned, in my judgment it was rightly admitted by the learned commissioner. B

If that is so, there seems to me to be no reason at all to object to the exercise of the discretion by the learned commissioner in giving leave to amend at that stage. Whether an adjournment was necessary or not, I do not know. The husband having given evidence of his adultery in that way, it seems unlikely that he would get much help from some such defence as an allegation of " conduct conducing ", although no doubt such a defence would be open to him; but there C was no objection to the amendment being made. The court has said recently in a case, *Clear* v. *Clear* (3) (Feb. 26, 1958, unreported), that, in suits for divorce, where a husband or wife has given evidence in the witness-box of his or her adultery following on no allegation of adultery but only a prayer indicating that discretion would be sought, it does not follow as of right that leave to amend will be given; although I think that it is generally more convenient that such leave D should be given provided that no injustice to the parties will be done. If leave is not given, it may well be that the charges of cruelty will fail, as so often happens, and fresh proceedings can at once be brought by the wife or the opposite party based on the admissions made in the witness-box. We referred in *Clear* v. *Clear* (3) to a decision of DAVIES, J., in *Clueit* v. *Clueit* (4) (ante, p. 417) where leave to amend was given in similar circumstances; this court agreed with the course E taken by DAVIES, J., in *Clueit* v. *Clueit* (4), and with the reasons which he gave.

So far as the form of the amendment is concerned, it has been argued that the paragraph which I read out was too vague to stand by itself and could be struck out, and, therefore, that leave to amend ought not to be given. Reliance was placed in support of that contention on *B.* v. *B. & G.* (5) ([1936] 2 All E.R. 1254), a decision of LANGTON, J., where a respondent to a divorce petition sought leave F to amend his answer by putting in a charge of adultery based only on the notice contained in the prayer that discretion was being sought. It was argued that, the inevitable inference being that discretion was being sought in respect of adultery, leave to amend should be given; but leave was refused, and that decision has stood for a very long time.

It has been recognised that, according to the practice of the court, the prayer G of a petition cannot properly be treated as an admission. Indeed, the practice is now regulated by rules, to which I shall refer, which prevent the other party against whom discretion is being sought ascertaining before the hearing the facts from any document before the court; so that no evidence is given relating to the adultery until the party seeking discretion goes into the witness-box. The rule is r. 28 (5) of the Matrimonial Causes Rules, 1957, which deals with what H are called " discretion statements ", in which a party has to set out on paper before the hearing details of his or her adultery. Sub-rule (5) reads:

> " Neither the fact that a discretion statement has been lodged or that such notice as aforesaid has been given nor the contents of the discretion statement or notice shall be given as evidence against the party lodging or giving the same in any matrimonial cause or matter except when that I party has put the discretion statement or notice or the contents thereof in evidence in open court."

It follows from that that what is contemplated is that, before the court can deal with the matter, the party seeking discretion must give evidence which includes evidence of his or her own adultery.

I do not think that there is any substance in the objection that the allegation in the amended answer based on the husband's evidence is too general. He has given his evidence in open court, stating an oath that he has committed adultery following on the parting with his wife in April, 1954. He did not get as far as giving further details of that because he was stopped, for reasons into which I need not go.

Without casting any doubt whatever on the decision of LANGTON, J., in *B.* v. *B. & G.* (5), I do not think it would be sensible to exclude this pleading, based as it is on the husband's sworn statement, on the ground that that sworn statement is not sufficiently specific. The contention was below and is here that, where discretion is asked for, the duty of the court is to deal with the issues raised by the pleadings and dispose of them by findings before considering the question of discretion. I confess that I cannot lend any support to the contention that that is a practice which ought to be followed, if it ever has been followed. It is quite true that the judge who has the conduct of the trial is entitled to be master in his own court, and, if for good reasons he finds it convenient to take a particular issue separately, it may well be that no injustice will be done; but in a matrimonial cause where charges of cruelty are made (as here) and the fact of adultery is a relevant matter, and must be a relevant matter, it seems to me that it would be absurd to ask the judge to arrive at any decision on the cruelty without taking into account the fact of the adultery of the other party. It may be that in some cases the adultery of one spouse may be segregated, but certainly not in this case, where (according to the pleadings, at any rate; we have not examined the evidence) the wife's suspicions of adultery were aroused before the parting; and indeed she claimed to have evidence. How a judge can be expected to arrive at a decision on the issue of cruelty without investigating that matter, I fail to see. Unkindness, abuse, even blows, may wear a very different colour when they are found to have come about because of quarrels arising between spouses where accusations of adultery, true or false, have been made.

In the ordinary case where discretion is sought, whether the suit be defended or undefended, it seems to me to be convenient that the petitioner should be asked to deal with the fact of his or her adultery in examination-in-chief in the place in which that fact chronologically appears. For example, if the adultery had taken place immediately after the marriage, it should be dealt with then in evidence; and I deprecate the practice which seems to have been adopted in some cases of dealing with the whole case as pleaded and then, as if by way of afterthought, suddenly producing a document which bears the dignified name of " discretion statement ", handing it to the witness saying: " Is that all right?", hoping the witness will say: " Yes ", and leaving it at that. The adultery which is referred to in that statement is part of the human story which the court has to investigate, and there is no magic in the discretion statement itself; that is a document which is provided for by the rules in order that these matters may be given proper consideration and that the court may have the material before the hearing, although the parties have not access to it as of right. But the matter with which the court is concerned at the end of it all is the evidence given by the parties and nothing else—not the so-called " discretion statement " any more than the petition or the answer. It is the evidence which has to be dealt with.

I think that the course which counsel for the husband sought to induce the commissioner to follow was rightly resisted by the learned commissioner, who found himself very unwilling to treat these matters in separate compartments. In my judgment, there is no substance in the contention that leave to amend was wrongly given; and this appeal should be dismissed.

PEARCE, L.J.: I agree with all that my Lord has said. In my judgment, there is no rule of practice entitling a petitioner to defer giving evidence of his own adultery until the judge has given judgment on the issues on the pleadings; nor would such a practice be reasonable or desirable. It would seem a strange

thing if a party could compel a judge to decide issues while deliberately withholding from him evidence which might throw a strong light on those issues— A
evidence which would be told to him as soon as it had become too late for him to use it. In many cases it is very difficult to arrive at true findings of cruelty or desertion without knowing whether at all relevant times one or other of the parties was committing, or had committed, or was about to commit, adultery.
Even concealed adultery is likely to have a serious effect on the relations between B
husband and wife. Whether wholly unknown, or partially suspected, it may alter the whole atmosphere of a home. It is important that such a matter should be fully known to the judge when he is deciding the issues between the parties, and it would be wrong to allow one of the parties to deprive him of that knowledge.

Appeal dismissed.

Solicitors: *W. H. Matthews & Co.* (for the husband); *Seeley & Son*, agents for C
L. C. Thomas & Son, Neath (for the wife).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

WRIGHT *v.* BOYCE (INSPECTOR OF TAXES). D

[CHANCERY DIVISION (Vaisey, J.), March 5, 6, 1958.]

Income Tax—Income—Voluntary payments—Huntsman—Christmas gifts—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *s.* 156, *Sch. E*, *paras.* 1 *and* 2, *Sch.* 9, *Rules applicable to Sch. E*, *r.* 1.

A huntsman engaged by the master of the hunt, and under the master's E
orders, was responsible for the feeding of the hounds, management of the pack and the kennels and " finding foxes and getting the hounds on to them ". At the time of his appointment, which was made orally, nothing was said about Christmas gifts, but it was found to be a widespread and long-standing custom for gifts of cash to be made to the huntsman at Christmas
time, normally at the meet on Boxing Day. The gifts were entirely voluntary F
and were made by followers of the hunt and others interested in it. Many givers were influenced by personal regard for the huntsman but it was found that that personal regard had its origin in the way the huntsman performed his duties as huntsman. The huntsman was assessed to income tax under Sch. E in respect of the gifts of cash and on appeal the Special Commissioners
of Income Tax held that the gifts (other than those received from persons G
not connected with the hunt) accrued to the taxpayer by virtue of his employment and were taxable. On appeal,

Held: the gifts (i.e., those which the Special Commissioners found to be taxable) were taxable since they came to the huntsman by virtue of his employment as huntsman and were not mere presents or testimonials.

Moorhouse v. *Dooland* ([1955] 1 All E.R. 93) applied. H

Appeal dismissed.

[As to taxation of voluntary payments to the holder of an office or employment, see 20 HALSBURY'S LAWS (3rd Edn.) 322-324, para. 592; and for cases on the subject, see 28 DIGEST 85-88, *490-507*.

For the Income Tax Act, 1952, s. 156, Sch. E, paras. 1 and 2, and Sch. 9, Rules
Applicable to Sch. E, r. 1, see 31 HALSBURY'S STATUTES (2nd Edn.) 149, 150, 522.] I

Case referred to:

(1) *Moorhouse* v. *Dooland*, [1955] 1 All E.R. 93; [1955] Ch. 284; 36 Tax Cas. 1, 12; 3rd Digest Supp.

Case Stated.

The taxpayer appealed to the Special Commissioners of Income Tax against assessments to income tax under Sch. E made on him as follows: additional assessments in respect of gratuities only 1948-49 £200, 1949-50 £200; first assessments: 1950-51 £341, 1951-52 £353, 1952-53 £583, 1953-54 £709, 1954-55 £658. The question for determination was whether certain sums received by the taxpayer, the huntsman successively of the Bathurst Hunt and the Woodland Pytchley Hunt, about Christmas time by way of gifts from followers of the hunts and other persons interested in the hunts, were taxable emoluments of his employment. The taxpayer contended that the sums were not such taxable emoluments. The Crown contended that the sums were a profit accruing to the taxpayer by reason of his employment as huntsman and were properly assessable to tax under Sch. E. The commissioners found that gifts, except certain gifts in kind and gifts which came from persons not connected with the hunt in which the appellant was employed in each of the relevant years, came to the taxpayer because he was employed as huntsman and accrued to him by virtue of that appointment, notwithstanding that the giver was influenced by personal regard for the taxpayer, such personal regard having had its origin in the way in which the taxpayer performed his duties as huntsman. The appeal therefore failed. The taxpayer appealed by way of Case Stated.

H. B. Magnus, Q.C., and *R. A. Watson* for the taxpayer.

Cyril King, Q.C., and *A. S. Orr* for the Crown.

VAISEY, J.: This case comes before the court by way of an appeal from the decision of the Special Commissioners assessing the appellant taxpayer for tax under Sch. E. The assessments were made in respect of the taxpayer's emoluments as a huntsman, first to the Bathurst Hunt and later to the Woodland Pytchley Hunt. The question is whether certain sums which the taxpayer received about Christmas time in each of the years in question should be included in those emoluments. The amounts are not great, but the point which is raised is not easy. This is the latest of many decisions on a similar point.

The Bathurst Hunt, which operates in the South of Gloucestershire and North of Wiltshire, has no written rules. Its hounds and kennels are owned by Lord Bathurst, and he appoints the master. There is a hunt club, which is a social club without funds, and I do not think anything turns on it. There is a committee, which guarantees to the master a sum of money which goes towards his working expenses or the working expenses of the hunt. The Woodland Pytchley Hunt, which operates in Northamptonshire, again has no written rules. The master is elected by a committee, which represents subscribers, farmers and landowners, and there is an annual general meeting to which persons who contribute more than a certain sum are invited, together with certain landowners and farmers who are concerned and interested.

In the case of both hunts it appears that the huntsman is engaged by the master and is under the master's orders, and his principal duties are to be responsible for the feeding of the hounds, management of the pack and the kennels and, as the Case somewhat naively states, "finding foxes and getting the hounds on to them". There is no doubt (it is found as a fact and it is no doubt a truism) that the success of the hunt is largely dependent on the huntsman's abilities.

The taxpayer had been a hunt servant since boyhood. He was engaged as huntsman with the Bathurst Hunt orally at an interview in 1946, and at that interview nothing was said about Christmas presents or Boxing Day presents or tips or anything of that kind. He was told the terms of his employment, which I suppose included the terms of his salary, and the same thing happened when he left the service of the Bathurst Hunt in 1952 and was engaged as huntsman to the Woodland Pytchley Hunt. Again, nothing was said about tips or presents at the time of his appointment, which was by word of mouth.

The commissioners find that in each year when the taxpayer was huntsman to the Bathurst Hunt and the Woodland Pytchley Hunt he received presents of cash about Christmas time. Some came from persons with whom he had come into contact in his capacity as a hunt servant earlier in his career but who had no connexion with the hunt in which he was huntsman at the time the presents were given. These people were few in number, and most of the presents of cash A given to the taxpayer at Christmas or on Boxing Day came from people with whom he was at the time in contact in his capacity as huntsman. Such persons would mostly be people who regularly rode in the hunt but would also include persons who occasionally rode and persons who did not ride but had an interest in the hunt. Many of those were personal friends of the taxpayer, who, in his capacity of huntsman, had become a personality of some note to a wide circle of B people in the district, not only people who hunted but also people who voluntarily assisted in the work of the kennels, farmers and people who attended meets on foot. He also got presents in kind from farmers. Although the word is not used, I gather from that that the taxpayer was a very popular as well as a very successful huntsman.

The commissioners find these facts: C

> " It is a widespread custom in hunts in most parts of the country (including the Bathurst and Woodland Pytchley Hunts) for followers of the hunt to give the huntsman presents of cash at Christmas time, and the usual occasion for the gifts is the meet on Boxing Day. The custom is one of long standing and well known to people who hunt [including, if I may say so, D obviously the taxpayer himself] and soon becomes known to people who take up hunting. There is no compulsion on followers of the hunt to give such presents nor (in the case of the Bathurst and Woodland Pytchley Hunts) was any form of circular or reminder given to followers about it, or any organised collection or cap, either on Boxing Day or at any other time. There is no conventional amount to give; a person would give a larger E amount if he liked or respected the [taxpayer], or a smaller one or none at all if he disliked him. About half of the persons riding at the Boxing Day meet would give the [taxpayer] a present (where several members of the same family were riding, the [taxpayer] generally receives one present from the head of the family only); some people (particularly those who could not attend the Boxing Day meet) give the [taxpayer] a present before or after Boxing F Day; if, however, there is no meet on Boxing Day the [taxpayer] does not receive many presents. For example, in one year when hunting was stopped by frost from October to February and in another year when the [taxpayer] was prevented by illness from hunting during the Christmas season he received very few presents of cash."

Pausing there, it was opened to me, and I have no doubt it is the fact, that in G addition to the presents of cash the taxpayer was accustomed to receive presents in kind—a box of cigars, or a bottle of whisky, or a bottle of port, or a couple of pheasants; I do not know what; but at any rate not in cash. Those presents in kind do not come into this case at all; no claim is made by the Crown for treating those presents or the value of them as a taxable interest in the hands of the taxpayer. The taxpayer's contention was that the payments in cash were H not taxable as emoluments of his employment as huntsman and that the assessments under appeal should be reduced accordingly; in other words that these were not part of his income at all, they were not remuneration, pay, salary or accretion either of pay or of salary; they were testimonials or presents. Drawing the line between those types of things received is not a very easy task. On the other hand the Crown urged that the sums were a profit accruing to the taxpayer I by reason of his employment as huntsman and were properly assessable to income tax under Sch. E.

After considering the evidence, the commissioners found that, with the exception of certain gifts which they referred to and which I will mention subsequently, these sums came to the taxpayer because he was employed as huntsman and accrued to him by virtue of his employment, and they say that, in coming to that conclusion, they did not overlook the fact that in the case of many of the sums the giver was influenced to some extent by personal regard for the taxpayer.

but they found that such personal regard had its origin in the way in which the taxpayer personally performed his duties as huntsman. The gifts which the commissioners found not to be liable to tax and excluded from the assessment came from persons who had no connexion with the hunt with which the taxpayer was employed in the relevant years. In other words, the commissioners say that no tax should be paid on presents which came from old friends.

It is difficult for me to express my conclusions in terms which are completely accurate having regard to the many authorities on this subject; but, as I understand the matter, if these sums were received not merely because the taxpayer was a huntsman and because, being a huntsman, he came in contact with a good many people who enjoyed hunting or joined in the hunting, that is not enough. The question is: Did they come to him by virtue of his office ? That is to say—were they so linked up with his office as distinct from his personality that they must fairly be regarded, not as mere presents or gifts, but as a contribution to what he was paid, looked at from his own point of view, from the point of view of those who made the gifts and from the point of view of the taxing authorities?

In the most recent case on this kind of point, *Moorhouse* v. *Dooland* (1) ([1955] 1 All E.R. 93), which came before the Court of Appeal in 1954, a cricket club professional under the terms of his employment was permitted to have collections made for him in respect of any meritorious performance on the cricket field. The judgments of HARMAN, J., in the court below and of SIR RAYMOND EVERSHED, M.R., and the lords justices in the Court of Appeal contain many statements as to the law applicable to this subject. I personally find much guidance from the statement of principles enunciated by JENKINS, L.J., in that case (ibid., at p. 104). He said:

> " (i) The test of liability to tax on a voluntary payment made to the holder of an office or employment is whether, from the standpoint of the person who receives it, it accrues to him by virtue of his office or employment, or in other words by way of remuneration for his services. (ii) If the recipient's contract of employment entitles him to receive the voluntary payment [as was obviously the case here], whatever it may amount to, that is a ground, and I should say a strong ground, for holding that, from the standpoint of the recipient, it does accrue to him by virtue of his employment, or in other words by way of remuneration for his services. (iii) The fact that the voluntary payment is of a periodic or recurrent character affords a further, but I should say a less cogent, ground for the same conclusion. (iv) On the other hand, a voluntary payment may be made in circumstances which show that it is given by way of present or testimonial on grounds personal to the recipient, as for example a collection made for the particular individual who is at the time vicar of a given parish because he is in straitened circumstances . . . "

The question of law now before me is: In view of the facts set out, are the sums in question assessable to income tax under Sch. E ? Schedule E of the Income Tax Act, 1952, says that tax (i.e., income tax under that schedule)

> " shall be charged in respect of every public office or employment of profit, and in respect of every . . . stipend payable by the Crown or out of the public revenue . . . 2. Tax under this schedule shall also be charged in respect of any office, employment or pension the profits or gains arising or accruing from which would be chargeable to tax under Sch. D but for the proviso to para. 1 of that schedule."

Then Sch. 9, which contains rules applicable to Sch. E, provides:

> " 1. Tax under Sch. E shall be annually charged on every person having or exercising an office or employment of profit . . . in respect of all salaries,

> fees, wages, perquisites or profits whatsoever therefrom for the year of assessment . . . "

after making certain deductions.

What I have to decide is: Were these payments, this collection made on Boxing Day or thereabouts in favour of the taxpayer, part of the fees, wages, perquisites or profits arising from his employment ?—because they did not come from the person employing him, either the master or the committee of the hunt; they came from sympathising supporters of the hunt, and no doubt also largely from personal friends. Considering the matter from the unsympathetic point of view of everybody having to pay tax on what he earns, it seems to me that the taxpayer really earned as huntsman of these two hunts successively first of all his salary and, secondly, the customary collection which was made for him at Christmas or Boxing Day. The Special Commissioners, having seen the taxpayer and having very carefully set out the circumstances in which he was employed and remunerated, came to the conclusion that these sums were not mere presents nor mere testimonials. I pause to observe that a testimonial, of course, indicates some special matter which has to be commemorated, either making a large score at cricket or, it may be, some other special performance of a duty or at any rate on some special occasion such as a birthday or wedding and so forth, and I cannot regard these payments as testimonials, nor, I think, in the strict sense are they gifts. Mr. Magnus, who has said everything that could possibly be said for the taxpayer in this case, points out that many of them came from people who were personal friends of the taxpayer, and indeed perhaps all of them came from people who could call themselves friends, although the degree of friendship must have been somewhat variable. Still, he got them not merely because he was huntsman. Of course, if he had never been huntsman, he would not have been there, he would not have been dressed up as huntsman at the meet and therefore the occasion of his receiving presents would never have arisen; but that is not the way to look at it, I think. The way to look at it is this: Is it part of what resulted by virtue of his being huntsman, i.e., because of his performance of his duties as huntsman?

So regarded, I think that the findings of the Special Commissioners were correct, though I confess that I regret the result in this case, just as I have regretted similar results in the past in the cases of the clergymen's Easter offerings, because it is very much against the wishes of those who made the presents that the taxpayer should have to pay tax on them instead of having them without deduction as money that he could spend. If the persons who made these gifts could be cross-examined, I have no doubt that they would say that that was the last thing they wanted, just as the last thing that an ordinary contributor of an Easter offering to a clergyman wishes is that it should be depleted by the requirements of the Revenue.

I say that with, I hope, a not improper but undoubtedly strong feeling of regret that sums which were never contemplated as being taxable profits have to be so treated on the authority of the very large number of cases decided on this point. But, if the parson has to pay on his Easter offering, if the taxi driver has to pay on his tips and if the waiters have to pay on their tips from the customers and in other cases (I need not mention other kinds of employment), I feel bound to hold that the gifts received by the huntsman in the circumstances set out in the Case, are assessable to income tax. I uphold these assessments and dismiss this appeal.

Appeal dismissed.

Solicitors: *Withers & Co.* (for the taxpayer); *Solicitor of Inland Revenue.*

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

NOTICE.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

Divorce—Costs—Counsel's fees for interlocutory work.

STATEMENT ON THE APPLICATION OF THE JOINT STATEMENT BY THE LAW SOCIETY AND BAR COUNCIL ON JUNIOR COUNSEL'S FEES FOR INTERLOCUTORY WORK IN MATRIMONIAL CAUSES

In view of the diversity of the interlocutory work in matrimonial causes, the following notes for guidance are issued by the registrars of the divorce registry as representing a statement of the policy which will in future be adopted by the taxing authorities in applying the Joint Statement* to matrimonial causes.

1. A substantial amount of the interlocutory work in matrimonial causes will fall into the category which justifies the allowance on taxation of an increase in fees of only fifty per cent. rather than one hundred per cent., for example—
   (a) Settling simple petitions, except where cruelty, or constructive desertion, or two or more different matrimonial offences together are alleged, where a higher fee will be allowed.
   (b) Short and simple advices on evidence in undefended causes which will always be allowed.
   (c) Short conferences or opinions on a short point.
   (d) Formal answers or replies.

2. Higher fees, however, will be allowed in such superficially simple work if it can be shown that in a particular case counsel has had to put more than the usual amount of time into it.

3. It is intended that in all other classes of work fees allowed shall ordinarily be raised by one hundred per cent. and in proper cases by a greater percentage, so that in the aggregate, taking into account brief fees in ancillary matters, counsel's fees allowed for interlocutory work shall be increased by something approximating to one hundred per cent. It is not proposed that the conference fee allowed on an interlocutory or ancillary brief should be increased.

B. LONG,
Mar. 24, 1958. Senior Registrar.

---

* The Joint Statement by the Law Society and the Bar Council to which this notice refers is published in the LAW SOCIETY'S GAZETTE, April, 1958 (see also 108 LAW JOURNAL 236); this statement includes the former statement regarding fees of junior counsel for interlocutory work in the Chancery Division and Queen's Bench Division which was published in the LAW SOCIETY'S GAZETTE for September, 1957 (see also 107 LAW JOURNAL 605).

The Law Society and the Bar Council have agreed to extend the recommendations in the latter statement to the Probate, Divorce and Admiralty Division with effect from May 1, 1958. The principal recommendation was that, in general, solicitors should mark and counsel should expect to receive fees for interlocutory work which would be on the average one hundred per cent. higher than those then being allowed on taxation, though in particular instances that increase might be too high or too low. It was stated that in order to implement the proposed increase in interlocutory fees it would be necessary for solicitors to mark fees on all instructions sent to counsel (other than in legal aid matters) and therefore to agree these fees at the time when the papers were delivered.

The Joint Statement published in April, 1958, states that in applying this recommendation to matrimonial causes in the Probate, Divorce and Admiralty Division both the Law Society and the Bar Council recognise that in some cases an increase of one hundred per cent. would be too high, while in others, owing to the complexity or importance of the work, even an increase of one hundred per cent. would be too low; for example, it is not proposed that the fee for the simplest interlocutory matter should be automatically doubled. However, even in the simplest cases, it is agreed that an increase of fifty per cent. is justified except as regards conference fees on interlocutory or ancillary briefs. The Joint Statement states that in regard to the Probate, Divorce and Admiralty Division it is published with the approval of the Lord Chancellor and the President of the Probate, Divorce and Admiralty Division.

NOTE.

QUEEN'S BENCH DIVISION.

Costs—Taxation—Counsel's fees for interlocutory work—Personal injury cases.

A Joint Statement* by the Law Society and the Bar Council concerning junior counsel's fees for interlocutory work in the Chancery and Queen's Bench Divisions of the High Court was published in the LAW SOCIETY'S GAZETTE for September, 1957 (see also 107 LAW JOURNAL 605), and is republished, as extended, in the LAW SOCIETY'S GAZETTE for April, 1958 (see also 108 LAW JOURNAL 236). The publication in April, 1958, contains the following specific application of the recommendations previously made to personal injury cases in the Queen's Bench Division:

> " Consequent on the Joint Statement regarding the Chancery and Queen's Bench Divisions, the Law Society and the Bar Council have agreed and publish below ' market rate ' fees for interlocutory work in personal injury cases. The marking of such fees in every case remains in the discretion of the instructing solicitor and their acceptance in the discretion of counsel concerned. Where the case is of exceptional simplicity or where hardship exists, solicitors would be justified in marking papers at lower fees than those set out. Similarly, where higher fees than those shown in the list are warranted, solicitors would be justified in marking the papers accordingly. It is agreed that these ' market rate ' fees shall have effect from May 1, 1958."

TABLE OF FEES

Interlocutory Item	Personal injury cases (excluding running-down cases)	Running-down cases
	Guineas	Guineas
Writ generally indorsed	2	2
Statement of claim	6	5
Defence with or without counterclaim ..	6	5
Defence, plain admission	2	2
Particulars, request and answer ..	3	3
Reply with or without defence to counter-claim	4	4
Third-party notice	4	4
Interrogatories and answers	4	4
Affidavits	4	4
Advice on evidence	6	5
Opinion (including opinion on appeal) ..	6	6
Opinion on quantum only	4	4
Further opinion	3	3
Notice of appeal to Court of Appeal and counter-notice	5 or 4 if settled with opinion on appeal	5 or 4 if settled with opinion on appeal
Brief on summons before master ..	5 to include conference	5 to include conference
Brief on appeal to judge in Chambers ..	8 to include conference	8 to include conference

---

* The main recommendation of the Joint Statement issued in September, 1957, is briefly summarised in the footnote at p. 869, letter H, ante. The Joint Statement then issued intimated that discussions had taken place between the Lord Chancellor and the Taxing Office and the Lord Chancellor had been assured by the Chief Taxing Master that, if the Bar and the solicitors' profession chose to agree on new market rates, these would be recognised by the taxing master on taxation.

WILSON AND ANOTHER *v.* THOMAS.

[CHANCERY DIVISION (Roxburgh, J.), February 26, 1958.]

Specific Performance—Title—Doubtful title—Latent ambiguity of description of beneficiaries in will—Deed of family arrangement to resolve ambiguity—Sale of reversionary interest subject to special conditions—Whether title too doubtful to be forced on purchaser.

Clause 7 of the special conditions on a sale of reversionary interests in a trust fund provided that " The purchaser shall assume as is the case that the persons who executed a deed of family arrangement dated Nov. 28, 1936, are the same persons as the beneficiaries under the will of the testator and the purchaser shall not be entitled to raise any requisition or objection in respect thereof nor to require the vendors to supply any proof thereof ". The testator, who died in September, 1936, had bequeathed his residuary estate on trust, subject to a life interest to his wife, for several named beneficiaries including " Allan Hewit ". The interests of certain beneficiaries were subjected by the will to protective trusts. By a deed of family arrangement dated Nov. 28, 1936, the beneficiaries, after stating that they were " satisfied that the testator so intended " agreed that the will should have effect as if the words " Frederick Allan Wilson and Henry Hewitt Wilson " were substituted for the words " Allan Hewit " in the will. It was not recited in the deed whether there was any such person as " Allan Hewit ". The purchaser refused to complete on the ground that the title was not acceptable.

Held: the court could not reach the conclusion that " Allan Hewit " in the will referred to two persons without the aid of extrinsic evidence, and a title which depended on the resolution by such means of a latent ambiguity of description was too doubtful to be forced on a purchaser; specific performance would, therefore, be refused and the court would declare that the purchaser was entitled to rescind and to give a good receipt for the deposit.

Dictum of SIR H. H. COZENS-HARDY, M.R., in *Re Nichols' & Von Joel's Contract* ([1910] 1 Ch. at p. 46) applied; dicta of SWINFEN EADY, L.J., in *Smith* v. *Colbourne* ([1914] 2 Ch. at p. 544), and of MAUGHAM, J., in *Johnson* v. *Clarke* ([1928] Ch. at pp. 855, 856), considered.

[As to when the court will refuse to grant an order for specific performance owing to the title being doubtful, see 31 HALSBURY'S LAWS (2nd Edn.) 385, para. 447; and for cases on the subject, see 42 DIGEST 490-493, *575-606*.]

Cases referred to:

(1) *Re Nichols' & Von Joel's Contract*, [1910] 1 Ch. 43; 79 L.J.Ch. 32; 101 L.T. 839; 40 Digest 215, *1823*.

(2) *Smith* v. *Colbourne*, [1914] 2 Ch. 533; 84 L.J.Ch. 112; 111 L.T. 927; 40 Digest 45, *283*.

(3) *Alexander* v. *Mills*, (1870), 6 Ch. App. 124; 40 L.J.Ch. 73; 24 L.T. 206; 40 Digest 706, *2396*.

(4) *Johnson* v. *Clarke*, [1928] Ch. 847; 97 L.J.Ch. 337; 139 L.T. 552; 31 Digest (Repl.) 46, *2048*.

Action.

On Sept. 26, 1956, the defendant, Benjamin Alfred Allden Thomas, entered into an oral agreement with Messrs. Foster and Cranfield, a firm of auctioneers (referred to hereinafter as " the auctioneers "), who were acting as the agents of the plaintiffs, Henry Talbot Wilson and Albert Wellesley Wilson. By the agreement the defendant agreed to purchase for the sum of £5,425 the plaintiffs' reversionary shares and interests of 66/1041 parts each of certain trust funds (being a will fund and a settlement fund described as lot 6 in an auction sale held on Sept. 26), subject to the reservations and the general and special conditions set out in the auctioneers' particulars of sale. A On the same day (Sept. 26), a deposit of £542 10s. was paid by the defendant to the auctioneers as stakeholders, in accordance with the terms of the agreement, and a memorandum of the sale was indorsed on the particulars of sale and signed by the defendant. By cl. 3 of the special conditions of sale, the sale was to be completed on Oct. 29, 1956. Clause 6 of the special conditions dealt with the position as to death B duty in regard to the settlement fund. Clause 7 of the special conditions was:

> " The purchaser shall assume as is the case that the persons who executed a deed of family arrangement dated Nov. 28, 1936, are the same persons as the beneficiaries under the will of the testator and the purchaser shall not be entitled to raise any requisition or objection in respect thereof nor to C require the vendors to supply any proof thereof."

The testator, Henry Wilson, had made his will on Apr. 5, 1935, and died on Sept. 21, 1936. The general conditions of sale provided for payment of interest by the purchaser for delay in completion and for forfeiture of the deposit and liberty to re-sell if the purchaser failed to comply with any of the conditions of sale. It was further provided that if there were any error, omission or mis- D statement in the particulars, it should not vitiate the sale, but compensation should be allowed.

The " will fund " referred to in the particulars of sale consisted of the trust funds representing the residuary estate of the testator, Henry Wilson. By his will the testator directed his trustees to hold the trust funds after the death of his widow on trust for a number (about sixteen) of named beneficiaries, including E the testator's " nephews Allan Hewit and Henry Bowcock ". The interests of some of the beneficiaries were protected life interests with remainders over (in some cases in favour of the named beneficiary's children). The deed of family arrangement, referred to in cl. 7 of the special conditions of sale, was executed by all of the named beneficiaries who survived the testator (other than the widow and " Allan Hewit ") and by Frederick Allan Wilson and Henry Hewitt F Wilson, and it authorised and directed the trustees to read and construe the will so that it should take effect as if the words " Frederick Allan Wilson and Henry Hewitt Wilson " were substituted for the words " Allan Hewit " where they appeared in the will.

The defendant having refused to complete the purchase and having asked for G the return of his deposit, the plaintiffs brought an action against him, claiming (i) specific performance of the agreement, (ii) damages for breach of contract in lieu of or in addition to specific performance, (iii) a declaration that the plaintiffs were entitled to interest at the rate of five per cent. per annum on the unpaid balance of the purchase money from the date agreed for completion until the date of the order in the action, and, alternatively (iv) rescission of the agreement and a declaration that the deposit had been forfeited to them, and (v) a H declaration that they were entitled to re-sell and to recover from the defendant any loss on the re-sale. By his defence the defendant alleged that the plaintiffs had failed to show a good title in accordance with their contract to the interests agreed to be sold and, alternatively, that the title was not one which he should be compelled to accept, and, by way of counterclaim, he claimed (i) a declaration I that he was entitled to rescind the agreement, and (ii) repayment of the deposit, or, if the deposit were held by the auctioneers as stakeholders, a declaration that he was entitled to give a good receipt therefor.

R. G. Woolley for the plaintiffs, the vendors.

F. G. King for the defendant, the purchaser.

ROXBURGH, J., stated the facts and continued: It is indubitably the normal course to leave questions of title to a master, but as it is quite plain in this case that there is no issue between the parties except as regards title, and those issues are obviously difficult and important, I agreed to try those questions of title. For that purpose, by agreement of all parties concerned, the defendant opened his objections to the title. Those objections fall into two quite plain divisions. The first group of objections relates to estate duty, and it is alleged that special condition 6 is misleading in that regard. Again by consent between the parties, I have tried first the other issue and, in the view which I take of this case, it is unnecessary to determine the question about estate duty.

I now come to the point which I have to decide, and it is raised by para. 4 of the defence:

> "The defendant further contends that special condition 7 is misleading since on reading it he was entitled to assume that the deed therein referred to was executed by all persons beneficially interested in the property the devolution whereof the deed purported to regulate. This is not the case since the shares of certain of the persons beneficially interested were settled on protective trusts with remainders in favour of persons who were not parties to the deed."

Pausing there, the allegation that the shares of certain persons beneficially interested were settled by the will on protective trusts with remainders in favour of persons who are not parties to the deed is quite plainly true. That is the kernel of this case. Paragraph 4 of the defence continues:

> "The defendant will contend that the administration of either the will fund or the settlement fund as in the particulars mentioned in accordance with such deed would constitute a breach of trust of which the defendant as successor in title to the plaintiffs would be stopped from complaining and for which the defendant's shares might be in part impounded to make good the breach or otherwise diminished by the costs of litigation."

By his counterclaim the defendant, on both the grounds which I have specified, and on the ground of estate duty which I have merely indicated, claims a declaration that he is entitled to rescind the agreement, to repayment of the deposit, costs and further or other relief.

What is said in the defence to counterclaim in relation to special condition 7 is this:

> "3. Special condition 7 states that the purchaser shall assume that the persons who executed the deed of family arrangement dated Nov. 28, 1936, are the same persons as the beneficiaries under the will . . ."

Special condition 7 does not say that. It says that he "shall assume *as is the case;*" and that makes all the difference. Then the defence to counterclaim continues: ". . . and in fact the said deed was executed by all the beneficiaries then in being". In fact, that is not true either, because technically there was a beneficiary in being who did not and could not execute the deed owing to extreme infancy, but fortunately the case does not really turn on that. The defence to counterclaim then goes on:

> "In any event the said deed of family arrangement does not purport to vary the trusts of the shares of the beneficiaries under the will but to place on record that by the words 'Allan Hewit' contained in the will the testator was referring to the two persons mentioned in the said deed. It is contended that there is no such one person as 'Allan Hewit' and the said deed of family arrangement does not in any way affect the proper construction of the said will having regard to the admissible evidence of the surrounding circumstances that the words 'Allan Hewit' mean the said two persons referred to by the testator by their respective popular Christian names.

> "4. Alternatively if the defendant was misled by special condition 7 (which is not admitted) then the plaintiffs contend by reason of what is hereinbefore set out in para. 3 hereof that the same has not in any way whatsoever affected the reversions as aforesaid which the defendant has agreed to purchase.
>
> "5. It is further contended that on the footing that 'Allan Hewit' are two persons then the shares of the plaintiffs are 66/1041 each and these shares are in fact the shares contracted to be sold. If on the other hand 'Allan Hewit' is one person (which is denied) then the shares of the plaintiffs are even greater but in that event only the shares contracted to be sold will be assigned.
>
> "6. In further alternative it is admitted that in the unlikely event of a court of construction deciding that each of the said two persons mentioned in the said deed is not entitled and that one person only 'Allan Hewit' is entitled and further in the event of the trustees having paid these two persons their respective shares a claim under s. 62 of the Trustee Act, 1925, could arise but the plaintiffs contend that such a contingency is not real but remote and shadowy and in response to a request therefor made by the defendant with a view to him proceeding with the said sale and affirming the said contract the plaintiffs are and have always been ready and willing as indicated to the defendant long before the commencement of this action to indemnify the defendant against any effect (if any) upon the shares contracted to be sold by any such impounding or diminishing thereof by costs of litigation or otherwise."

The first point which I have to decide, although it is not the main point of the case, is what is the true construction of the opening words of special condition 7:

> "The purchaser shall assume as is the case that the persons who executed a deed of family arrangement dated Nov. 28, 1936, are the same persons as the beneficiaries under the will of the testator . . ."

I think that what those words really mean becomes plain when one reads the rest of special condition 7:

> ". . . and the purchaser shall not be entitled to raise any requisition or objection in respect thereof nor to require the vendors to supply any proof thereof."

I think that it was intended to mean that, as some of the names were slightly different in the deed from those in the will, the defendant was to assume identity as between the persons named in the will and the persons named in the deed. If that is the meaning of special condition 7, there is nothing wrong with it, but it does not touch the point in the case because it then follows that the defendant is not precluded from taking the objection, which is a true objection in fact, that many beneficiaries under the will, one in existence and others who were liable to come into existence within the permitted period, were not in any way bound by the deed, and that the deed is not an effective deed to alter the devolution of the estate. Therefore, whichever way I read special condition 7, I get back to this: there is nothing in the special condition which precludes the objection which has been taken. That is the first point.

In his will the testator names a large number of relations, and he names them all, with the possible exception of Allan Hewit, with two names (although, I think, he was not always quite correct). Nobody who looked at the will uninstructed would doubt that the testator had a nephew whose name was Allan Hewit. The plaintiffs admit that a lot of people who could be beneficially interested in the estate were not parties to the deed, and that, therefore, the deed cannot alter the devolution of the estate, but they submit that, if I were to try the

A question relating to the will, admitting such extrinsic evidence as would be admitted in a claim under a will, I should come to the same conclusion about the construction of the will as the parties to the deed did. The question, therefore, is whether I ought to allow the plaintiffs in this action to call evidence for that purpose. It is clear that such a course has never yet been taken in any reported case.

B Before I consider the law on the matter, I propose to read the deed. It is stated to be made between a number of beneficiaries under the will (hereinafter called "the beneficiaries"), of the one part, and the trustees, of the other part, and to be supplemental to the will. Then it continues as follows:

> " . . . each of the beneficiaries being satisfied that the testator so intended
> C hereby authorises and directs the trustees to read and construe the principal will so that the same shall take effect as if the words 'Frederick Allan Wilson and Henry Hewitt Wilson' were substituted for the words 'Allan Hewit' where they appear in cl. 5 of the principal will and each of the beneficiaries [and that includes the two plaintiffs, the vendors in this case] hereby covenants and agrees with each of the other of them that the principal will
> D will take effect accordingly and so not only in respect of the property now subject to the trusts of the principal will and the property from time to time representing the same but in respect of any other property which may accrue or be added thereto by virtue of any disposition hereinafter made and the property from time to time representing the same . . . "

From that deed I get no light why the parties entered into the deed. They may
E have reached their conclusions on matters entirely outside the evidence which any court is entitled to regard, or they may have not. I cannot tell. There is no statement in the recitals that there is no such person as "Allan Hewit"—I suspect that there was not, but it is not recited. That, I should have thought, was the smallest precaution which should have been taken in the deed, if it was intended to be used for any purpose other than as a deed of reciprocal covenant.
F It is, therefore, quite plain—and this is, from my point of view, important—that, if I look at the will as a document for the purpose of construing it without regard to extrinsic evidence, I could not possibly arrive at the conclusion that "Allan Hewit" referred to two persons. On the other hand, it might well be that, on a summons taken out to construe the will, evidence could be adduced which would enable the court to construe the will in the manner in which it was construed by
G the deed of family arrangement. In those circumstances, what ought I to do?

There are three cases on this matter. Two of them were in the Court of Appeal. It is unfortunate for me that the first case in the Court of Appeal was not cited to the Court of Appeal which decided the second case. That situation is apt to embarrass puisne judges. There is also a decision by MAUGHAM, J., where the relevant passage is, in my view, obiter dictum. If there are two cases in the
H Court of Appeal which are not altogether in complete harmony, my proper course is to try to see where the two decisions come together to make a reconcilable whole, and that is what I propose to do. I am not thereby suggesting that a different result would have been likely in either case.

The first case in the Court of Appeal which is very near the present case is *Re Nichols' & Von Joel's Contract* (1) ([1910] 1 Ch. 43). In that case the title
I depended on the construction of an obscure will. The present case is much more difficult than that one, for reasons on which I will enlarge later. The present case depends on what extrinsic evidence can be admitted. The facts in that case, according to the headnote, were as follows:

> "An agreement was made for the sale of freehold ground rents, the title to which depended upon the construction of an obscure will. The purchaser having objected to the title, the vendors took out a vendor and purchaser summons for the purpose of getting the question of construction determined.

> NEVILLE, J., offered to adjourn the case to enable the vendors to take out an originating summons, and, on the refusal of this offer, held that the title was too doubtful to force upon the purchaser. The vendors appealed, and on the appeal the [Court of Appeal] made the same offer, which was accepted. Upon the originating summons the question of construction was decided in favour of the vendors, and on the adjourned hearing of the appeal it was declared that the vendors had shown a good title, and the order of NEVILLE, J., was discharged on the subsequent matter: Held, that the vendors ought to pay the costs of the appeal and in the court below."

In his judgment SIR H. H. COZENS-HARDY, M.R., said ([1910] 1 Ch. at p. 46):

> " I should be very sorry to have it supposed that it is my view that upon a vendor and purchaser summons it is not the habit and duty of the court in ordinary cases to construe a will or document forming part of the title, but I also think it is quite plain that when there is real difficulty or doubt in construing a will, and when there is, according to the rules of the court, a very easy mode in which that construction can be determined in such a manner as to bind everybody, it is not right for the court to force a title upon a purchaser which merely may mean that he is buying a lawsuit . . . Here the vendors said they had a good title; the purchaser objected that they had not. The vendors might have obtained a decision upon the construction of the will which would have bound everybody, but they preferred to take out a vendor and purchaser summons, the result of which would be to get the will construed at the expense of the purchaser."

I stress that passage. SIR H. H. COZENS-HARDY, M.R., went on to say:

> " NEVILLE, J., took the view that this was not a matter which ought to be decided simply as between vendor and purchaser. He said, ' There is a real point of difficulty and I will not decide it one way or the other. I offer you an opportunity of taking out a construction summons '. That offer was refused."

I think that I am entitled to adhere to the view expressed by SIR H. H. COZENS-HARDY, M.R., in spite of the cases to which I am going to refer. What he said was not considered in *Smith* v. *Colbourne* (2) ([1914] 2 Ch. 533), and nobody with the authority to criticise SIR H. H. COZENS-HARDY has ever done so. Therefore, I shall adopt his very words ([1910] 1 Ch. at p. 46):

> " I should be very sorry to have it supposed that it is my view that upon a vendor and purchaser summons it is not the habit and duty of the court in ordinary cases to construe a will or document forming part of the title, but I also think it is quite plain that when there is real difficulty or doubt in construing a will, and when there is, according to the rules of the court, a very easy mode in which that construction can be determined in such a manner as to bind everybody, it is not right for the court to force a title upon a purchaser which merely may mean that he is buying a lawsuit."

Although the Court of Appeal in *Smith* v. *Colbourne* (2) were not referred to *Re Nichols' & Von Joel's Contract* (1), I am not suggesting that there is any discrepancy between what was decided in the two cases. The discrepancy, if any, is in the way in which the propositions were stated, but in the later cases the court requires perhaps a greater degree of difficulty than would be postulated by the passage which I have read from the judgment of SIR H. H. COZENS-HARDY, M.R. I think that that is as far as it goes. Indeed, I am inclined to think that probably today, if there was a mere question of construction not requiring extrinsic evidence and it was not very difficult, the court probably would not take the course which NEVILLE, J., took. I am not in a position to judge how

A difficult was the question of construction in *Re Nichols' & Von Joel's Contract* (1), although it was certainly treated by the Court of Appeal as one of what they called "real difficulty". That, being a matter of argument, is quite a different matter from the point with which I am concerned in the present case.

In *Smith* v. *Colbourne* (2) it became necessary to construe a number of written documents. I need not state what they were. The point is that it was not necessary B or even desirable to call any oral evidence about any of the matters with which the court was there concerned. They were, strictly speaking, questions of the construction of documents. Therefore, it cannot be doubted that the conclusion which the Court of Appeal reached in that case was entirely consistent with the conclusion which the Court of Appeal reached in the earlier case. The only question is whether the language does not go rather further. SWINFEN C EADY, L.J., said ([1914] 2 Ch. at p. 544):

> "It was then urged by the defendant that the position of a purchaser with regard to these windows would be one of some doubt, and that the title ought not to be forced upon him, but the rule of the court is that enunciated by JAMES, L.J., when delivering the judgment of the Court of D Appeal in *Alexander* v. *Mills* (3) ((1870), 6 Ch. App. 124 at p. 131): 'As a general and almost universal rule, the court is bound as much between vendor and purchaser, as in every other case, to ascertain and determine as it best may what the law is, and to take that to be the law which it has so ascertained and determined'. In my opinion the position of the purchaser after completion with regard to these five new windows will not be one of E any doubt."

If by "law" is meant law in the narrow sense, that is to say, a question of law including a question of mere construction as distinct from a question of fact or a question of mixed law and fact, there would I think be no discrepancy between that proposition and the proposition in *Re Nichols' & Von Joel's Contract* (1). If, however, the word "law" includes questions of mixed law and fact, then I F think that it does go much further. Indeed, that proposition is not really reconcilable with what was said in the earlier case, and I would prefer what was said in the earlier case.

The position in the present case is this. In the ordinary way the kind of question raised by this case would be raised by an originating summons, and anybody G who wanted to say that "Allan Hewit" was two persons would have to file evidence; otherwise he could not hope to succeed, because prima facie "Allan Hewit" is not two persons. Therefore, the first thing that he would have to show would be that there was no such person as "Allan Hewit". That, no doubt, would open up an inquiry which might end in the result which was reached by the parties to the deed of family arrangement; but it would always be open to persons H interested in contending the contrary to bring in evidence tending to show that the testator probably did not mean the two persons who have been selected. Then the court would have to adjudicate on the matter by balancing the evidence. In such a case each side would have an opportunity of tendering what evidence they possessed, and the court would do the best it could on that evidence.

The question in the present case is not a technical question, and in that way I this case is entirely different from *Johnson* v. *Clarke* (4) ([1928] Ch. 847), a decision of MAUGHAM, J., to which I shall refer later. It is not merely a question whether or not the many persons interested in remainder are going to be bound by this arrangement, because quite obviously they will not be, but it is this: the purchaser is not to be assumed to know anything whatever about the relationship of the testator to various members of his family. If I were to allow this matter to be litigated before me in these proceedings, it would throw on the purchaser the burden of seeking for evidence amongst a large number of persons, all of whom are strangers to him. How can that be fair on the purchaser? The duty of the plaintiffs is to make a good title. The deed of family arrangement shows that the matter was regarded as doubtful. There is the covenant* which might involve the vendors and their interest in this fund in liability, if the court decided another way. Why should the vendors be entitled to have the title cleared, a step which they significantly failed to take when the deed of family arrangement was entered into ? They could have done it with the sanction of the court, and they did not do it. They executed the deed of family arrangement which binds nobody except the parties to it, and they failed to clear the title. In cl. 7 of the special conditions of sale they make the cryptic reference to the deed of family arrangement which I have read. Though not intended to mislead, it certainly was bound to mislead a purchaser. Why should the matter be litigated at the expense of the purchaser—not only at his expense but to his great disadvantage in seeking to clear the title in this way? The plaintiffs have the benefit of knowing all the members of the family, and the defendant presumably knows few, if any, of them.

In my view, this case is stronger than *Re Nichols' & Von Joel's Contract* (1) as a case of real difficulty. There the only difficulty was one of construction in the narrow sense of the word. Here the difficulty is one of evidence, and the obtaining of evidence. It is not so much the difficulty of deciding on the evidence when it has been obtained, but of getting the evidence put before the court in a manner fair to the purchaser. Taking the words of JAMES, L.J., in *Alexander* v. *Mills* (3) ((1870), 6 Ch. App. at p. 131), which were quoted in *Smith* v. *Colbourne* (2) ([1914] 2 Ch. at p. 544):

> " . . . as a general and almost universal rule, the court is bound as much between vendor and purchaser, as in every other case, to ascertain and determine as it best may what the law is . . . "

even if I gave to the word " law " the wide meaning (which I am not disposed to give) as including a mixed question of law and fact, I should say that, even if the rule is almost universal, this is a case in which it would be contrary to natural justice to apply it.

Before I pass from the subject I must refer to the decision of MAUGHAM, J., in *Johnson* v. *Clarke* (4). That case is important in the present context because (though not a will case) it is the only case in which any question involving evidence of the position as between the vendor and a third party has been found in the reports. It is a singular case, and I derive some satisfaction from some of the things which MAUGHAM, J., said, although the decision in that case was the other way. In that case part of the property which was for sale was in the occupation of a tenant who was believed by the vendors to be merely a tenant from year to year, but the tenant produced a document under which he claimed a much more extensive tenancy, and that was taken as an objection to the vendors' title. In that case the tenant did, in fact, give evidence. Apparently, no question was raised about it at that stage, and, therefore, the judge had in fact before him, not only the document, but every fact which the tenant could have put before the court if he had been a party. Let us consider the difference between that case and this, where there is not before the court, as far as I know, any single person who wishes to contest the propriety of the deed of family arrangement.

The report of that case contains a number of misprints. Having heard the tenant MAUGHAM, J., said ([1928] Ch. at p. 854):

> " Now, I should like to say at the outset for myself that I have a great deal of sympathy with the view that it is hard upon a purchaser that he should be bound on occasion to accept a title which is open to a doubt arising from the circumstance that the decision of the court in a specific performance action does not technically bind the person who may be thought to have a

---

* See p. 875, letter D, ante.

> claim adverse to the title sold, and accordingly that in fact there is a title being forced upon a purchaser which may involve a law suit."

I stress the words " does not technically bind " which were truly applicable in *Johnson* v. *Clarke* (4), but not, I think, in every case. Maugham, J., then cited *Smith* v. *Colbourne* (2) and also *Alexander* v. *Mills* (3). He then said this ([1928] Ch. at p. 855), which I think is very interesting from my point of view:

> " Now, I do not think that the previous decision of the Court of Appeal in the case of *Re Nichols' & Von Joel's Contract* (1) in any way conflicts with that decision."

I am not saying that I entirely agree. He went on (ibid.):

> " *Re Nichols* (1) was a case where the title depended upon a question of construction arising under a will involving real difficulty, and what was held was this—that inasmuch as there is according to modern practice a very easy mode in which the construction of a will can be determined in such a manner as to bind all the persons interested under that will it is not right in that case for the court to force a title upon the purchaser which may mean that he is buying a law suit. If then there were in this case [I stress these words] some easy method of ascertaining whether Mr. Richards [the tenant] has got the rights which he no doubt claims under the document of Mar. 20, 1915, I am not at all sure that it would not be right for me to refuse the present order and to say that the [vendor] should clear his title; but I do not myself see that there is any easy method of determining that question."

Then follows a passage which must, I think, again contain some misprint. I will read it as it appears to me that it must be intended to be read. I think that it should continue thus (ibid., at p. 856):

> " I think therefore that although there is, as I have said, the exception of a case where an originating summons would clear up the difficulty, to suggest [such a summons] or something of that sort, here, would still leave the court in the position that the question would have to be determined in the absence of Mr. Richards; and upon the authorities I am unable to hold that the right thing to do is to compel the vendor to commence an action against Mr. Richards to determine in some way whether a document which they say is not binding has any validity or not. Accordingly, unless there is going to emerge from the circumstances that I am going to mention some very great or serious difficulty . . . "

Pausing there, may I say that I wholeheartedly adopt the word " serious ". I am not quite sure whether the difficulty need be " very great ", but I am of opinion that, if it has to be very great, it is very great in this case:

> " . . . with regard to the document in question, I think it is the duty of the court to ascertain as best it can to use, I think, the phrase of James, L.J., whether Mr. Richards has any enforceable right against the estate of the testator other than that which arises from his having paid rent for a number of years and being a tenant from year to year. I have to consider that in the light of the evidence before me."

At that stage of the report I thought that I was going to get the answer to my problem, but I did not, because in that case both the tenant (Mr. Richards) and the writer of the letter, under which the tenant claimed a more extensive tenancy, were called, and, accordingly, there really was no further evidence which could possibly be of assistance.

As I have already said, I prefer to base myself on the proposition as stated in *Re Nichols' & Von Joel's Contract* (1), but I should be prepared to say that the present case is outside the scope of any of the three previous cases and is a much stronger case than any of them, because, in my view, it would not be fair to expect the purchaser to look for and obtain extrinsic evidence on a matter of this kind, namely, extrinsic evidence to resolve a latent ambiguity in the will. When one reads the will there does not seem to be any ambiguity at all. If there be any, it is by the introduction of the fact that there was no person named " Allan Hewit "; therefore, it is plainly latent. I should have thought that it could hardly ever be right to adjudicate on the question of a latent ambiguity without having either all the beneficiaries before the court or, at any rate, a sufficient number of them to induce the court to make a representation order. It has not been suggested in the present case that there is any difficulty in having this matter adjudicated on by an originating summons in the matter of the will trusts, and I know of no difficulty. So far as I can see there is nothing to prevent the trustees asking a court to determine the question; they may well be indemnified for the purpose by the vendors. I cannot see that the court would have any difficulty in determining the matter, and, once it had been determined in proceedings of that sort, that would be the end of the point.

Accordingly, as I offered an adjournment on terms which I said I should have to consider (and which were to include a term that the defendant was not unduly prejudiced by an adjournment), and the offer was declined, my decision is the same as that of NEVILLE, J., in the comparable case, *Re Nichols' & Von Joel's Contract* (1). There will be an order for judgment for the defendant under the counterclaim, a declaration that the defendant is entitled to rescind, and, as the deposit is held by the auctioneers, a declaration that the defendant can give a good receipt therefor.

Judgment for the defendant on the counterclaim.

Solicitors: *Ridsdale & Son*, agents for *Rex Taylor & Meadows*, West Kirby, Cheshire (for the plaintiffs); *Edward Montague Lazarus & Son* (for the defendant).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

[END OF VOLUME ONE.]

BIBL. LONDIN. UNIV.